Submission on the *Planning Bill 2022*

17 June 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (**HEJ**). The goal of the HEJ Program is to empower overburdened communities to fight for environmental justice.

Acknowledgement of Contributions

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission, including EDO solicitors, particularly Rachel Walmsley and Cerin Loane, and our fantastic volunteers, Ayla Bower-Williams, Kimberley Slapp and Jadviga Kobryn-Coletti.

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Acknowledgment of funding from ACT Government

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

Acknowledgment of Country

The EDO recognises the Traditional Owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

A note on language on 'First Nations'

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purposes of these submissions, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

Environment, Planning and Sustainable Development Directorate
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Executive Summary

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the ACT government's proposed draft *Planning Bill 2022* (**the Bill**).

The Bill is the most critical element of the ACT Planning System Review and Reform Project. The Bill, which is intended to replace the *Planning and Development Act 2007* (ACT), now in force for 15 years, is the centrepiece for how development will be planned, decided on, and regulated in the ACT in the future. It is important that the Bill establishes a planning system that provides for an appropriate balance between the need to achieve sustainable development with the need to protect and preserve our natural environment for future generations.

The EDO's ACT Practice is part of the EDO's Healthy Environment & Justice Program, which aims to empower overburdened communities to fight for environmental justice. Environmental justice means that all people are treated fairly under, and have the right to be meaningfully involved in, environmental laws, regulations and policies, regardless of their race, colour, national origin, or income. Environmental justice recognises that human rights and environmental rights are closely intertwined, and that promoting the rights of people in the community is central to protecting the environment from harm.

In these submissions, we have approached our analysis of the Bill by examining the extent to which the Bill promotes environmental justice. While we have considered the impacts of the Bill on the rights of all people in the ACT, our submissions have a particular focus on First Nations, children and young people, and people who are financially disadvantaged, as some people and communities who are often at greater risk of environmental harm, including harm caused by climate change, loss of biodiversity, and destruction of Aboriginal cultural heritage.

We have also considered the extent to which the Bill promotes the right to a healthy environment. Although the ACT Government has not yet enshrined the right to a healthy environment in the *Human Rights Act 2004* (ACT), we consider that international best practice requires Australian governments, including the ACT, to recognise this right.

In these submissions, we make 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 submission is structured as follows:

A **Framework of Submission:** We explain the concepts of environmental justice and the right to a healthy environment, which we will use as the lens through which we have examined the Bill.

B **General Concepts:** We address central concepts that apply to the Bill in its entirety including the concept of outcomes-focussed planning systems, the objects of the Bill and the Territory Plan, the concept of ecologically sustainable development, and the hierarchy of planning strategies. We make a number of recommendations, including in particular that the object of the Bill can be strengthened, and that the primary object of the Bill should be to achieve ecologically sustainable development.

C **Justice as Recognition:** We address which social groups and communities are given respect, and who is and is not valued, within the ACT's planning system. We submit that 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 in the planning system and to have their voices heard.

D **Distributive Justice:** We address the extent to which the Bill protects the substantive rights of the ACT community to share in environmental benefits and the extent to which it protects the ACT community from environmental burdens, focusing on climate change and greenhouse gas emissions, biodiversity, and Aboriginal cultural heritage. We make a number of recommendations, including that the Bill should impose a duty on decision-makers to refuse an application for a development proposal that creates an unacceptable climate risk or has an unacceptable impact on the environment or Aboriginal cultural heritage. We also oppose provisions that enable decision-makers to approve development that is inconsistent with advice received from the Conservator of Flora and Fauna even in circumstances where the development is likely to have a significant adverse environmental impact on a protected matter. We also advocate for representative Aboriginal organisations to have the right to be consulted by decision-makers in planning matters under the Bill, and to give their free, prior and informed consent, as these rights do not currently exist.

E **Procedural Justice:** We address the extent to which the Bill protects the procedural rights of the ACT community, which are the right to access environmental information, the right to participate in decision-making, and the right to access justice. We make a number of recommendations, including that the Territory Planning Authority should be required to continuously disclose environmental risks of development to the public. We also submit that the Bill should include open standing provisions allowing any person to seek review of government decisions, and should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.

As a final note, it is important to acknowledge that our submission focuses on the Bill as it relates to what we consider to be central environmental justice issues. However, there are a number of other environmental issues that have been raised by stakeholders which we have not been able to address in our submissions, either because those issues do not directly relate to environmental justice, or because of resource and time restraints. If there are provisions of the Bill that we have not directly commented on in these submissions, this should not be taken as an endorsement of those provisions.

We are happy to be consulted about any additional environmental matters that are raised during the course of public submissions.

Summary of Recommendations

Outcomes-focussed

1. 'Desired future planning outcomes' and 'good planning outcomes' should be clearly defined in the Bill.
2. Outcomes-focussed provisions should be appropriately balanced with mandatory provisions and technical specifications.
3. The Bill must include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

Objects of the Bill

4. The objects of the Bill should be rewritten to provide that the overarching object of the Bill is the achievement of ecologically sustainable development, and should also include:
   - 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.

Object of the Territory Plan

6. The object of the Territory Plan should be consistent with the objects of the Bill.
7. The object of the Territory Plan should be expanded to include a clean, healthy and sustainable environment.

Ecologically sustainable development

8. The definition of ecologically sustainable development should be updated to recognise that ecologically sustainable development requires the effective integration of environmental, economic, social and equitable considerations in decision-making processes, and that ecologically sustainable development can be achieved through the implementation of ecologically sustainable development principles.
9. All decisions, powers and functions under the Bill should be exercised to achieve ecologically sustainable development.

Planning strategies

10. The Bill should clearly state the hierarchy of planning strategies for each type of decision made under the Bill.
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.
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.

Justice as recognition

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 in the planning system and to have their voices heard.

Climate change and greenhouse gas emissions

14. Climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

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.

16. The Bill should include definitions for 'climate change', 'sustainable' and 'resilient'.

Biodiversity

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.

18. The definition of 'protected matters' should include matters protected under the *Nature Conservation Act 2014* (ACT).

19. Decision-makers should be required to consider the cumulative impacts of a proposed development.

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 applications.

21. The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to have a significant adverse environmental impact.

Aboriginal cultural heritage

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.

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.

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.

Access to information

25. Ensure the Territory Planning Authority's website is accessible.

26. Ensure 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.

Participation in decision-making

28. The Bill should require longer periods for public consultation on key planning decisions.
29. The principles of good consultation should be enshrined in the Bill.
30. The principles of good consultation should reflect best practice.

Access to justice

31. The Bill should include open standing provisions allowing any person to seek review of government decisions.
32. The Bill should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.
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.
34. The Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill.
35. There should be no limits on the matters upon which a planning decision can be challenged.

ACT Planning System Review and Reform Project

Submission from EDO on the *Planning Bill 2022*

A Framework of Submission

The strategic goal of the EDO's ACT Practice is to empower overburdened communities to fight for **environmental justice**.

Environmental justice is a social movement that addresses the disproportionate impact of environmental harms – including harm from climate change, pollution, extractive industries, and natural disasters – on overburdened people and communities.

In the environmental context, overburdened communities and individuals include, for example, persons with disability, the elderly, and young people, who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. It may include low-income communities who live in close proximity to polluting industries and who may be reliant on an industry for their economic stability, which may also impact their health and environment, but who may not be able to afford living elsewhere. Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices, and the resources that they depend on.

Environmental justice recognises that such individuals and communities are often most at risk of experiencing environmental harms. However, they are also often the least responsible for perpetuating such harms.

In this way, environmental justice also addresses environmental racism, which is the deliberate targeting of ethnic and minority communities for exposure to toxic and hazardous waste sites and facilities, coupled with the systematic exclusion of minorities in environmental policy making, enforcement, and remediation.[1] Any policy, practice or directive that differentially affects or disadvantages (where intended or unintended) individuals, groups or communities based on race or colour is environmental racism.[2] In Australia, environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation and dispossession, as well as the destruction of First Nations lands including for planning and development purposes. It can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities.

By addressing the disproportionate impact of environmental harm on overburdened people and communities, environmental justice can be used as a framework to achieve protection of our environment. In January 2022, the EDO published a national report advocating for Australian environmental protection agencies to adopt an environmental justice framework to underpin environmental regulation in Australia.[3]

Environmental justice can also be used as a framework to underpin other laws that impact our environment, including planning legislation. For this reason, we have analysed the Bill and prepared these submissions by considering the extent to which the Bill achieves environmental justice for the ACT community, including overburdened people in our community.

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[1] Benjamin Chavis, *Confronting environmental racism: voices from the grassroots* (1993, South End Press) 31.
[2] Robert Bullard, 'Environment and Morality: Confronting Environmental Racism in the United States' (Programme Paper No 8, United Nations Research Institute for Social Development, October 2004) iii.
[3] EDO, *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice* (Report, January 2022).

Defining environmental justice

Environmental justice is not defined in any piece of Australian legislation, and it is difficult to define. At the EDO, we have regard to the definition used by the United States Environmental Protection Agency (**US EPA**), which describes **environmental justice** as:

> '[T]*he fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies'*.[4]

The US EPA further defines 'fair treatment' and 'meaningful involvement' as follows:[5]

- 'fair treatment' means that *'no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies'*; and
- 'meaningful involvement' means that people have an opportunity to participate in decisions about activities affecting their health or environment, that the public can influence regulatory decision-making, that community concerns will be considered in decision-making, and that decision-makers will seek out and facilitate the involvement of those potentially affected.

Environmental justice is often underpinned by three theories:

1. **Justice as recognition**, which is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it;[6]
2. **Distributive justice**, which is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens);[7] and
3. **Procedural justice**, which is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[8]

In these submissions, we have explored the extent to which the Bill addresses each of the above theories of environmental justice.

The right to a healthy environment

In addition to the above, the EDO has long advocated for recognition of the **human right to a healthy environment** in Australia, and in particular since 2002 when a Bill of Rights was first considered for the ACT.[9] We acknowledge the *Human Rights Act 2004* (ACT) (**Human Rights Act**)

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[4] US EPA, *Learn About Environmental Justice* (Website, May 2022) <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.
[5] Ibid.
[6] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013), 2.
[7] Ibid, 1.
[8] Ibid, 2.
[9] Hanna Jaireth, Environmental Defenders Office ACT Inc., *Submission on the Need for an ACT Bill of Rights* (Submission #61, Bill of Rights Consultive Committee, 2002); Environmental Defenders Office ACT Inc., *Submission to the ACT Attorney General for Consideration under s 43 Review of Operation of the Human Rights*

does not yet recognise the right. However, the ACT Government is currently investigating including the right to a healthy environment in the Human Rights Act. In addition, more than 80% of UN Member States legally recognise the right to a healthy environment either through constitutional recognition, ratification of regional treaties and/or national legislation.[10] In October 2021, the UN Human Rights Council adopted a resolution that recognises the right to a clean, healthy and sustainable environment, and invited the UN General Assembly to consider this resolution.[11]

The right to a healthy environment is a standalone fundamental right. However, it is comprised of a number of elements, which are derived from Australia's existing obligations under international human rights treaties and multilateral environmental agreements, and their elaboration in international and regional courts and tribunals, UN treaty bodies and inter-governmental bodies.[12] These sources enshrine rights that are protected under the Human Rights Act, such as the right to life[13] and the right to enjoy culture, practice religion and use language.[14]

Because the right to a healthy environment is implied in, or derived from, other human rights – including rights protected under the Human Rights Act – recognition of the right to a healthy environment is international best practice. For this reason, in these submissions we have also considered whether the Bill is consistent with the right to a healthy environment.

This Bill will be examined for its compatibility with rights under the Human Rights Act. We note the following:

- the rights that are engaged by the Bill include the right to life,[15] the right to freedom of expression including access to information,[16] the right to participate in public affairs,[17] and the right to culture, and in particular how they relate to the environment;[18]
- 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;
- 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

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Act 2004 (Submission, A-G Environment Related Human Rights, June 2005); Australian Network of Environmental Defender's Offices, *Submission to the National Human Rights Consultation* (Submission, National Human Rights Consultation, 15 June 2009); Environmental Defenders Office (Tasmania) Inc., *Proposed Charter of Human Rights for Tasmania*' (Submission, Tasmania Human Rights Consultation, 2011); Environmental Defenders Office (Victoria) Inc., *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (Submission No 271, 1 July 2011).

[10] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019) at [10]-[13].

[11] Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/RES/48/13 (18 October 2021). The HRC also adopted Resolution 48/14, appointing a Special Rapporteur on the promotion and protection of human rights in the context of climate change.

[12] The international sources for the right to a healthy environment are listed under Framework Principles 1 and 2: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 2.

[13] *Human Rights Act 2004* (ACT) s 9.

[14] Ibid, s 27.

[15] Ibid, s 9.

[16] Ibid, s 16.

[17] Ibid, s 17.

[18] Ibid, s 27.

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.

We have addressed why we consider that the Bill will negatively impact the above human rights in the body of these submissions.

B General Concepts

In this section, we address EDO's views on the following five general concepts that apply to the Bill in its entirety:

1. outcomes-focussed planning systems;
2. objects of the Bill;
3. objects of the Territory Plan;
4. ecologically sustainable development (**ESD**); and
5. the role of planning strategies, policies and plans.

