THE ACT DRAFT PLANNING BILL – Comments by

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CONCLUSIONS & RECOMMENDATIONS

- ***Confidence, certainty and clarity -***
  provide a 'district strategy' and draft territory plan for public scrutiny **before** finalising the Bill; **improve** the current territory plan rather than starting again; require clear rules and reasons for decisions, not just *applicable desired outcomes* 'achieved'; improve compliance

- ***Trust and transparency –***
  greater involvement of the Legislative Assembly in planning policy; minimise Ministerial 'guidelines' and regulations with limited public input; take decision-making on non-minor DAs away from the planning authority (e.g. NSW Local Planning Panels)

- ***Consultation –***
  list Principles of good consultation in the Act (early, informative, adequate time, product respected); require Community Participation Plans like NSW; require proper Pre-DA community consultation

INTRODUCTION:

This Bill is the first outcome of the ***ACT Planning System Review and Reform*** project which has been underway for some years now. It is intended to replace the current *Planning and Development Act 2007* (P&D Act). There is also a new **Territory Plan** expected within the next year.

The ACT planning system was last comprehensively overhauled following the coming to power of the current Labor government, which produced the P&D Act 2007 and the Territory Plan 2008. There were also significant (regrettable) 'governance' changes with the removal of:

- The **Commissioner for Land and Planning** (an independent expert planner with a small staff who determined significant DAs); and
- **Local Area Planning Advisory Committees** (which reviewed planning policy matters and commented on development proposals)

It is unclear why the current P&D Act needs to be completely replaced, given the draft Planning Bill is similar in structure and content (except for some key changes) to the P&D Act. Similarly, it remains to be seen how a 'new' Territory Plan will be a great improvement on the current one, which already features '**performance-based' codes**, with 'rules' (few of which are mandatory) and 'criteria' for considering departures from rules.

In this regard one of the few attempts to evaluate this sort of performance-based (or 'outcomes-focussed') approach is a paper by Jennifer Roughan in 2016 on *Performance Based Planning in Queensland* which concluded:

In addition to complaints of complexity and a lack of efficiency, there are increasing signals from communities (and elected representatives) that there is ***confusion****, a* ***lack of confidence*** *and, possibly, a sense of injustice. These issues arise from a* ***lack of certainty, inconsistent decision making*** *and (at least perceived)* ***lack of transparency****.* ***Rather than unleashing innovation and rewarding best practice, the system is more frequently grappling with whether development is "good enough" to pass performance outcomes which occur at various levels in a planning instrument and are often unclear and capable of multiple interpretations.***

As a major part of its consultation program on the *ACT Planning System Review and Reform* project the planning authority ran four '**stakeholder**' meetings last year with representatives of community groups, the development industry, professional bodies and others such as the Conservation Council, ACTCOSS, etc. The *ACT Planning Review and Reform Working Series Listening report 17 December 2021* identified three '**key feedback themes**', which were said to be 'consistently prominent' across the four 'stakeholder' meetings:

1. **"Confidence, certainty and clarity"** – "important to both community and industry", "Clear rules and processes are preferred"

2. **"Trust and transparency"** – "Building trust in the planning system should be a priority", "Transparency across the planning system, including decision making, was valued by all participants"

3. **"Consultation"** – "Community consultation is an important aspect of restoring trust in planning system"

Consistent with these key themes are community concerns such as:

- Lack of transparency and accountability in decision-making
- Lack of opportunities for effective community participation
- Poorly worded and over-complex planning controls
- Lack of effective scrutiny of the planning authority by the Legislative Assembly
- Poor quality of development outcomes (knock-down-rebuilds, 'demonstration housing' schemes; over-dense residential flat buildings, loss of mature trees, etc)
- Lack of effective compliance with planning decisions

The following comments reflect the structure of the Planning Bill (as well as the current P&D Act 2007 and other planning legislation) and identify the main changes from the P&D Act and areas of concern.

1.GOVERNANCE (*structure and processes for decision making, accountability*)

Good governance arrangements are critical to building TRUST in the planning system and TRANSPARENCY in decision-making.

The Territory planning authority seems to be unique in Australia in its wide range of powers all vested in **one individual** – the 'chief planner', who is also the CEO of a complex 'directorate' (government department). There is a relatively small, single chamber parliament and **no** local government. The government ministers form the 'Executive'.

In stark contrast, NSW and SA have:

- Two houses of parliament with several committees
- The **planning ministry** and **department**
- An **independent State Planning Commission** (with commissioners and a chief executive) – which sets the planning 'rules' and deals with State significant development
- **Local councils** – have some planning and assessment roles
- **Regional and local planning boards and/or assessment panels** (independent predominantly 'expert' panels for more significant and/or controversial development)

Khalid Ahmed, adjunct professor, **Institute of Governance** and Policy Analysis, University of Canberra, says:

The Draft Planning Bill incorporates significant changes to the governance of the planning system in the Territory. In particular, it:

• Degrades the role and powers of the Legislative Assembly for oversight and input to key planning instruments;

• Provides unspecified discretionary powers to the Minister to make planning instruments and directives, and to make rules for community input;

• Increases the powers and discretionary authority of the Chief Planning Executive; and

• Diminishes the role of the community in planning decisions.

2.COMMUNITY PARTICIPATION/ENGAGEMENT

The Bill (s.10) **has a heading: 'Principles of good consultation', but what these are is left to the Minister who 'may make guidelines'. The Bill also removes the current requirement for 'Pre-DA Community Consultation'** (apparently because it wasn't working very well – so fix it, don't just abandon it)!