(1) Outcomes-focussed planning systems

In preparing the Bill and policy positions included in the Bill, the Environment, Planning and Sustainable Development Directorate (**EPSDD**) has sought to achieve five key principles, which include that the ACT's reformed planning system is **outcomes-focussed**.[19]

EDO has a number of concerns about the extent to which the ACT's reformed planning system is outcomes-focussed. We brought these concerns to EPSDD's attention during our participation in the ACT Planning System Review and Reform Project's Legislation Working Group (**LWG**) and are restating these concerns here for ease of reference.

We understand that the ACT Government considers outcomes-focussed planning systems to be best practice, and that the purpose of an outcomes-focussed planning system is to increase efficiency and ensure a flexible, discretionary approach to assessing developments according to results-based measurements, rather than prescriptive technical requirements.

However, critics of outcomes-focussed systems are of the view that such systems lower the standard of development, and result in a lack of public sector oversight of the private sector. Another critical issue is that it can be easier for applicants to successfully challenge planning decisions and obtain development approval or removal of conditions.

The following critiques provide examples of some of the dangers of an outcomes-focussed approach:

- in Colorado USA, performance-based zoning has led to unpredictable outcomes, and has led to a reactive system that has struggled to adjust to fast-changing community expectations, which made infrastructure planning problematic and created a complex and time-consuming review process;[20]
- similarly, the performance-based system in Idaho USA, which permitted any land use and did not include zoning requirements, encountered issues with the way development impact was measured, especially at a community level, with communities not being able to understand the system, as well as uncertainty around what development could take place.[21]

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[19] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 9.
[20] L. Nellis and A. Richman, 'Performance Zoning: Requiem or Revolution?' (March 13, 1998) Videotape of a Presentation at the Rocky Mountain Land Institute, Seventh Annual Conference.
[21] D. R. Porter, 'Flexible Zoning: A Status Report on Performance Standard' (1998) *Zoning News* 1, which also identified similar issues in Colorado USA.

While the Bill describes the ACT's reformed planning system as outcomes-focussed, it is in fact a 'hybrid' system whereby many provisions will be written with an outcomes focus, while other provisions will specify mandatory technical requirements.[22] Hybridity is a common occurrence in overseas jurisdictions utilising outcomes-focussed planning schemes, including the US (described above) and New Zealand.[23]

Queensland's planning system is also a hybrid system in practice.[24] However, critiques of Queensland's planning system indicate that a hybrid system may not address the above criticisms of outcomes-focussed systems.

A review into Queensland's outcomes-focussed planning system identified that planners struggled to identify core desired outcomes, which led to vague and highly discretionary statements of preferred outcomes, that the system resulted in decisions to approve development even in circumstances where the proposal conflicted with clearly stated acceptable outcomes, and that the system had created uncertainty in decision-making, concluding that *'courts will be as powerless as the community to stop development that flies in the face of substantive planning scheme "requirements"'* .[25] Other critiques have also identified the following issues:

- there is too much ambiguity in outcome statements, leading to inconsistency in decision-making;
- flexibility in the planning system leads to greater potential for conflict between community expectations, politics and accountability in decision-making; and
- the lack of clarity around performance criteria intended to increase flexibility can actually fuel development speculation and problems with land valuation.[26]

For example, in 2016, Brisbane City Council approved an application to develop West Village, a major urban renewal project, in the heart of Brisbane. The total approved site cover was 15% more than the maximum site cover in the relevant neighbourhood plan code, however as compliance with the maximum site cover requirement was simply one possible acceptable solution, the developer was still able to demonstrate compliance with the relevant performance measure and the overall purpose of the code. After the decision was appealed in the Planning and Environment Court, the Planning Minister approved the development subject to conditions, which were intended to be a compromise (for example, reducing the site cover to the maximum amount permitted in the code, in exchange for increasing the number of permitted storeys from 15 to 22), however this was viewed by the community as an outcome that was more favourable to the developer, and caused disenchantment in the community with Queensland's planning system.[27]

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[22] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 11.
[23] Philippa England and Amy McInerney, 'Anything goes? Performance-based planning and the slippery slope in Queensland planning law' (2017) 24 *Environmental and Planning Law Journal* 238, 240.
[24] Ibid.
[25] Ibid, 244 and 250.
[26] Jennifer Roughan, Buckley Vann Planning + Development, *Performance Based Planning in Queensland* (March 2016) pp 8-12; Travis G. Frew, *The Implementation of Performance Based Planning in Queensland under the Integrated Planning Act 1997: An Evaluation of Perceptions and Planning Schemes* (2011) (PhD Thesis, School of Urban Development, Queensland University of Technology) pp 282 and 315-316.
[27] Philippa England and Amy McInerney, 'Anything goes? Performance-based planning and the slippery slope in Queensland planning law' (2017) 24 *Environmental and Planning Law Journal* 238, 244-245.

We acknowledge that the performance of the ACT's planning system will depend greatly on how it is implemented. However, we are concerned that the ACT may experience similar issues as Queensland should it implement an outcomes-focussed system.

From our review of the Bill, it appears that the Bill contains proscriptive requirements for planning decisions that are to be followed by applicants and decision-makers. In general, EDO is supportive of such provisions because they ensure certainty, transparency and consistency in planning decisions, which also results in greater public confidence in decisions. However, we expect that most outcomes-focussed provisions will be included in the new Territory Plan. As the new Territory Plan is not yet publicly available, we are unable to comment on any outcomes-focussed provisions in the Plan. However, we are able to address the provisions in the Bill that relate to an outcomes-focussed system, which we have done below.

Recommendations for outcomes-focussed planning systems

Recommendation 1: 'Desired future planning outcomes' and 'good planning outcomes' should be clearly defined in the Bill.

The Bill refers to 'desired future planning outcomes', 'desired planning outcomes', 'desired outcomes' and 'good planning outcomes' throughout. We understand that the ACT Government considers good outcomes to be development that performs well and integrates effectively into its site context, and that a good outcome considers built form, public spaces, interactions with surrounding blocks and more. It considers community needs now and into the future. The ACT Government has also stated that in the ACT's reformed system, the Authority will be more descriptive of what good planning outcomes are and what the desired outcomes are for an area.[28]

However, these terms are not defined in the Bill. We consider that introducing an outcomes-focussed system that does not clearly state or define the desired outcomes creates a risk that the ACT will face similar issues to those faced in Queensland, described above.

It appears that desired planning outcomes are to be included in the Planning Strategy,[29] district strategies,[30] and the Territory Plan,[31] which are not currently publicly available.

Given the importance of desired planning outcomes in the ACT's reformed planning system, we do not consider that it is appropriate for such outcomes to be specified in the Planning Strategy or district strategies. Non-legislative policy documents should be used to provide further guidance on, or expand upon, the meaning of desired planning outcomes, but not define the outcomes.

We submit that desired outcomes ought to be defined and specified in the Bill. At the very least, outcomes ought to be specified in the Territory Plan, and not in the Planning Strategy or district strategies. It is also critical that desired outcomes, wherever they are stated, are clearly defined and are not ambiguous.

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[28] ACT Government, 'ACT Planning System Review and Reform Project, *YourSay Conversations* <https://yoursayconversations.act.gov.au/act-planning-system-review-and-reform> (website as at June 2022).
[29] Bill, ss 6(2)(a) and 34(1)(c).
[30] Bill, ss 6(2)(b) and 37(2)(a).
[31] Bill, ss 6(2)(c), 43 and 181(a).

Recommendation 2: Outcomes-focussed provisions should be appropriately balanced with mandatory provisions and technical specifications.

As noted above, we understand the approach taken by the ACT Government to date is to introduce some provisions that are written with an outcomes-focus, and other provisions that are mandatory and/or that contain technical specifications. Mandatory and technical provisions are critical to ensuring that there is also **certainty** and **transparency**, which are two other key principles for the ACT's reformed planning system.[32] We encourage the ACT Government to continue to apply this approach as it continues to implement the ACT Planning System Review and Reform Project.

Recommendation 3: The Bill must include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

In an outcomes-focussed system, it is critical that the ACT Government undertakes regular monitoring and evaluation of development across the ACT to ensure that desired outcomes are being met, and that the new system is working as intended. It is also critical that proponents are required to report to the ACT Government, to allow the ACT Government to gather sufficient information to be able to monitor or evaluate outcomes and take compliance action if required. This is particularly the case for the Bill, which allows third parties to seek merits review of decisions in very limited circumstances, meaning there will be little independent oversight of development by the ACT Civil and Administrative Tribunal (**ACAT**) (which we address later in these submissions in **Part E**, section 3). We submit that the Bill should include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

(2) Objects of the Bill

The objects of the Bill are set out in s 7(1). Subsection (2) sets out some additional matters that the planning system is 'intended' to achieve. Subsection (3) sets out matters that are 'important in achieving the object of the [Bill]'.

EDO supports the primary object of the Bill in s 7(1), which is *'to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by creating an effective, efficient, accessible and enabling planning system'*. We also support the inclusion of ESD (which we discuss later in **Part B**, section 4 of these submissions) and community participation in the objects of the Bill.[33]

EDO considers that the objects of the Bill are a good starting point. However, the objects are not as strong as they ought to be and ought to be reconsidered. We make the following recommendations to improve the objects of the Bill.

Recommendations for the objects of the Bill

Recommendation 4: The objects of the Bill should be rewritten to provide that the overarching object of the Bill is the achievement of ecologically sustainable development, and should also include:

- **protection of the right to a clean, healthy and sustainable environment;**
- **reduction of greenhouse gas emissions;**

[32] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 9.
[33] Bill, s 7(1)(b) and (c).

- **protection of the environment;**
- **protection of natural, built and cultural heritage, including Aboriginal heritage; and**
- **promotion of knowledge, traditions and customs of traditional custodians.**

We submit that the overarching object of the Bill in s 7(1) should be to create a planning system that achieves ESD. As currently stated, the object of the Bill is to create a planning system that 'promotes and facilitates' ESD. This could be strengthened. We have further addressed ESD later in these submissions (**Part B**, section 4).

As noted in **Part A** of these submissions, we consider that international best practice requires the ACT Government to recognise the right of people in the ACT to a clean, healthy and sustainable environment. For this reason, we submit that the object of the Bill in s 7(1) should extend to creating a planning system that promotes a clean, healthy and sustainable environment.

In relation to climate change, s 7(3) of the Bill provides that a '*sustainable and resilient environment that is planned, designed and developed for a net-zero greenhouse gas future using integrated mitigation and adaptation best practices'* is a matter that is *'important to achieving the object'* of the Bill.[34] However, the use of this language in subsection (3), which describes these matters as important to achieving the object of the Bill rather than objects themselves, is weak. At a minimum, ensuring a sustainable and resilient environment developed for a net-zero greenhouse gas (**GHG**) future in s 7(3) should itself be recognised as an object of the Bill in s 7(1).

However, this object could be stated more clearly. A preferable approach would be for the objects of the Bill to explicitly include reducing GHG emissions, consistent with objectives, targets and responsibilities set out in the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) (**Climate Change Act**) and related ACT legislation and policies. We submit that the objects of the Bill should include reducing GHG emissions in accordance with the targets set in the Climate Change Act. We have further addressed climate change later in these submissions (**Part D**, section 1).

In relation to protection of the environment, we note that in NSW, the objects of the *Environmental Planning and Assessment Act 1979* (NSW) include to *'protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats'*.[35] We recommend including a similar provision in s 7(1) of the Bill, and submit that including this would ensure that protection of the environment is considered at each level of the ACT's reformed planning system, and strengthen protection of the environment in planning matters. We have further addressed biodiversity later in these submissions (**Part D**, section 2).

In relation to Aboriginal cultural heritage, s 7(3) of the Bill provides that *the knowledge, culture and tradition of the traditional custodians of the land, the Ngunnawal people'* and '*the integration of natural, built, cultural and heritage elements'* are matters that are important to achieving the objects of the Bill.[36] As submitted in relation to climate change, the use of language in subsection (3) is weak. Protecting heritage, including Aboriginal heritage, and promoting and facilitating the knowledge, culture and tradition of traditional custodians in s 7(3) should itself be recognised as an object of the Bill in s 7(1). We have further addressed Aboriginal cultural heritage further later in these submissions (**Part D**, section 3).

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[34] Bill, s 7(3)(e).
[35] *Environmental Planning and Assessment Act 1979* (NSW) s 1.3(e).
[36] Bill, s 7(3)(e).

We further submit that the reference to creating a planning system that is 'outcomes-focussed' and 'provides a scheme for community participation' in the current objects of the Bill appear to us as being better suited as processes and procedures intended to help achieve the objects of the Bill, which are set out in s 7(2). However, we consider that the objects should include creating a planning system that protects the rights of the community to participate in decision-making.

If the ACT Government agrees with our view that some of the 'important matters' we have identified in s 7(3) should be recognised as objects of the Bill, s 7(3) will need to be amended to remove references to these matters.

We have set out below our suggested objects clause for the ACT Government's consideration.

> ***7 Object of Act***
>
> *(1) The primary object of this Act is to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by establishing an effective, efficient, accessible and enabling planning system that achieves ecologically sustainable development and that:*
>
> *(a) respects, protects and promotes the right of residents to a clean, healthy and sustainable environment;*
> *(b) reduces greenhouse gas emissions consistent with targets in the Climate Change and Greenhouse Gas Reduction Act 2010 (ACT);*
> *(c) protects the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats;*
> *(d) protects natural, built and cultural heritage, including Aboriginal cultural heritage;*
> *(e) promotes and facilitates the knowledge, culture and tradition of the Territory's traditional custodians; and*
> *(f) promotes the rights of the community to participate in decision-making.*
>
> *(2) As part of achieving the object mentioned in subsection (1), the planning system is intended to—*
>
> *(a) be outcomes focussed;*
> *(b)* [list remaining matters set out in s 7(2)].

Recommendation 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.

Decision-makers are required to have regard to the object of the Bill in some,[37] but not all, planning decisions. For example, there is no requirement to consider the objects when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Territory Planning Authority (**the Authority**) decides under s 180(1) whether to approve a development application.

Objects are written for the purpose of setting overarching goals for legislation. However, there is often a risk that objects will be passed over as aspirational statements unless further mechanisms are put in place to ensure the achievement of objects. In our view there ought to be a broad requirement for people involved in administration of the Bill to make decisions and act consistently with the objects of the Bill.

[37] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill: s 15(3)(a). See also ss 9(1), 34(1)(a), 87(2)(a) and 88(2)(b).

This could be achieved by including a provision that requires people and bodies involved in the administration of the Bill to act in accordance or consistently with the objects of the Bill.[38] We submit that including such a provision in the Bill would ensure that the objects of the Bill are considered at all stages of the ACT's reformed planning system.

(3) Objects of the Territory Plan

The object of the Territory Plan in s 42 is *'to ensure, in a manner not inconsistent with the national capital plan, that the planning and development of the ACT provides the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation'*.

While these objects are a good starting point, we submit that the object of the Territory Plan can be strengthened as follows.

Recommendations for the objects of the Territory Plan

Recommendation 6: The object of the Territory Plan should be consistent with the objects of the Bill.

Section 42 provides that the Territory Plan should be consistent with the provisions of the National Capital Plan. We submit that s 42 should be amended to also require the Territory Plan to be consistent with the objects of the Bill.

Recommendation 7: The object of the Territory Plan should be expanded to include a clean, healthy and sustainable environment.

As noted in **Part A** of these submissions, we consider that international best practice requires the ACT Government to recognise the right of people in the ACT to a clean, healthy and sustainable environment. For this reason, we submit that the object of the Territory Plan in s 42 should extend to providing the people of the ACT with a clean, healthy and sustainable environment.

(4) Ecologically sustainable development

The object of the Bill in s 7(1) is to create a planning system that, among other things, *'promotes and facilitates ecologically sustainable development that is consistent with planning strategies and policies'*.[39] ESD is defined in s 8(1) as development involving the effective integration of the following principles:

- the protection of ecological processes and natural systems at local, Territory and broader landscape levels;
- the achievement of economic development;
- the maintenance and enhancement of cultural, physical and social wellbeing of people and communities;
- the precautionary principle; and
- the inter-generational equity principle.

EDO is supportive of the inclusion of ESD in the overarching object of the Bill. However, we make the following recommendations, which we consider will ensure that the Bill effectively promotes

[38] *Planning, Development and Infrastructure Act 2016* (SA) s 13.
[39] Bill, s 7(1)(b).

and facilitates ESD. These recommendations are in addition to our recommendation that the overarching object of the Bill should be to achieve ESD (**Recommendation 4**).

Recommendations in relation to ESD

Recommendation 8: The definition of ecologically sustainable development should be updated to recognise that ecologically sustainable development requires the effective integration of environmental, economic, social and equitable considerations in decision-making processes, and that ecologically sustainable development can be achieved through the implementation of ESD principles.

The National Strategy for Ecologically Sustainable Development, endorsed by all Australian jurisdictions in 1992, defines the goal of ESD as development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[40]

ESD aims to provide for the needs of present generations without compromising the ability of future generations to meet their own needs. ESD seeks to integrate environmental, economic, social and equitable considerations in decision making. However, historically, an imbalance has led to environmental and social considerations being set aside for economic outcomes. Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations.

ESD should be achieved by the effective integration of short and long-term environmental, economic, social and equitable factors in decision-making. No one of these factors should be given priority. An effective ESD framework cannot be used simply as a 'balance' or 'trade off' exercise. Rather it recognises that long-term environmental health and socio-economic outcomes are deeply interconnected.[41]

ESD also requires recognition of the following principles in public and private sector decision-making (**ESD principles**):[42]

- **Prevention of harm:** taking preventative actions against likely harm to the environment and human health;
- **Precautionary principle:** taking precautionary actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives;
- **Inter-generational equity:** the present generation have an obligation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;

[40] See Department of Environment and Energy (Cth), *National Strategy for Ecologically Sustainable Development* <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>.
[41] APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) available on EDO's website at https://www.edo.org.au/wp-content/uploads/2022/06/APEELBlueprintforenvironmentallaws-Final-Blueprint.pdf.
[42] Developed from APEEL, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, April 2017). See also APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017).

- **Intra-generational equity:** the present generation have an obligation to ensure that environmental costs, benefits and outcomes are borne equitably across society;
- **Biodiversity principle:** ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction;
- **Environmental values principle:** ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature; and
- **Polluter pays principle:** that those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation.

In addition to these principles, we submit that new and additional ESD principles should also be considered and adopted:

- **Achieving high levels of environmental protection**, including by requiring the use of best available scientific and commercial information, continuous improvement of environmental standards, and the use of best available techniques for environmental management;
- **Non-regression principle:** non-regression in environmental goals, standards, laws, policies and protections; and
- **Resilience principle:** strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment.

As currently drafted, the definition of ESD in s 8(1) means development involving integration of environmental, economic and social considerations, in addition to their integration with some, but not all, of the ESD principles listed above.

In our view, environmental, economic and social considerations are better viewed as factors in decision-making. These factors can be achieved through the implementation of ESD principles, which should be described in the Bill separately. Guidance can be taken from the definition of ESD in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), although s 6(2) does not incorporate all of our recommended ESD principles (which we recommend below are incorporated into the Bill). In addition to environmental, economic and social factors, it is also important to recognise 'equitable' factors, consistent with ESD principles of inter-generational and intra-generational equity. Equity is about making sure decisions produce fair outcomes. Equitable considerations are important as they consider the distribution of benefits, costs and impacts within and between generations, that arise from decisions made. Finally, while s 8(1) of the Bill identifies the precautionary principle and the inter-generational equity principle, it does not recognise the remainder of the ESD principles that we have outlined above.

In light of the above, we suggest that the definition the definition of ESD in s 8(1) of the Bill should be updated as follows:

> in this Act:
>
> ***ecologically sustainable development*** means the effective integration of environmental, economic, social and equitable considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the prevention of harm principle;

(b) the precautionary principle;

(c) inter-generational equity principle;

(d) the intra-generational equity principle;

(e) the biodiversity principle;

(f) the environmental values principle;

(g) the polluter pays principle;

(h) the principle of achieving high levels of environmental protection;

(i) the non-regression principle; and

(j) the resilience principle.

We recommend that the definition of ESD principles included in s 8(2) are amended to include definitions of the additional principles listed above. We also recommend that the definition of the precautionary principle is updated to include a broader definition like that adopted in NSW.[43]

Recommendation 9: All decisions, powers and functions under the Bill should be exercised to achieve ESD.

As noted above, the object of the Bill is currently to promote and facilitate ESD. However, if ESD is to be realised, it should be the outcome that decision-makers strive to achieve. It is not enough for ESD to be part of a process that simply requires ESD to be considered on the way through to making a decision. Decision-makers should be instructed to do more than simply have regard to it.[44]

As the Bill is currently drafted, there are no provisions that require consideration of ESD when making decisions or exercising powers or functions under the Bill.

Although ESD is incorporated into the objects of the Bill, as noted earlier in these submissions, decision-makers are required to consider the objects in some,[45] but not all, planning decisions. In particular, there is no requirement to consider the objects for other important planning decisions including, for example, when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Authority decides under s 180(1) whether to approve a development application. This means that achieving ESD is not a relevant consideration in these decisions.

As currently drafted, the Bill does not provide the necessary framework that would afford proper application of ESD and the ESD principles. Simply making ESD the objective of the ACT's reformed planning system is not enough. To give practical effect to the object of the Bill, there should be explicit requirements in the Bill that decisions be made in accordance, or consistently, with ESD.

We submit that all decisions, powers and functions under the Bill need to be exercised to achieve ESD.

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[43] *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(a).

[44] Gerry Bates, *Environmental Law in Australia* (10th ed, Lexis Nexis Butterworths, 2020) at [4.22], p 184.

[45] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill: s 15(3)(a). See also ss 9(1), 34(1)(a), 87(2)(a) and 88(2)(b).

(5) Role of planning strategies

The strategies created under the Bill include the Planning Strategy,[46] district strategies,[47] and the statement of planning priorities.[48] In these submissions, we refer to these three types of documents as the '**planning strategies**'.

Recommendations for planning strategies

Recommendation 10: The Bill should clearly state the hierarchy of planning strategies for each type of decision made under the Bill.

The objects of the Bill include that the ACT's reformed planning system is intended to provide a clearly defined hierarchy of planning strategies that inform the content of the Territory Plan.[49] The object of the Bill is also to create an accessible and enabling planning system.[50]

We assume that the reference to 'planning strategies' in the object of the Bill is a reference to the Planning Strategy, district strategies and the statement of planning priorities, although this is not abundantly clear. In addition, as currently drafted, the Bill does not clearly state the hierarchy of planning strategies for each type of planning decision under the Bill.

We submit that the Bill should be amended:

- to clarify the meaning of 'planning strategies' in the Bill, including in the object in s 7(1)(b);[51] and
- to make the hierarchy of planning strategies abundantly clear to the reader, including the hierarchy of planning strategies in relation to the Bill, the Territory Plan, and policies and guidelines made under the Bill, and their hierarchy in relation to each other.

We submit that amending the Bill this way will assist the ACT community to better understand the hierarchy of various documents in the ACT's reformed planning system, including in the event that there is inconsistency between two or more planning strategies, which will make the planning system more accessible and promote public participation.

Recommendation 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.

Section 35 of the Bill clearly states matters where the Planning Strategy is a relevant consideration, however there is not an equivalent provision for district strategies or the statement of planning priorities. As the Bill is currently drafted, it will be difficult for an everyday user without a legal background to understand when district strategies and the statement of planning priorities are relevant.

We submit that the Bill should be amended to address the matters where the district strategies and statement of planning priorities are and are not relevant. We submit that amending the Bill this way will assist the ACT community better understand the extent to which each planning

[46] Bill, s 34.
[47] Bill, s 37.
[48] Bill, s 38.
[49] Bill, s 7(2)(b).
[50] Bill, s 7(1).
[51] Section 9(1) also uses the term 'planning strategies'.

strategy will be considered and applied in planning decisions, and the extent to which the public can expect to rely on matters set out in those strategies.

Recommendation 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.

The Planning Strategy and district strategies are made after the Executive has engaged in mandatory public consultation. After the Planning Strategy and district strategies are finalised and made public, the ACT community will expect the ACT Government to make decisions – for example, in relation to development applications – that are consistent with those strategies. The Territory Plan is required to give effect to the Planning Strategy and district strategies.[52] However, there are currently no provisions that ensure that the Territory Plan is reviewed after the Planning Strategy and district strategies are made. To the contrary, the Bill currently provides that an amendment to the Territory Plan cannot be invalidated merely because it is inconsistent with the Planning Strategy or district strategies.[53]

We submit that after a decision to make the Planning Strategy and/or a district strategy, the Territory Plan should be reviewed for its consistency with the Planning strategy. This will ensure that any outcomes in the strategies are reflected in the Territory Plan and will therefore be reflected in other decisions such as development approvals.

[52] Bill, s 43(b).
[53] Bill, s 80(2).

C Justice as Recognition

Justice as recognition is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.[54]

In considering whether the Bill promotes justice as recognition, in this section we have considered the extent to which the Bill allows for the views of people and communities who are most at risk of environmental harm to be incorporated into planning issues in the ACT, whether the mechanisms allowing for this to take place are accessible, and whether the views of these people and communities are afforded sufficient weight in planning decisions.

As we outlined earlier in these submissions, there are a number of overburdened individuals and communities. However, for the purpose of these submissions we have focussed on

1. First Nations;
2. children and young people; and
3. people who are financially disadvantaged.

(1) First Nations

According to the 2016 Census, around 6,500 people, or 1.6% of the ACT population, identify as Aboriginal or Torres Strait Islander.[55]

The Special Rapporteur on Human Rights and the Environment (**Special Rapporteur**) identifies First Nations as people who are often at greater risk of environmental harm. In particular, First Nations rely on their country for their material and cultural existence, but face increasing pressure from government and businesses seeking to exploit their resources and are often marginalised from decision-making processes and their rights are often ignored or violated.[56]

We have addressed the particular obligations that the Australian and ACT Governments owe to First Nations under human rights law in **Part D**, section 3 of these submissions.

(2) Young people and children

The EDO considers children to be people who are 18 years old or younger, while young people are 24 years old or younger. A significant proportion of the ACT's population are young people and children, with the 2016 Census reporting that around 130,000 people, being over 30% of the ACT population, are 24 years old or younger.[57]

The Special Rapporteur identifies children as people who are at greater risk of environmental harm for a number of reasons, including that they are developing physically and are less resistant to many types of environmental harm.[58] In 2018, the Special Rapporteur released a special report

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[54] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 2.
[55] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[56] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](d), p 17.
[57] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[58] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](b), p 17.

focusing on the rights of children in relation to the environment.[59] This report identified that of the approximately 6 million deaths of children under the age of 5 in 2015, more than 1.5 million could have been prevented through the reduction of environmental risks.[60] Exposure to pollution and other environmental harms in childhood can have lifelong consequences, including by increasing the likelihood of cancer and other diseases.