NSW has **mandatory community participation** requirements, including:

- **Community participation plans** which must have regard to **eight** listed matters or principles; these plans are published on NSW planning portal

In SA there must be a ***Community Engagement Charter*** based on **six principles**. [See Appendix for consultation principles]

The ***Community Engagement Charter*** is prepared by the State Planning Commission, put on the SA planning portal with an invitation for representations, reported on to the Minister who refers it to a parliamentary committee who may suggest amendments – either House may then disallow.

Contrast this with the draft Bill – the minister <u>may</u> make guidelines. This is not good enough. The Bill needs to clearly set out the principles for community engagement, as well as requirements for Community participation plans.

3.PLANNING POLICY MAKING

The proposed main planning 'instruments' in the ACT planning system are:

- **the planning strategy –** made by the **Executive** (presumably on advice of the planning authority), subject to unspecified 'public consultation' – NO apparent role for Legislative Assembly
- **district strategy** – may be made by the **Executive**, also subject to unspecified 'public consultation' – NO apparent role for Legislative Assembly or for district community councils
- **statement of planning priorities** – may be given by the Minister to the planning authority
- **estate development plans** – 'approved under a development application'; relevant provisions to be incorporated in the territory plan
- **territory plan** – planning authority must give the 'draft territory plan' (presumably a 'new' plan, under the new Act), together with a report on 'consultation', to the **Executive for making**. The Executive **notifies** the territory plan, which does not commence until 'approved' by the Legislative Assembly (s.50). There is little description of the content of the territory plan, unlike the current P&D Act which requires:
  a) a statement of **strategic directions**;
  b) objectives for each **zone**;
  c) development **tables** (uses permitted or prohibited etc in each zone);
  d) **codes** (rules and criteria for development assessment).

  Under the Bill, the territory plan is to set out "the policy **outcomes** to be achieved by the plan; and requirements and **outcomes** against which development proposals are assessed." **Nothing about content and format of Codes, or even whether there will be Codes.**

  This all seems to be designed to give the planning authority enormous discretion in dealing with development proposals, and to limit the ability of the community to comment in relation to compliance with rules, criteria etc.

  Also, why is there such limited involvement of the Legislative Assembly and, potentially, district Community Councils?

4. DEVELOPMENT ASSESSMENT AND CONSENT

In NSW and SA the different types of development are to be spelled out in planning instruments. Under the draft Bill '**prohibited**' and '**exempt**' development is left to regulations (requiring no public consultation).

Development requiring an **environmental impact statement** (EIS) will also be prescribed by regulation or 'declared' by the Minister (s.102), rather than listed as 'Impact' track development under the territory plan. The territory planning authority of course also runs the EIS process.

The draft Bill and Regulations regarding environmental assessment take out the process of **EIS exemption** which at present requires **public notification** and introduce **Environmental Significance Opinions**, **not requiring public input**. Publicly notified **Strategic Environmental Assessments** are also deleted.

A development application for a **territory priority project** must be decided by the chief planner (s.180). N**o role for the Minister or the Legislative Assembly or an independent assessment panel as per NSW and SA.** Even the Minister's 'call-in' powers are omitted from the Bill.

NSW and SA have independent, expert **regional** and **local planning (assessment) panels** as 'consent authorities' for most development proposals.

Local planning panels (NSW) are composed of three 'approved independent' members with 'relevant expertise' plus one representative of the local community. They are even required to conduct their meetings in public!

Something equivalent to this is necessary in the ACT! (Note that the Minister may appoint an **Inquiry Panel on an EIS** – this may be a potential model for **Local planning panels**, but criteria for them need to be in the Bill.)

4. DEVELOPMENT ASSESSMENT AND CONSENT [continued]

The decision-maker is required (s.181) to consider: "(a) **any applicable desired outcomes in the territory plan**". **No mention of any Rules, Criteria, zoning objectives, other policies. Just 'applicable desired outcomes'. How can the community, the ACAT, or even an applicant, deal with this?**

The decision-maker can give development approval **contrary to entity advice** (Heritage Council, Conservator, etc) if "satisfied that acting contrary to the advice will significantly improve the **planning outcome** to be achieved." (s.185)

And, in respect of a matter '**protected** by the Commonwealth', "if the Commonwealth Minister does not give the decision-maker advice about the proposed decision within **10 working days**…the decision-maker may approve the application."

The decision-maker can also **review, amend or correct** its decisions.

All this seems to be designed to give the 'decision-maker', ie. the planning authority, enormous discretion in dealing with development proposals, to limit the ability of the community to comment in relation to compliance with rules, criteria etc., and to ignore the requirements of other government agencies including those of the Commonwealth!

How can this be acceptable?

APPENDIX:

1 – THE 'GUNNING PRINCIPLES' FOR PUBLIC CONSULTATION

The Gunning Principles are the founding legal principles applicable to public consultation in the UK. They were first laid down in 1985 by Mr Stephen Sedley QC and have stood the test of time in successive court judgements, making them applicable to all public consultations that take place in the UK. They consist of four principles, which if followed, are designed to make consultation fair and lawful:

1 – Consultation must be at a time when proposals are still at a formative stage

2 – Sufficient reasons must be put forward for any proposal to permit "intelligent consideration" and response

3 – Adequate time is given for consideration and response

4 – The product of consultation is conscientiously taken into account by the decision maker(s)

2 – PRINCIPLES OF SA ***Community Engagement Charter***

These are similar to the Gunning Principles and are (in summary):

a) the community should have reasonable, timely, meaningful and ongoing opportunities to…participate in relevant planning processes;
b) should be weighted towards engagement at an **early stage**…;
c) information about planning issues should be in plain language, readily accessible…;
d) participation methods should seek to foster and encourage constructive dialogue…;
e) participation methods should be appropriate …to significance and likely impact;
f) communities should be provided with reasons for decisions..(including how community views have been taken into account).