In addition, children and young people are of a generation that will live to experience the effects of climate change. The UN Human Rights Council has also recognised that children are among the most at risk to the effects of climate change, which may have a serious impact on their human rights including the right to life, health, food, adequate housing, safe drinking water and sanitation.[61]

(3) People who are financially disadvantaged

According to data collected by the ACT Council of Social Services Inc (**ACTCOSS**), in 2020 the number of people in the ACT who are living in poverty increased to around 38,000 people.[62]

In relation to children, ACTCOSS identified that almost 8,000 (or 12%) of children live in low-income households in the ACT, that children are more likely to live in poverty (18%) when compared with the whole population (14%), and that the risk of poverty for children in sole parent families is much higher, at 44%.[63] ACTCOSS also identified that First Nations face an elevated risk of experiencing poverty and/or socioeconomic disadvantage in the ACT.[64]

The Special Rapporteur identifies people living in poverty as people who are particularly at risk of environmental harm. This is because they may lack adequate access to safe water and sanitation, and they are more likely to burn wood, coal and other solid fuels for heating and cooking, causing household air pollution.[65] We further note that people living in poverty may not have access to other fundamental services such as heating or cooling or access to public green space, and may not have guaranteed access to shelter, which means that they are more at risk to the effects of climate change including extreme temperatures and climate-related natural disasters. In addition, people experiencing poverty or socioeconomic disadvantage may be less likely to participate in decision-making if they do not have sufficient time and energy or the resources to do so.

People who are financially disadvantaged are therefore likely to experience serious impacts of environmental degradation on their substantive human rights, including the right to life, health, food, adequate housing, safe drinking water and sanitation, and on their procedural rights including the right to participate in decision-making.

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[59] John Knox, Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/37/58 (24 January 2018).
[60] Ibid, [15], p 5.
[61] UN Human Rights Council, *Resolution adopted by the Human Rights Council on 1 July 2016: Human rights and climate change*, UN Doc A/HRC/RES/32/33 (18 July 2016) p 2.
[62] ACTCOSS, *Poverty and Covid-19 in the ACT* (Factsheet, October 2020) p 1.
[63] Ibid, 1 and 5.
[64] Ibid, 1.
[65] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](c), p 17.

Recommendation in relation to justice as recognition

Recommendation 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 in the planning system and to have their voices heard.

The Bill – and the ACT's planning system more generally – appears to be designed to be accessible by certain types of people in the ACT, to the exclusion of other overburdened people. In particular, our planning system appears to assume that people accessing the system are people who have the following characteristics, or are part of a community that has access to such characteristics:

- people who are native English speakers;
- people who have good literacy;
- people who have access to the internet;
- people who have sufficient time and resources to review and comment on long and sometimes technically complex documents;
- people who have knowledge and understanding of where and how to access planning information; and
- people who have knowledge and understanding of legal processes and/or where and how to access legal advice or assistance.

We consider that the ACT Government can do more to ensure that there are provisions in the Bill that protect the rights of people who do not meet the above criteria, who may include First Nations, children and young people, and people who are financially disadvantaged.

We submit that 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 in the planning system and to have their voices heard.

In general, the Bill should include provisions that ensure that:

- public participation processes are designed to enable First Nations, children and young people, and people who are financially disadvantaged to participate;
- people and bodies that make decisions, or exercise powers and functions, under the Bill consider the rights and interests of First Nations, children and young people, and people who are financially disadvantaged, and consider the impact of key planning decisions on such people.

D Distributive Justice

Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens).[66] Environmental benefits can include access to clean air, water and land, green space and a healthful ecology. In contrast, environmental burdens can include air pollution and loss of green space, biological diversity or ecological integrity.

Distributive justice – and environmental justice more broadly – focuses largely on the benefits of the environment for people, rather than benefits for the environment's sake. However, distributive justice is promoted by giving substantive rights to members of the community to share in environmental benefits, and to prevent, mitigate and remediate environmental burdens.[67]

In this section of our submissions, we address the extent to which the Bill promotes distributive justice by giving substantive rights to the ACT community to share in environmental benefits. While there are a range of environmental issues that are relevant to planning matters, for the purpose of these submissions we have focussed on three key areas:

1. climate change and GHG emissions,
2. biodiversity; and
3. Aboriginal cultural heritage.

(1) Climate change and greenhouse gas emissions

In order to promote distributive justice, the Bill must promote the right of people in the ACT to a safe climate.

The Special Rapporteur has identified that access to a safe climate is one of the substantive elements of the right to a clean, healthy and sustainable environment.[68] States, including Australia, have obligations under international human rights law to protect human rights from environmental harm, and to fulfil their commitments under international human rights treaties.[69] Climate change imposes a number of foreseeable and potentially catastrophic adverse effects on the enjoyment of a wide range of human rights including the right to life and the right to culture, which are both protected in the Human Rights Act.[70] The threat of climate change gives rise to extensive State duties to take immediate actions to prevent those harms.[71]

These duties include substantive obligations: States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially

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[66] Justice Brian Preston, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 1.
[67] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environmental and Planning Law Journal* 182 at 185.
[68] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) pp 9-12; UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019).
[69] John Knox, Independent Expert on Human Rights and the Environment, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report*, UN Doc A/HRC/25/53 (30 December 2013).
[70] *Human Rights Act 2004* (ACT), ss 9 and 27.
[71] David Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019) at [62].

businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right.[72] States must also avoid discrimination and retrogressive measures. These principles govern all climate actions, including obligations related to mitigation, adaptation, finance, and loss and damage.[73] Rights relating to the environment are derived from international human rights treaties, including the *International Covenant on Civil and Political Rights* (**ICCPR**) and *International Covenant on Economic and Social Rights* (**ICESCR**).[74] As many obligations under the ICCPR and some of the obligations under the ICESCR are incorporated into the Human Rights Act, obligations in relation to climate change extend to the ACT Government to the extent the provisions in the Human Rights Act reflect those in the ICCPR and ICESCR. These obligations otherwise reflect best practice.

The Bill provides that a *'sustainable and resilient environment that is planned, designed and developed for a net-zero greenhouse gas future using integrated mitigation and adaptation best practices'* is a matter that is *'important in achieving the object of the* [Bill]'.[75]

The principles of good planning include sustainability and resilience principles, which is defined to mean that:

- places should be planned, designed and developed to be sustainable and resilient;
- effort should be focussed on adapting to the effects of climate change, including through mitigating the effects of urban heat, managing water supplies and achieving energy efficient urban environments;
- policies and practices should promote the use, reuse and renewal of sustainable resources, and minimise use of resources.[76]

Under the Bill, development applications for development proposals that are expected to produce more than 250T of GHG emissions annually are required to be accompanied by an expected GHG statement.[77] In addition, such development proposals are required to be accompanied by an EIS,[78] and are considered 'significant development'.[79]

However, the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to mitigate against climate change impacts from development. Our recommendations in relation to climate change are additional to our recommendation that the objects of the Bill should include reducing GHG emissions (**Recommendation 4**).

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[72] Committee on Economic, Social and Cultural Rights, *General comment No. 3 on the nature of States parties' obligations*, UN Doc E/1991/23 (14 December 1990)
[73] UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019) at [65].
[74] See Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018)
[75] Bill, s 7(3)(e).
[76] Bill, s 9(2).
[77] Bill, s 162(2)(d) and Schedule 2, Part 2.2, item 12; draft *Planning (General) Regulation 2022*, s 26. This trigger is also in the current legislation: *Planning and Development Act 2007* (ACT), s 139(2)(u); *Planning and Development Regulation 2008* (ACT), r 25AA.
[78] Bill, s 102(a); draft *Planning (General) Regulation 2022*, r 8 and Schedule 1, Part 1.2, item 24.
[79] Bill, s 91(c).

Recommendations in relation to climate change and greenhouse gas emissions

Recommendation 14: Climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

As noted above, climate change and GHG emissions are recognised as matters that are important to achieving the objects of the Bill and in the principles of good planning.[80]

As the Bill is currently drafted, climate change considerations will be taken into account by people and bodies for some,[81] but not all, planning decisions under the Bill. For example, climate change is not a relevant consideration when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Authority decides under s 180(1) whether to approve a development application.

However, simply recognising climate change and GHG emissions as matters that are important to achieving the object of the Bill is not enough. Climate change objects of the Bill should be clearly prioritised and operationalised in decision-making. Without this, the object of ensuring a sustainable and resilient environment developed for a net-zero GHG future has limited practical effect.

We submit that the Bill should include an overarching obligation for people and bodies who make decisions or exercise decision-makers exercising functions under the Bill to consider the negative impacts of climate change, including cumulative impacts. For example, the Victorian *Climate Change Act 2017* includes a duty for decision-makers to have regard to the potential impacts of climate change and the potential contribution to the state's GHG emissions relevant to the decision or action when exercising their functions under other environmental legislation.[82]

We further submit that climate change should be explicitly identified as a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

Recommendation 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.

We submit that the Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to contribute to climate change through GHG emissions, including by:

- introducing a duty on decision-makers to refuse development applications for development proposals that will have unacceptable climate risks; and
- introducing a clear power for decision-makers to set conditions in relation to climate change or GHG emissions, including adaptive conditions.

The Bill currently prevents decision-makers from approving development applications for development proposals that are inconsistent with the matters prescribed in s 184(1).[83] Section 184

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[80] Bill, ss 7(3)(e) and 9(1)

[81] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill and with the principles of good planning: s 15(3). See also ss 9(1), 34(1)(a), 15(3)(a), 87(2)(a) and 88(2)(b).

[82] *Climate Change Act 2017* (Vic), s 17 and Schedule 1.

[83] Although, s 184(1)(c) and (d) are subject to s 185: Bill, s 184(2).

does not currently restrict decision-makers from approving development applications for proposals that will have an unacceptable climate change impact.

We submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have unacceptable climate risks. This could include where climate change poses a likely threat to the lives or safety of present or future residents, would impose prohibitive public costs by way of emergency management, infrastructure reparation or future adaptation costs and would increase threats to biodiversity. A precautionary approach should apply where there is a lack of full scientific certainty as to the scale or nature of the threat, so that the proponent must demonstrate to the decision maker that a serious or irreversible threat is negligible.

We further submit that the Bill should require decision-makers to assess and respond to climate change impacts during the lifecycle of the development, including by imposing conditions to ameliorate those impacts. Section 182 of the Bill sets out provisions in relation to condition-setting for development applications that are conditionally approved. We submit that s 182 should be amended to provide that decision-makers can set conditions in relation to climate change or GHG emissions, including adaptive conditions.

In practice, adaptive conditions might include, for example, that any conditions relating to GHG emissions are to be reviewed after a certain period of time to examine whether there have been any unexpected climate risks, whether the climate impacts of the development have exceeded the terms of its approval, or whether the development has exceeded its annual expected GHG emissions. If the conditions are no longer appropriate, they can be modified. Modification might be appropriate in other circumstances including, for example, if the ACT's GHG emissions targets change.

However, any offsetting conditions that relate to GHG emissions (for example, conditions to achieve 'carbon neutrality', where there are no net emissions from a project) must be strictly regulated via a robust science-based scheme, developed with advice from the ACT Climate Change Council and that meets best practice, and should be used sparingly.

It is particularly necessary for the Bill to include strong provisions for regulation of development proposals that contribute to climate change in circumstances where the *Environment Protection Act 1997* (ACT) (**EP Act**) does not include any provisions that regulate climate change or GHG emissions.

Recommendation 16: The Bill should include definitions for 'climate change', 'sustainable' and 'resilient'.

As currently drafted, the Bill refers to 'climate change' and a 'sustainable' and 'resilient' environment throughout. However, none of these important terms are defined in the Bill. We submit that the Bill should include a definition for these terms.

There is also currently no definition of these terms in the Climate Change Act or in similar legislation enacted in South Australia and Tasmania.[84] However, the Victorian *Climate Change Act 2017* includes a definition of climate change, which is taken from the United Nations Framework Convention on Climate Change and defined as *'a change of climate which is attributed directly or*

[84] *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA); *Climate Change (State Action) Act 2008* (Tas).

indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.[85]

(2) Biodiversity

In order to promote distributive justice, the Bill must also promote the right of people in the ACT to healthy ecosystems and biodiversity.

The Special Rapporteur has identified that access to healthy ecosystems and biodiversity is one of the substantive elements of the right to a clean, healthy and sustainable environment.[86] The Special Rapporteur argues that, in order for people to have full enjoyment of their human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems, which in turn depends on the health and sustainability of ecosystems, which depends on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.[87]

Human rights law does not require that ecosystems remain untouched. However, in order to support the continued enjoyment of human rights, development cannot overexploit natural ecosystems and destroy the services on which we depend. Development must be sustainable, and sustainable development requires healthy ecosystems.[88]

As the loss of ecosystem services and biodiversity threatens a broad spectrum of rights, States have a general obligation to safeguard biodiversity in order to protect those rights from infringement. That obligation includes a duty to protect against environmental harm from private actors.[89] Rights relating to the environment are derived from international human rights treaties, including the ICCPR and ICESCR.[90] As many obligations under the ICCPR and some of the obligations under the ICESCR are incorporated into the Human Rights Act, obligations in relation to biodiversity also extend to the ACT Government to the extent the provisions in the Human Rights Act reflect those in the ICCPR and ICESCR. These obligations otherwise reflect best practice.

The Bill provides that *'the ACT's biodiversity and landscape setting'* is a matter that is *'important in achieving the object of the* [Bill]'.[91]

In addition, the principles of good planning include natural environment conservation principles,[92] which is defined to mean that:

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[85] *Climate Change Act 2017* (Vic), s 3.
[86] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) pp 17-18; John Knox, Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report on Biodiversity), UN Doc. A/HRC/34/49 (19 January 2017).
[87] John Knox, Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report on Biodiversity), UN Doc. A/HRC/34/49 (19 January 2017) at [5].
[88] Ibid, [8].
[89] Ibid, [33].
[90] See Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018).
[91] Bill, s 7(3)(c).
[92] Bill, s 9(1)(h).

- planning and design should promote healthy and resilient ecosystems, by avoiding or minimising loss of habitat and other key threatening processes for biodiversity;
- policies, planning and design should integrate and promote nature-based solutions to climate change and water security, and the valuation and maintenance of the ecosystem services and amenity provided by a healthy natural environment;
- biodiversity connectivity and habitat values should be integrated across urban areas, including through appropriate planning for, and landscaping of, urban open space and travel corridors.[93]

The Bill also removes the contentious EIS exemption provisions that currently exist in the *Planning and Development Act 2007* (ACT) (**P&D Act**).[94] There are no longer provisions that allow a proponent to apply to be exempted from producing an EIS, however proponents may still rely on recent studies when addressing the matters in the scoping document in its draft EIS, whether or not the study relates to the particular development proposal.[95]

While EDO is generally supportive of these provisions, the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to achieve sustainable development in the ACT. Our recommendations in relation to biodiversity are in addition to our recommendation that the objects of the Bill should be expanded to include protection of the environment (**Recommendation 4**).

Recommendations in relation to biodiversity

Recommendation 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.

Provisions on offsetting are set out in Chapter 9 of the Bill. The provisions are procedural rather than substantive. They include, for example, procedures detailing how the offset policy will be made,[96] how offset policy guidelines will be made,[97] the form of offsets and how the value of offsets are to be calculated,[98] and how offset management plans are created.[99]

Biodiversity offsetting is an attractive option for governments and policy makers seeking to ensure development can proceed despite environmental impacts. However, questions remain about the effectiveness of biodiversity offsetting and its ability to deliver the anticipated environmental outcomes. Critics of biodiversity offsetting point to difficulties in quantifying biodiversity values for market purposes, and in establishing offset markets (i.e. supply and demand requirements), challenges in re-creating nature, time lags in restoring areas, failure to account for declining base lines, failures to effectively manage offsets sites and protect offset sites in perpetuity, and perverse outcomes, as reasons to adopt the use of biodiversity offsets with caution.[100]

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[93] Bill, s 9(2).
[94] *Planning and Development Act 2007* (ACT), s 211H.
[95] Bill, s 110.
[96] Bill, ss 219, 223, 224 and 225.
[97] Bill, s 227.
[98] Bill, ss 233 and 234.
[99] Bill, s 241.
[100] See, for example: Bull, J.W. et al, 'Biodiversity offsets in theory and practice' (2013) 47(3) *Fauna and Flora International* 369-380; Curren, M. et al., 'Is there empirical support for biodiversity offset policy?' (2014) 24(4)

Given the significant challenges in achieving genuine biodiversity outcomes through offsetting, it should only be allowed in limited circumstances, in line with best practice science-based principles. There are a number of fundamental principles that must underpin any ecologically sound biodiversity offsetting scheme. The fundamental principles are as follows:

- **Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts:** The mitigation hierarchy should be clearly set out in relevant planning legislation as a mandatory pre-condition before any offsetting option is considered. Appropriate guidance and emphasis should be provided to proponents on how they can demonstrate their endeavours to genuinely 'avoid' and 'mitigate' aspects of the proposed development.
- **Offsets must be based on the 'like for like' principle:** Any ecologically credible offset scheme must enshrine the requirement of 'like for like' offsets, to ensure that the environmental values of the site being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise the resulting action is not an offset. A 'like for like' requirement is absolutely fundamental to the ecological integrity and credibility of any offset scheme. Any concerted policy action and long-term strategic planning to contextualise offsetting within a broader strategy of environmental conservation, must be based on sound landscape conservation principles, without eroding the like for like principle.
- **Legislation and policy should set clear limits on the use of offsets:** Offset schemes must have clear parameters. The use of 'red flag' or 'no go' areas is essential to make it clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss. (This principle must not be undermined by relaxing the 'like for like' rule).
- **Indirect offsets must be strictly limited:** There should be extremely minimal use of indirect offsets under any offset scheme, including, for example, payment of money in lieu of a direct offset. This is due to significant uncertainty of regarding any link between an indirect offset and relevant environmental outcomes, and higher risk that biodiversity outcomes may not be achieved at all. Expanded use of indirect offsets results in net loss of impacted biodiversity.
- **Offsetting must achieve benefits in perpetuity:** An offset area must be legally protected and managed in perpetuity, as the impact of the development is permanent. Offset areas should not be available to be offset again in the future.
- **Offsets must be designed to improve biodiversity outcomes:** Simply requiring 'no net loss' does not acknowledge current trajectories of biodiversity loss, and that positive action is required to halt and reverse this trend. Offset schemes should be designed to improve biodiversity values (e.g. 'no net less or better', 'net gain', 'maintain and improve').

Ecological Applications 617-632; Fallding, M, 'Biodiversity Offsets: Practice and Promise' (2014) 31 *Environmental Planning & Law Journal* 33; Gordon, A. et al, 'Perverse incentives risk undermining biodiversity offset policies' (2015) 52 *Journal of Applied Ecology* 532–537; Gibbons, P. et al, 'Outcomes from 10 years of biodiversity offsetting' (2018) 24(2) *Global Change Biology* 643-654; Pope, J. et al, 'When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets' (2021) 67 *Environmental Management* 424–435.

- **Offsets must be additional:** Any offset action must be additional to what is already required by law. The requirement of 'additionality' must be based on clear criteria to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur.
- **Offset arrangements must be legally enforceable:** Any offset scheme must be underpinned by strong enforcement and compliance mechanisms in legislation, with adequate resourcing, established from the outset.
- **Offset frameworks should build in mechanisms to respond to climate change and stochastic events:** Climate change and associated impacts (such as more frequent and intense weather events) have a significant impact on biodiversity. Any biodiversity offsets scheme must build in mechanisms for responding to climate change and stochastic events (for example, a mechanism to ensure credit charge estimates can be reviewed following significant events, such as bushfires).

In the ACT's current planning system, offsetting principles are set out in the *ACT Environmental Offsets Policy*, which is a non-legislative policy document. Similarly, under the Bill, we expect that offsetting principles will be included in the offsetting policy,[101] which is a notifiable instrument made by the Minister.[102]

We submit that the offsetting principles should be enshrined in the Bill, rather than in a policy document. In addition, the Bill should clearly state that offsetting should only be allowed in limited circumstances, in line with the best practice science-based principles that we have set out above.

In addition, in 2021, the Office of the Commissioner for Sustainability and the Environment (**OCSE**) published a report on environmental offsets in the ACT, which identified a number of opportunities for improving offsets in the ACT.[103] These are summarised in a submission from the Commissioner for Sustainability and the Environment, who has recommended that the draft Bill is revised to reflect and address the issues OCSE identified with the ACT's current offset policies and their implementation.[104] We endorse this recommendation.

Recommendation 18: The definition of 'protected matters' should include matters protected under the *Nature Conservation Act 2014* (ACT).

The Bill includes provisions in relation to protected matters. The Authority must refer a development application to the Conservator of Flora and Fauna (**Conservator**) if satisfied that a proposed development is likely to have a significant impact on a protected matter.[105] In addition, offsets are intended to address development that is likely to have a significant adverse environmental impact on a protected matter.[106]

'Protected matter' is defined in s 214 as a matter that is protected by the Commonwealth or is declared by the Minister to be a protected matter.[107] Matters protected by the Commonwealth

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[101] Bill, s 217.
[102] Bill, ss 219(2) and 224(2).
[103] Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* (2021) <https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/>.
[104] Dr Sophie Lewis, Commissioner for Sustainability and the Environment, *ACT Planning System Review and Reform Project,* Submission Number 3 (1 June 2022), recommendation 5.
[105] Bill, s 166(1)(c).
[106] Bill, ss 216 and 237(1).
[107] Bill, s 214(1).

means matters of national environmental significance that are protected by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**),[108] which extends to matters such as world and national heritage properties, Ramsar wetlands, and nationally listed threatened species and ecological communities.

'Protected matter' does not include species or ecological communities that are protected under the *Nature Conservation Act 2014* (ACT) (**NC Act**). It would be open to the Minister to make a declaration under s 214(2) to include species and ecological communities listed under the NC Act as 'protected matters'. Under the P&D Act, the Minister has declared certain ACT-listed species as protected matters under s 111A of the P&D Act.[109] However, this declaration does not include all ACT-listed species and ecological communities as protected matters.

We submit that the definition of 'protected matters' in s 214 should extend to matters protected under the NC Act. This is preferable to relying on the Minister to exercise power under s 214(2) to include those matters because it ensures that that all matters protected under the NC Act will be automatically protected under the Bill, and it is also a more administratively efficient solution.

Recommendation 19: Decision-makers should be required to consider the cumulative impacts of a proposed development.

When deciding a development application under s 180(1), a decision-maker must consider the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts,[110] and the interaction of the proposed development with any adjoining or adjacent development proposals.[111]

However, it is unclear whether decision-makers are required to consider the cumulative impacts of the proposed development on the ACT more broadly. From our review of the Bill, it appears that a decision-maker will consider the cumulative impacts of a proposed development when considering whether an adverse environmental impact is significant and therefore that the development is a significant development.[112] It is also possible that the cumulative impacts of a proposed development could be considered by decision-makers if such impacts are addressed in an EIS prepared for the development application.[113] However, there is no requirement in the Bill for EISs to address cumulative impacts. In addition, although an EIS scoping document may require consideration of cumulative impacts, there is no requirement in the Bill or the Regulation for the contents of a scoping document to require this.[114] In the absence of a provision requiring decision-makers to consider the cumulative impacts of development, it is not clear that cumulative impacts will be considered.

We submit that decision-makers should be required to consider the cumulative impacts of a proposed development. This could be achieved by amending s 181(e) to specify that consideration of the probable impact of a proposed development includes consideration of cumulative impacts.

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[108] Bill, s 215.
[109] *Planning and Development (Protected Matters) Declaration 2015* (ACT).
[110] Bill, s 181(e).
[111] Bill, s 181(f).
[112] Bill, ss 91(c) and 102. Decision-makers are also required to consider the 'cumulative impact' of changes to a development application when deciding whether to re-notify an application that has changed: s 174(4)(b). However, this focuses on the cumulative impacts of one particular development, rather than the cumulative impacts of the development within the context of the ACT.
[113] Bill, s 181(l)
[114] See Bill s 107; draft *Planning (General) Regulation 2022*, r 13.

Recommendation 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 applications.

Under s 185 of the Bill, decision-makers have the power to approve a development application even if the approval is contrary to advice it has received from other entities. For applications for significant development that is likely to have a significant adverse environmental impact on a declared protected matter, and that are inconsistent with the advice of the Conservator received under s 168 in relation to the protected matter, the Chief Planner may approve the application if:

- the proposal is consistent with the offsets policy; and
- the proposal would provide a 'substantial public benefit'.[115]

It is not appropriate for the Chief Planner to have the power to approve a development that is likely to have a significant adverse environmental impact on a declared protected matter, even if it would provide a substantial public benefit. As explained later in these submissions, we recommend that the Bill imposes a duty on decision-makers not to approve development that has an unacceptable impact on the environment (**Recommendation 21**).

However, if the ACT Government does not agree with this submission, we are concerned that, without clear and appropriate limits on the Chief Planner's power, there is a significant risk that the Chief Planner will be empowered to approve most significant development proposals in the ACT even if they have an unacceptable impact on the environment. The Bill must therefore set clear and appropriate limits on the Chief Planner's power to override the Conservator's advice on development applications.

We are supportive of the word 'substantial' in the public benefit test, as this appears to set a high threshold for the exercise of the Chief Planner's power.

However, we submit that a public benefit test is not appropriate. We are concerned that, in practice, application of this test may be skewed towards favouring the economic benefits of a project, rather than a more even-handed consideration of whether the proposal promotes ESD. If there is to be any limit on the Chief Planner's power, a 'substantial public interest' test should be adopted. Guidance can be taken from NSW, which has adopted a public interest test,[116] although we submit that the ACT should retain the word 'substantial'.

If, despite our recommendation, the ACT Government maintains the 'substantial public benefit' test, we recommend that the Bill should include a definition for 'substantial public benefit' in s 185(2). This term is currently not defined in the Bill.

We understand from a public information session held by EPSDD on 4 May 2022 that this term can be interpreted using case law from other jurisdictions including from NSW.

As noted above, NSW adopts the term 'public interest',[117] rather than public benefit. We have identified two decisions from the NSW Land and Environment Court that include a cursory mention of the term 'public benefit'.[118] We note that in 2013, the NSW Government considered

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[115] Bill, s 185(2).
[116] *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(e).
[117] *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(e).
[118] See for example *Mecone Pty Ltd v Waverley Council* [2015] NSWLEC 1312; *Marchese & Partners Architects Pty Ltd v North Sydney Council* [2000].

including a 'public benefit' consideration within its public interest test.[119] However, this proposed amendment was ultimately not adopted. In Queensland, the *Planning Act 2016* (Qld) adopts the term 'public benefit'.[120] There is some case law from the Planning and Environment Court of Queensland in which the Court has considered whether a proposed development has a 'public benefit'.[121]

However, even if there is some case law that has considered the meaning of 'public benefit', it is not appropriate to assume that, in the absence of a definition in the Bill, the meaning of 'substantial public benefit' in the Bill can be interpreted by decision-makers, courts and tribunals by relying on jurisprudence from other jurisdictions in the context of completely different legislative schemes.

In addition, for everyday people in the ACT who do not have legal backgrounds, the absence of a definition in the Bill does not provide sufficient certainty for the threshold that will apply in decisions like these.

Recommendation 21: The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to have a significant adverse environmental impact.

We submit that the Bill should include strong compliance and enforcement mechanisms for development proposals that are likely to have a significant adverse environmental impact, including by:

- introducing a duty on decision-makers to refuse development applications for development proposals that will have unacceptable impact on the environment; and
- introducing a clear power for decision-makers to set adaptive conditions, to ensure that conditions can be regularly reviewed and modified if appropriate.

The provisions of the Bill imply that a development application that has unacceptable environmental impacts will not be approved. For example, under s 184(1) a decision-maker may approve a development application only if it is consistent with advice from the Conservator. If the Conservator recommends that the application is not approved because of its impact on protected matters, then the decision-maker must refuse the application (unless the circumstances in s 185(2) apply, allowing a decision contrary to advice, which we oppose as recommended above in **Recommendation 20**).

However, this intention should be stated more clearly. We therefore submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have an unacceptable impact on the environment.

We further submit that s 182 of the Bill, sets out provisions in relation to condition-setting for development applications that are conditionally approved, should be amended to provide that decision-makers can set adaptive conditions. Adaptive conditions may permit conditions that protect or mitigate against environmental impacts to be reviewed and modified if appropriate,

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[119] Proposed amendment to s 4.19(2)(d), discussed in NSW Government, *A New Planning System for NSW: White paper* (April 2013).
[120] *Planning Act 2016* (Qld), s 5(2)(i).
[121] See for example *Sandstrom v Sunshine Coast Regional Council* [2021] QPELR 1107; *Navara Back Right Wheel Pty Ltd v Logan City Council; Wilhelm v Logan City Council* [2020] QPELR 899; *K&K (GC) Pty Ltd v Gold Coast City Council* [2020] QPEC 040; *Beerwah Land Pty Ltd v Sunshine Coast Regional Council* [2018] QPEC 010.

including for example if the development has an unacceptable impact on the environment or a greater impact on the environment than was anticipated in the development approval.

(3) Aboriginal cultural heritage

Finally, in order to promote distributive justice, the Bill must promote the right of First Nations in the ACT to speak on behalf of their country and to protect culturally significant places and objects, both tangible and intangible, from the impacts of development.

The ACT Government owes particular obligations to First Nations under the Human Rights Act. Under s 40B of the Human Rights Act, public entities are required to act consistently with human rights and to give proper consideration to relevant human rights when making decisions.[122] Human rights that are protected in the ACT include the cultural and other rights of Aboriginal and Torres Strait Islander Peoples to:[123]

- enjoy their culture, to declare and practice their religion, and to use their language;
- maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, languages and knowledge, and kinship ties; and
- have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The primary source of the rights in s 27(2) of the Human Rights Act is the *United Nations Declaration of the Rights of Indigenous Peoples* (**UNDRIP**), art 25 and 31. UNDRIP was endorsed by Australia in 2009. Although it is non-binding, Australia has accepted it as a framework for better recognising and protecting the rights of First Nations in Australia. Section 27 of the Human Rights Act is also derived from art 27 of the ICCPR, which Australia has also ratified.[124]

Section 27 should also be read together with s 8 of the Human Rights Act, which recognises that everyone has the right to recognition as a person before the law and the right to enjoy their rights without distinction or discrimination, and that everyone is equal before the law and is entitled to equal protection of the law without discrimination. Section 8 is derived from art 2(1) of the ICCPR.[125]

As noted in **Part C** of these submissions (Justice as Recognition), the Special Rapporteur identifies First Nations as people who are often at greater risk of environmental harm. As a result, States owe particular obligations under international human rights law to protect First Nations' right to enjoy a healthy environment. These obligations are derived from a number of international human rights treaties including the ICCPR, and are as follows:

- to prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a healthy environment, which includes an obligation to protect against environmental harm that results from or contributes to

[122] *Human Rights Act 2004* (ACT), s 40B(1).
[123] *Human Rights Act 2004* (ACT), s 27.
[124] Article 27 provides that ethnic, religious or linguistic minorities should not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.
[125] Article 2(1) provides that each State party must respect and ensure the rights of all individuals within its territory and subject to its jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate;[126]

- to take additional measures to protect the rights of those who are most vulnerable to, or at a particular risk from, environmental harm, taking into account their needs, risks and capacities, which includes an obligation to ensure that laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment;[127]
- to ensure that they comply with their obligations to Indigenous Peoples and members of traditional communities, including by recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used, consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources, respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources, and ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.[128]

As the Human Rights Act incorporates rights enshrined in the ICCPR, these obligations extend to the ACT Government.

The Bill protects Aboriginal cultural heritage to some extent during some, but not all, planning matters, which we address further below. We consider that the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to First Nations in the ACT. Our recommendations in relation to Aboriginal cultural heritage are additional to our recommendation that the object of the Bill should include protection of heritage, including Aboriginal heritage, and promotion and facilitation of the knowledge, culture and tradition of the traditional custodians of the land (**Recommendation 4**).

Recommendations in relation to Aboriginal cultural heritage

Recommendation 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.

There are no provisions in the Bill that require consultation with First Nations at any stage of the reformed planning system. We acknowledge that First Nations will have an opportunity to participate in the public consultation period for various planning decisions. However, as noted above, the ACT Government has obligations to take additional measures to protect the rights of those who are most risk of environmental harm, and to consult with First Nations before approving measures that may affect their country. We submit that consultation with First Nations

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[126] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [7], p 7 (Framework Principle 3). The sources for Principle 3 include ICCPR art 2(1) and 26, ICESCR art 2(2), and ICERD, art 2 and 5: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 3.
[127] Ibid, [40]-[42], pp 16-18 (Framework Principle 14). The sources for Principle 14 include ICCPR art 27, ICESCR art 15, ICERD, and UNDRIP art 20(2) and 32(3).
[128] Ibid, p 18 (Framework Principle 15). The sources for Principle 15 include UNDRIP, ICCPR art 27, and ICESCR art 15.

through a public consultation period is the bare minimum and is not enough to discharge the ACT Government's obligations. A more proactive approach is required.

The Authority must consult with the ACT Heritage Council (**Heritage Council**) during some (but not all) key planning decisions under the Bill, including in relation to the new draft Territory Plan,[129] draft major amendments to the Territory Plan,[130] and development applications for proposals that require an EIS and are therefore significant development.[131]

The Authority is also required to consult with the Heritage Council in relation to development applications for proposals that are significant development, but only if it relates to a place that is registered or provisionally registered under the Heritage Act, or if the Authority is *'aware that the proposed development may impact an Aboriginal object or place'.*[132] In the absence of provisions requiring consultation with First Nations, it is not clear to us how the Authority could become aware that the proposed development may impact an Aboriginal object or place.

Under the ACT's current planning system, when the Heritage Council receives a development application that has been referred by the ACT Planning and Land Authority under s 148 of the P&D Act,[133] the Council is required to provide advice to the Authority about the effect of the development on the heritage significance of a registered place or object or a nominated place or object that is likely to have heritage significance.[134] There is no requirement for the Heritage Council to advise on the effect of the development on places or objects that are not registered or nominated to be registered. There is also no requirement in the Heritage Act for the Heritage Council to engage with representative Aboriginal organisations (**RAOs**) when providing this advice to the Authority.[135]

We understand that, in practice, proponents engage cultural heritage consultants in relation to their development proposal before submitting a development application, and that heritage consultants will engage with RAOs and provide a heritage survey to the proponent to accompany its development application. However, there are no provisions in the Bill that require development applications to be accompanied by a heritage survey.[136] Instead, any such consultation with RAOs will occur outside the planning system and therefore outside the oversight of the ACT Government.

In short, the Bill does not require the ACT Government to engage in effective consultation with First Nations before it makes decisions that may have an impact on their country.

We submit that the Bill should include provisions requiring ACT Government consultation with RAOs for key planning decisions including development applications.

In making this submission, we acknowledge that First Nations may experience consultation fatigue from being frequently consulted to provide input on a variety of government programs and

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[129] Bill, s 48(2)(b)(v).
[130] Bill, s 59(d) and 64(3)(b)(v).
[131] Bill, s 166(1)(a); draft *Planning (General) Regulation 2022*, r 28(1)(f).
[132] Bill, s 166(1)(a); draft *Planning (General) Regulation 2022*, r 27(d).
[133] *Planning and Development Act 2007* (ACT) s 148(1); *Planning and Development Regulation 2008* (ACT) r 26(1)(f) (for the impact track).
[134] *Planning and Development Act 2007* (ACT) s 149(2); *Heritage Act 2004* (ACT) s 60.
[135] *Heritage Act 2004* (ACT) ss 60 and 61.
[136] See Bill, s 162(2)(d); Schedule 2, Part 2.2.

policies.[137] Consultation takes up time and resources, which may already be limited, and is often done without financial incentive or support. However, in our view, the Bill should at least facilitate an option to consult with RAOs on key planning decisions.

In addition to the above, the ACT Government's obligation to consult with First Nations before taking or approving any measures that may affect their country includes an obligation to obtain their free, prior and informed consent.

Free, prior and informed consent has been recognised in UNDRIP, which provides that *'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent'* prior to *'adopting and implementing legislative or administrative measures that may affect them'* or approving *'any project affecting their lands or territories or other resources'*.[138]

The *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, endorsed by the UN Permanent Forum on Indigenous Issues, made findings and recommendations on the defining qualities of free, prior and informed consent. These include:

- **Free:** decision-making should not be undermined by coercion, intimidation or manipulation;
- **Prior:** consent should be sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of Indigenous consultation consensus processes;
- **Informed:** information should be provided, in a form that is accessible and understandable, regarding the nature, size, pace, reversibility and scope of the project; the reasons for or purpose of the project; the duration of the project; the locality affected; the preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and equitable benefit sharing in a context that respects the precautionary principle, the personnel likely to be involved in the execution of the project; and
- **Consent:** the consent process should involve consultation and participation. Indigenous Peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The process may include the option of withholding consent.[139]

The Bill does not implement the principle of free, prior and informed consent relating to First Nations. We submit that the ACT Government must obtain the free, prior and informed consent of traditional custodians prior to making decisions in relation to development.

Recommendation 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.

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[137] See, for example, Department of Agriculture Water and the Environment, *Northern Rivers Regional Biodiversity Management Plan*: *Appendix 7*, p 1.
[138] UNDRIP, art 19 and 32(2).
[139] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc E/C.19/2005/3 (17-19 January 2005, adopted 17 February 2005) pp 12-13, summarised in Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 190.

Consultation with First Nations should be culturally safe and should occur in accordance with consultation guidelines that are developed through consultation with First Nations people and communities to ensure that the guidelines conform with Cultural Protocols based on First Nations Lore, including the principle of free, prior and informed consent. Such guidelines could be prepared with consultation fatigue in mind if First Nations consultants consider it to be a relevant issue.

Recommendation 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.

As with climate change and biodiversity, we submit that the Bill should introduce a duty on decision-makers to refuse development applications for development proposals that will have a significant adverse impact on Aboriginal cultural heritage.

The provisions of the Bill imply that a development application that has unacceptable impacts on Aboriginal cultural heritage not be approved. For example, under s 184(1) a decision-maker may approve a development application only if it is consistent with advice from the Heritage Council. If the Heritage Council recommends that the application is not approved because of its impact on a registered place or object or a nominated place or object that is likely to have heritage significance, then the decision-maker must refuse the application (unless the circumstances in s 185(1) apply, allowing a decision contrary to advice). However, this intention should be stated more clearly.

In addition, under the ACT's current planning system, the Heritage Council provides advice to the Authority about the effect of the development on the heritage significance of a registered place or object or a nominated place or object that is likely to have heritage significance,[140] but there is no requirement for the Heritage Council to advise on the effect of the development on places or objects that are not registered or nominated to be registered.

We therefore submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have a significant adverse impact on Aboriginal cultural heritage, whether or not the place or object is protected under the Heritage Act.

We note that this submission is consistent with submissions from the Heritage Council, which has recommended that where the Heritage Council advises that a proposed development is likely to have a significant adverse heritage impact, the development must not be approved.[141]

[140] *Planning and Development Act 2007* (ACT) s 149(2); *Heritage Act 2004* (ACT) s 60.
[141] ACT Heritage Council, *Submission from the ACT Heritage Council,* Submission Number 70 (June 2022), pp 8-9.

E Procedural Justice

Procedural justice is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[142] Broad, inclusive and democratic decision-making procedures are a precondition for distributive justice.[143]

In this section of our submissions, we address the following key elements of procedural justice:

1. access to environmental information;
2. entitlement to participate in decision-making; and
3. access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights – or, more simply, access to justice.[144]

In addressing these elements, we have considered the provisions of the Bill against the requirements of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (**Aarhus Convention**). Although Australia has not ratified the Aarhus Convention, we consider that the Convention represents best practice principles for promoting and protecting procedural rights and therefore the ACT Government should have regard to the Aarhus Convention when considering the Bill.

The Special Rapporteur identifies access to information, participation in decision-making and access to justice as procedural elements of the right to a healthy environment.[145] The Special Rapporteur has also identified that States have obligations under international human rights law to provide access to environmental information,[146] to provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process,[147] and to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.[148] These obligations are derived from a number of international human rights treaties, including the ICCPR. As the Human Rights Act incorporates rights enshrined in the ICCPR, these obligations also extend to the ACT Government.

(1) Access to information

Access to information is concerned with the right of people in the ACT to receive environmental information that is held by public authorities. The right to access information is derived from art

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[142] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 2.
[143] Ibid.
[144] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 185.
[145] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019).
[146] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) Framework principle 7, p 11. The sources for Principle 7 include the ICCPR, art 19: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 12.
[147] Ibid, Framework principle 9, pp 12-13. The sources for Principle 9 include the ICCPR, art 25: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 16.
[148] Ibid, Framework principle 10, p 13. The sources for Principle 10 include the ICCPR, art 2(3): UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 18.

19 of the ICCPR,[149] which is reflected in s 16 of the Human Rights Act. In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[150]

- **Presumption in favour of access to information:** Any environmental information held by a public authority must be provided when requested by any member of the public, unless it can be shown to fall within a finite list of exempt categories. Public authorities may withhold information where disclosure would adversely affect various interests (e.g. national defence, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy). To prevent abuse of the exemptions by over-secretive public authorities, any exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account.
- **'Any person':** The right of access to information extends to any person, without them having to prove or state an interest or a reason for requesting the information.
- **Time limits:** The information (or decision to refuse access) must be provided as soon as possible, and at the latest within one month after submission of a request for information. This period may be extended by a further month where the volume and complexity of the information justifies this, however the requester must be notified of any such extension and the reasons for it.
- **Refusals:** Refusals, and the reasons for them, are to be issued in writing where requested.
- **Continuous disclosure of risks:** Authorities must publicly disclose relevant information regarding environmental risks arising from activities it is responsible for managing and approving. This includes provisions to require authorities to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.
- **Transparency:** There is a requirement for regular preparation, publication and dissemination of a report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

In general, we consider that the extent to which the Bill promotes access to information is an improvement from the P&D Act. However, we make the following recommendations to ensure that the Bill effectively promotes access to information.

Recommendations in relation to access to information

Recommendation 25: Ensure the Territory Planning Authority's website is accessible.

The Bill provides for the creation of a website for the Authority.[151] Several provisions throughout the Bill provide that certain information must be made available on the Authority's website,

[149] Article 19 protects the right of everyone to hold opinions without interference, and to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, or in writing or in print, in the form of art, or through any other media.
[150] Aarhus Convention, art 4.
[151] Bill, s 511.

including the Planning Strategy,[152] district strategies,[153] the statement of planning priorities,[154] decisions to make and amend the new Territory Plan,[155] applications for EIS scoping documents,[156] draft and final EISs,[157] and decision notices for decisions on development applications.[158] These provisions mean that such information will be readily available to the majority of the public, which is a significant improvement to the P&D Act.

However, we submit that more can be done to ensure that information on the Authority's website is accessible. We recommend the following:

- include more information online about what the Authority is, its membership, the legislation and policies that govern its decisions, and its decision-making process;
- make information accessible to people who may have a limited understanding of the ACT's planning system, including children and young people;
- make information available in other languages than English, noting that at least 22% of households in the ACT speak a language other than English at home;[159]
- include a subscription service so that interested people can be notified of new applications or updates on existing applications, to avoid the need for people to constantly review the Authority's website for information. Although it is possible to subscribe to notifications using the DA Finder App, this application is only available on mobile phone and should be made available online using an internet browser.

Recommendation 26: Ensure information is available to people with no internet and at no additional cost.

The Bill also provides for the Authority to keep a public register in any form it considers appropriate, which must include certain information specified in s 500.[160] However, the public register must not contain certain information (associated documents) specified in s 503.[161] The Authority must publish certain documents included in the public register on its website.[162]

In the current planning system, the public register is available for inspection at the Access Canberra Environment, Planning, and Land Services Shopfront in Dickson ACT or by emailing EPSDD.[163] There is no charge for inspecting the register, although fees are payable for accessing copies of associated documents.

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[152] Bill, s 34(5).
[153] Bill, s 37(5).
[154] Bill, s 38(5).
[155] Bill, ss 49(4), 55(6), 72(6), s 83(5)
[156] Bill, s 106(2)(c).
[157] Bill, ss 111(c) and 127.
[158] Bill, s 191(5).
[159] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[160] Bill, s 499.
[161] Bill, s 500(3).
[162] Bill, s 502.
[163] EPSDD – Planning, *The public register – development applications, approvals and compliance orders* <https://www.planning.act.gov.au/talk-with-us/public-register>.

The 2016 Census identified that in the ACT, 14.1% of our population reported that they do not access the internet from their dwelling, and 10.1% of households reported that they did not have any access to the internet at all.[164]

We submit that the Authority should ensure that information in the ACT's reformed planning system continues to be made available to people without access to the internet, and at no additional cost. In particular, we recommend that:

- the Bill should include provisions ensuring that information included on the Authority's website is also available to be inspected in person; and
- there should be no fee for inspecting associated documents.

Recommendation 27: The Territory Planning Authority should be required to continuously disclose environmental risks of development to the public.

There are no provisions in the Bill that require the Authority or the Minister to disclose environmental risks associated with an approved development application to the public.

For significant development that requires an EIS, the public has the right to make representations on the draft EIS,[165] through which the public can become aware of environmental risks associated with the development proposal. There are also provisions that allow the Minister to conduct an inquiry about one or more aspects of an EIS,[166] including in relation to the effects on public health.[167] However, apart from the availability of inquiries into an EIS, there are no provisions under the Bill that require the Authority or the Minister to disclose environmental risks associated with an approved development if the environmental risks identified in an EIS eventuate. In addition, EISs are not required for all development applications.

We submit that the Bill should include provisions that require the Authority to continuously disclose to the public any environmental risks associated with an approved development.

(2) Participation in decision-making

Participation in decision-making is concerned with the right of people in the ACT to participate in environmental decision-making. The right to participate in decision-making derived from art 25 of the ICCPR,[168] which is reflected in s 17 of the Human Rights Act. In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[169]

- **Prior information:** The community should be informed early in an environmental decision-making process, and in an adequate, timely and effective manner throughout that process. Authorities must publicly disclose all documents on which environmental decisions will be based, allowing sufficient exposure time for the public to prepare and participate effectively during environmental decision-making.

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[164] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[165] Bill, s 112(1).
[166] Bill, s 129.
[167] Bill, s 129(3); *Public Health Act 1997* (ACT), s 134.
[168] Article 25 protects the right of all citizens to have the opportunity to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, and to have access on general terms of equality to public service.
[169] Aarhus Convention, art 5 to 8.

- **Timeframes for decision-making:** Public participation procedures should include reasonable timeframes to allow the public to access relevant information, prepare and participate effectively during environmental decision-making.
- **Open standing to participate:** Any person should have the right to participate in government decision-making, regardless of locality or organisational affiliation (or lack thereof).
- **How community views are taken into account:** The community's views should have meaningful weight in the decision-making process and the decision-making authority must demonstrate how community views have been considered and taken into account during that decision-making process, including via a publicly available statement of reasons. Statements of reasons for decisions should also be disclosed as a matter of course within no less than 30 days of a decision being taken.

The object of the Bill is to create a planning system that *'provides a scheme for community participation'.*[170] In addition, as part of achieving this object, the planning system is intended to *'provide for community participation in relation to the development of planning strategies and policies, and development assessment'.*[171]

The Bill provides for mandatory public consultation on a wide range of planning matters including in relation to the Planning Strategy,[172] district strategies,[173] draft major amendments to the Territory Plan,[174] draft EISs,[175] development applications,[176] and proposed declarations of Territory Priority Projects.[177] The Bill also provides for discretionary public consultation in other key decisions including in relation to a draft EIS scoping document,[178] a revised EIS if it is significantly different from the draft EIS,[179] an amended development application (if the application is changed, either following receipt of further information from the proponent or after amendment by the Authority, and if the adverse environmental impact of the development has increased),[180] and applications to amend development applications.[181] Anyone may participate in these public consultation processes.

We consider that these provisions are key strengths of the Bill. However, we make the following recommendations to ensure that the Bill effectively promotes effective participation in planning decisions in accordance with the object of the Bill.

Recommendations in relation to public participation

Recommendation 28: The Bill should require longer periods for public consultation on key planning decisions.

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[170] Bill, s 7(1)(c).
[171] Bill, s 7(2)(f).
[172] Bill, s 34(3).
[173] Bill, s 37(3).
[174] Bill, s 60(1)(c).
[175] Bill, s 112(1).
[176] Bill, ss 171 and 175(1).
[177] Bill, s 212(4).
[178] Bill, s 106(3); draft *Planning (General) Regulation 2022*, r 10(2).
[179] Bill, s 116.
[180] Bill, s 174.
[181] Bill, ss 201(1)(b) and 203.

The Office of Best Practice Regulation within the Commonwealth Department of Prime Minister and Cabinet recommends that, in general, and depending on the significance of the proposal, a public consultation period of between 30 to 60 calendar days is usually appropriate for effective consultation, and that 30 days is considered the minimum appropriate period.[182] 30 calendar dates equates to roughly 20 working days,[183] while 60 calendar days equates to roughly 40 working days.[184]

We submit that the public consultation period for key planning decisions should be extended as follows, consistent with the Office of Best Practice Regulation's recommendations:

- development applications should be extended from 15 working days[185] to **20 working days**;
- development applications for proposals that are significant development should be extended from 25 working days[186] to **40 working days**;
- draft EISs should be extended from 30 working days[187] to **40 working days**;
- draft major amendments to the Territory Plan should be extended from 30 working days[188] to **40 working days**.

In addition, the term 'working day' is not defined in the Bill. 'Working day' is defined in the *Legislation Act 2001*, which excludes weekends and public holidays in the ACT from being counted, but does not exclude the December to January summer period. Section 15 of the *Planning Legislation Amendment Act 2020* (ACT), which has not yet commenced, will amend the public notification period for development applications under s 157 of the P&D Act to exclude the period between 20 December and 10 January.

We submit that the Bill should include a definition of 'working day' that excludes the period between 20 December and 10 January from being counted. This definition should apply to all key planning decisions, not just development applications.

Recommendation 29: The principles of good consultation should be enshrined in the Bill.

The principles of good consultation are not included in the Bill. They are instead set in guidelines that may be made by the Minister under the Bill.[189] However, best practice for consultation in planning matters recommends legislating or creating legally enforceable policies that outline the standards and principles that are to be followed for consultation processes.[190]

Given the importance of the principles of good consultation in a wide range of key planning decisions under the Bill, and the need to provide certainty to the public on decision-making, we

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[182] Office of Best Practice Regulation, 'Best Practice Consultation' (Online, March 2020) <https://www.pmc.gov.au/sites/default/files/publications/best-practice-consultation_0.pdf> 5.
[183] From our calculations, 20 working days is 28 calendar days, although it would be more if there were public holidays included in that time period. This equates to roughly 30 calendar days.
[184] From our calculations, 40 working days is 56 calendar days, although it would be more if there were public holidays included in that time period. This equates to roughly 60 calendar days.
[185] Bill, s 171(2)(a); draft *Planning (General) Regulation 2022*, r 30(b).
[186] Bill, s 171(2)(a); draft *Planning (General) Regulation 2022*, r 30(a).
[187] Bill, s 111(a)(iii).
[188] Bill, s 52.
[189] Bill, s 10(1).
[190] See Leslie Stein, 'Community Participation: Best Practice' in *Comparative Urban Land Use Planning* (Sydney University Press, 2017).

submit that the principles of good consultation should be enshrined in the Bill. If the Minister then makes guidelines on good consultation, these guidelines could expand on the principles enshrined in the Bill.

Recommendation 30: The principles of good consultation should reflect best practice.

Good consultation means recognising that the right of the public to participate is not confined to the opportunity to be heard in respect of the content of a proposal. It also includes other critical factors such as the need for the community to understand the planning process and obtain access to the stream of relevant planning information and explanations.[191]

The International Association for Public Participation has developed core values for public participation for use in the development and implementation of public participation processes.[192] These are as follows:

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
- Public participation includes the promise that the public's contribution will influence the decision.
- Public participation promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision makers.
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.
- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

Planning Aid England makes the following practical recommendations for good consultation:

- **In the pre-application stage:** Build relationships with community groups and individuals; communicate widely to raise awareness about the plan, what is fixed, and what is up for debate; engage early and set a clear timeline for consultation; and monitor involvement and direct resources to under-represented and marginalised communities.
- **In the submission and decision stage:** Be clear about timelines and how comments will be considered; communicate widely and explain why consultation is taking place; ensure consultation is conducted widely, aiming resources and communication to a variety of groups; and monitor involvement and inform communities of the decision that is made.
- **In the construction and operation stage:** Continue relationships with existing community groups; communicate widely and keep the community informed of when, where and what is happening for the development; and respond to comments and continue to engage with the community.[193]

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[191] Ibid.
[192] International Association for Public Participation, *IAP2 Core Values* <https://www.iap2.org/page/corevalues>.
[193] Planning Aid England, *Good Practice Guide to Public Engagement in Development Schemes* (2010).

Chief Justice Preston further recommends that proper consultation should:[194]

- be undertaken at a time when proposals are at a formative stage, and at a stage when the public has the potential to influence the nature, extent and other features of the use of land and its resources;
- include sufficient information on a particular proposal to allow those consulted to give intelligent consideration and an intelligent response;
- give adequate time for this purpose; and
- conscientiously take the product of consultation into account when the ultimate decision is made.

We submit that the ACT Government should have regard to best practice, including the sources discussed above, when developing the principles of good consultation.

We further submit that the ACT Government should maintain mandatory public consultation in relation to pre-development applications, as is currently protected under the P&D Act. This would be consistent with best practice, which recommends consulting the public as early as possible at a stage when the public has the potential to influence the outcome of the decision.

(3) Access to justice

Access to justice is concerned with the right of people in the ACT to challenge or seek review of public decisions and ensure that breaches are enforced. The right to access to justice is derived from art 2(3) of the ICCPR.[195] In EDO's submission on the Inquiry into Petition 32-21 (No Rights Without Remedy), we have recommended that the Human Rights Act is amended to better protect the rights of people in the ACT to access justice.[196]

In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[197]

- **Open standing:** There is open standing to seek a review of government decisions, or enforce a breach, or anticipated breach, of environment law through third party enforcement provisions.
- **Third-party enforcement rights:** Any person has access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment.
- **Access to information appeals:** A person whose request for information has not been dealt with to their satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law (such as an

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[194] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 187-188, citing *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168 at 189; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 258 [107].

[195] Article 2(3) of the ICCPR provides that State parties must ensure that any person whose rights or freedoms are violated shall have an affected remedy, to ensure that any person claiming a remedy shall have their rights determined by competent authorities and to develop the possibilities of judicial remedy, and to ensure that competent authorities will enforce such remedies when granted.

[196] EDO, *Submission to Inquiry into Petition 32-21 (No Rights Without Remedy)*, Submission Number 22 to the ACT Legislative Assembly Standing Committee on Justice and Community Safety (7 April 2022).

[197] Aarhus Convention, art 9.

Ombudsperson). These appeals should be free of charge or inexpensive in relation to the average wage in Australia.

- **Access to justice:** The procedures referred to above must be 'fair, equitable, timely and not prohibitively expensive', including limitations on upfront costs for community members exercising legal rights and the use of public interest cost orders in those cases.

Recommendations in relation to access to justice

Recommendation 31: The Bill should include open standing provisions allowing any person to seek review of government decisions.

Under the Bill, third parties can seek review in the ACAT of certain decisions on development applications (discussed below). However, they may only do so if:

- they made a representation during the public notification period about the application, or had a reasonable excuse for not making a representation; and
- the approval of the application may cause them to suffer material detriment, which means that the decision has, or is likely to have, an adverse impact on their use or enjoyment of land or, for organisations, the decision relates to a matter included in the organisation's objects or purposes.[198]

We consider that best practice, as reflected in the Aarhus Convention, is for governments to enshrine open standing provisions in legislation. We also consider that the material detriment test is prohibitive and is not easily understood by some members of the ACT community.

For these reasons, we submit that the test for third party standing should be amended to allow any person to seek review in the ACAT, whether or not the approval of the application may cause the entity to suffer material detriment.

However, if there is to be some limit on the entities who may seek review of a development application decision, the ACT Government should consider adopting a broader test for standing, for example an entity whose 'interests are affected by the decision'. This would be consistent with other environmental legislation in the ACT including, for example, the EP Act,[199] and would be interpreted consistently with the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (**ACAT Act**).[200]

Recommendation 32: The Bill should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.

The Bill allows third parties to apply to the ACAT to seek review of only a limited number of decisions. These are:

- decisions to approve, with or without conditions, a development application that was publicly notified,[201] including decisions made on reconsideration under s 194;[202]
- decisions to amend, with or without conditions, a development application that was publicly notified.[203]

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[198] Bill, Schedule 6, Part 6.1, s 6.1.
[199] *Environment Protection Act 1997* (ACT) s 136D(b).
[200] ACT Civil and Administrative Tribunal Act 2008 (ACT) s 22Q.
[201] Bill, Schedule 6, Part 6.2, item 2.
[202] Bill, Schedule 6, Part 6.2, item 6.
[203] Bill, Schedule 6, Part 6.2, item 7.

However, the Bill also explicitly exempts a number of matters from third-party ACAT review, which are listed in Schedule 7 and include Territory Priority Projects.[204]

Where third-party merits review is not available, judicial review by the Supreme Court of the ACT may be available. However, judicial review is not a feasible option for many people in the ACT for the following reasons.

Proceedings before the Supreme Court are lengthy and complex. As a court, the Supreme Court is a formal venue with a large number of rules, practices and procedures that many people in the ACT – particularly those without legal training or experience – will not have an understanding of. In addition, judicial review proceedings are legally technical. It is nearly always necessary to have legal representation to be able to bring an action for judicial review in the Supreme Court.

This presents a barrier to justice due to the costs of obtaining legal representation, particularly for people who are not eligible for Legal Aid and are unable to find low cost or pro bono representation. It is also costly to commence and continue proceedings in the Supreme Court due to the fees that are payable unless waived by the Court. Applicants before the Supreme Court also bear a significant risk that the Court will grant a costs order if their application is unsuccessful. At the EDO, the risk of an adverse costs order is sometimes so significant for our clients that they are simply unable to proceed with litigation. In practice, relief through judicial review is available only to individuals or organisations with the financial means to afford legal representation and other costs of proceedings.

Although individuals without financial means may apply for Legal Aid or seek the assistance of a community legal centre, community legal centres in the ACT are already significantly overworked and under-resourced, and do not have the capacity to represent everyone who seeks their assistance. The ACT Government should not have to rely on community legal centres to meet the gap in access to justice that is created by the unavailability under the Bill of less formal and less costly avenues for relief.

Even successful applications for judicial review do not always achieve the desired outcome. In a successful application, the usual remedy is for the Court to set aside the challenged decision and order the decision-maker to remake the decision according to law. More often than not, the decision-maker will proceed to make the same substantive decision, as only errors in the decision-making process can be addressed.

In comparison to judicial review in the Supreme Court, it is not necessary to be legally represented in merits review proceedings in the ACAT, which is designed for people to represent themselves.[205] ACAT fees are not as prohibitive as they are in the Supreme Court,[206] and parties usually bear their own costs in ACAT proceedings[207] which removes the risk of an adverse costs order for applicants. The ACAT stands in the shoes of the decision-maker and has the power to remake the substantive decision itself. In the context of planning decisions, the remedies available in merits review before the ACAT are far more effective than judicial review proceedings before the Supreme Court.

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[204] Bill, Schedule 7, item 1.

[205] ACAT, 'Do I need to be represented at ACAT?' (Web page, 2022) <https://www.acat.act.gov.au/what-to-expect/representation-and-advice#Do-I-need-to-be-represented-at-ACAT->.

[206] For example, the current filing fee for a civil dispute for an individual in ACAT is $593.00. In comparison, the current filing fee for an individual to commence a proceeding in the Supreme Court is $1,845: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, items 1000 and 1200.

[207] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1).

In addition to the above, most members of the community who do not have any legal training do not know about the existence or availability of judicial review. In our experience, when we advise members of the community that merits review in ACAT is not available, but that judicial review in the Supreme Court may be available, they are surprised to learn about the availability of this avenue of relief. Unless more can be done to educate the public about the availability of judicial review (for example, by including notes in the Bill that judicial review may be available), and to make judicial review more accessible, merits review will likely be the only avenue that most members of the community will pursue. When merits review is not available, the likely outcome – whether due to the significant barriers in commencing judicial review proceedings, or lack of knowledge of the availability of such relief – is that the community merely will not participate.

Furthermore, in circumstances where the ACT Government is intending to introduce an outcomes-focussed system, which may increase the ease at which developers can obtain development approval by removing prescriptive mandatory requirements, but potentially decrease the ability of the community to challenge approval decisions and development conditions, it is critical that the Bill provides sufficient protection of third party review rights.

For the above reasons, we submit that the Bill should enable third parties to seek review of all key planning decisions in the ACAT. At a minimum, the decisions that are currently capable of third party merits review should be expanded to include development applications for Territory priority projects and decisions to amend the Territory Plan.

Recommendation 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.

Subsection 509(4) prohibits third parties from obtaining an extension of time for making an application for review to the ACAT. This provision is identical to s 409(3) of the P&D Act.

This provision, which is extremely prohibitive, should be removed. In our view, an applicant who wishes to seek review by ACAT of a decision made under the Bill should be able to request an extension of time if they have a legitimate reason to do so, just as most applicants in the ACAT are entitled to do. There may be a number of legitimate reasons for requesting an extension of time, including for example if the applicant was not aware of the development due to an error in the public notification process.

We submit that the Bill should not prohibit third parties from seeking an extension of time for making an application to ACAT for review. It should be possible to request additional time to seek review in the ACAT of a reviewable decision made under the Bill if the decision is incorrect, provided there is a legitimate reason for requiring additional time and the request is made consistently with the *ACT Civil and Administrative Tribunal Procedures Rules 2020*.[208]

Recommendation 34: The Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill.

The Bill includes some citizen enforcement provisions. However, the actions that are available to citizens the ACT are limited to making a complaint and seeking an injunction. In particular, any person who believes that a person is carrying out, or has carried out, a controlled activity may

[208] *ACT Civil and Administrative Tribunal Procedures Rules 2020*, r 38. We note that r 38(5) provides it is subject to any express provision about the extension of time in any other law, such as s 409(3) of the P&D Act. We similarly disagree with the prohibition under s 409(3) and are therefore suggesting this rule be read without reference to that provision. If our recommendation is accepted by the ACT Government, r 38 would need to be amended to remove this restriction.

submit a complaint to the Authority,[209] which then decides whether to investigate the complaint. In addition, if a person has engaged, is engaging, or proposes to engage in conduct contravening a controlled activity order or prohibition notice, any person may apply to the Supreme Court for an injunction to restrain that contravention.[210] In addition, the actions that are available to citizens are only available in relation to controlled activities. Controlled activities are listed in Schedule 5 and include matters such as undertaking a development for which development approval is required without obtaining that approval or other than in accordance with the development approval,[211] or failing to take steps to implement an offset management plan as required under s 243.[212] However, the list of controlled activities is not that extensive.

In comparison, in NSW, citizen enforcement provisions are broader. Section 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW) provides that any person may bring proceedings in the Land and Environment Court of NSW for an order to remedy or restrain a breach of the Act, *'whether or not any right of that person has been or may be infringed by or as a consequence of that breach'.*

We submit that the Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill. This could be done by including a provision like s 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW) in the Bill.

Recommendation 35: There should be no limits on the matters upon which a planning decision can be challenged.

One of the strengths of the Bill compared to the current P&D Act is that the Bill removes the restrictions that are currently imposed under s 121(2) in merits review of decisions to approve development proposals in the merit track. We strongly support the ACT Government's decision to remove this provision, which was confusing to all users of the planning system and also presented a significant barrier to access to justice for such decisions.

However, as noted earlier, one of the issues that has been identified with outcomes-focussed planning systems is that it can be easier for applicants to successfully challenge planning decisions and obtain development approval or removal of conditions. This is clearly not a desirable outcome for environmental justice in the ACT.

In addition, the Bill currently purports to restrict the availability of challenges to the Territory Plan on certain grounds. Subsection 80(2) provides that the validity of a provision of the Territory Plan must not be questioned in any legal proceeding only on the basis that the major plan amendment that inserted or amended the provision was inconsistent with the Planning Strategy or a district strategy.

In our view, there should not be any limits to the matters that can be challenged in relation to the Territory Plan. It is not appropriate to prevent a legitimate challenge to a provision of the Territory Plan if the sole reason for the challenge is that the provision is inconsistent with the Planning Strategy or a district strategy. Under the Bill, the Territory Plan is required to give effect to the Planning Strategy and district strategies.[213] It is also likely that the ACT community will consider the Planning Strategy and district strategies to have equal importance in planning decisions as the Bill and the Territory Plan. If the Planning Strategy or a district strategy has been made by the

[209] Bill, s 413(1).
[210] Bill, s 457(2).
[211] Bill, Schedule 5, item 3.
[212] Bill, Schedule 5, item 5.
[213] Bill, s 43.

Executive, and legislation is later developed that is inconsistent with that strategy, a member of the ACT community who is affected by the inconsistency should have every right to raise their concerns in legal proceedings.

We submit that there should be no limits on the matters upon which a planning decision can be challenged, whether through merits review or otherwise.

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