LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND ENVIRONMENT

(Reference: Inquiry into exposure draft planning and development bill 2006)

Members:

MR M GENTLEMAN (The Chair)
MR Z SESELJA (The Deputy Chair)
MS M PORTER

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 29 AUGUST 2006

Secretary to the committee:
Dr H Jaireth (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry that have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

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The committee met at 1.39 pm.

HARRUP, MS TRISH, Director, Conservation Council of the South East Region and Canberra

THE CHAIR: Good afternoon, members, ladies and gentlemen. Thank you for coming along this afternoon. Whilst I formally open the meeting, I need to ask members whether they are happy enough for the press to be here.

MR SESELJA: Sure. We always welcome members of the press.

MS PORTER: Yes.

THE CHAIR: The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege in respect of submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to discharge the functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing. Do you understand that, Ms Harrup?

Ms Harrup: Yes.

THE CHAIR: Would you like to make an opening statement?

Ms Harrup: Thank you, members of the committee. As you know, I am the Director of the Conservation Council of the South East Region and Canberra, which represents a number of community and conservation organisations, as well as seeking to represent the broader environmental interests of all Canberrans. Our mission is to achieve the highest quality environment for Canberra and the surrounding region. We see issues relating to the natural and built environment and those contained within the planning system reform as integral to achieving that mission.

Thank you for the opportunity to appear today and comment. We support a planning system that is designed to deliver better ecological outcomes for Canberra and the region. We also support the minister's aim of achieving a vibrant urban fabric. Our preferred outcome is a planning system that achieves the right balance between delivering strategic planning outcomes with approval mechanisms for particular developments, as well as

mechanisms to preserve and, where appropriate, enhance the current ecological integrity, while allowing appropriate community and scientific input.

We have prepared a written submission on the first phase. I hope members have had a chance to read that. We will also prepare written comments on this stage of the planning reform. I will get that to you by the end of the week. For now, I would be happy to make some general comments. We are supportive, but we have also identified some issues with what we have seen so far.

The overall test of this planning reform is whether it will encourage sustainability. We advocate sustainability, which we broadly describe as decision making, which seeks to integrate the social, economic and ecological needs of the community in a balanced manner for current and future generations.

I turn firstly to the current planning system. This relates particularly to, obviously, our area of interest around the environment. Our impression is that the current system has allowed for detailed environmental assessment, to which the community can input, to take place after political decisions have been made—our submission speaks to some recent examples of that—and for trade-offs between environmental, social and economic interests to be made prior to environmental assessments being undertaken at a detailed level. We also believe that environment and ecological assessments are often inadequate.

There are examples in our written submission, but I would just like to quote one which I think really is a good example of what we are referring to. This is from an ecological assessment of the Gungahlin Drive extension done many years ago. It indicates that the preparation of the report was based on an acceptance that the road was going ahead. This is looking at the potential ecological impacts but accepting that the road would go ahead. The author stated:

> While a selective tree survey may be useful in identifying trees to be protected along the margins of the roadworks corridor, this could prove to be a very costly exercise …

It continues:

> In particular, there is no point in surveying trees within the road alignment which will need to be removed irrespective of their quality.

That is an example of a decision being made to proceed with a road and then doing the ecological assessment. What we want the planning system reform to deliver is that an ecological assessment would look at those trees and look at the environmental impact of proceeding with the development prior to the decision being made to proceed with the road. That probably sounds quite obvious, but there are several examples in our submission that point to the fact that it is currently not occurring.

What do we want? We want a planning system that ensures that the environmental impacts of development are identified and assessed, and ensures that there is an opportunity for them to be discussed in the public domain with community and scientific input. We want a planning system that will ensure that the option of not proceeding with the development is a real option where the significance of environmental impacts is such that proceeding with the development would be contrary to sustainability principles. And

we want a planning system that ensures we are delivering a built environment that improves our energy, greenhouse emissions and water consumption standards, with continual improvement over time.

If I could speak firstly to the main objects of the act, here we see reference to both the economic aspirations and financial principles. We think that results in a greater weighting to those aspects at the expense of social and environment interests. Also in the main object, whilst we support the inclusion of the sustainability principles, we note that people place prosperity. The ACT government's policy for sustainability identifies additional principles around empowering people and engaging the community. We believe the planning legislation could benefit from the inclusion of those principles.

At part 4.3 there is a list of the expertise areas that the minister must try to ensure are represented among the members appointed to the Land Agency Board. We recommend that that be expanded to fill a gap of environment and ecology to provide coverage of that aspect of sustainable development. The current list is industry focused. We note that the draft bill proposes to limit the referral of draft variations to the territory plan to the appropriate committee, such as this, at the minister's discretion. We disagree with that. My understanding is that, under the proposed changes, the intention is that there will be fewer variations to the territory plan and that they will be more significant.

We therefore support the continued referral to the committee. The committee involvement provides a level of independent review that the planning system would not otherwise achieve. There are many examples where the committee process has made constructive recommendations that have improved, or have the potential to improve, planning outcomes.

I will talk now a bit about strategic environmental assessment. It is a new concept introduced in the ACT through the draft land act. It is a concept that has been discussed much at a national and international level and something that we strongly support. Strategic environmental assessment is a comprehensive environmental assessment of major policies, plans and programs. It allows for assessment of environmental, social and economic issues up front to inform decision making. We strongly support its inclusion in the planning process. As it is, it has no teeth and would need to be strengthened to work.

Key points there about how it could be improved are, firstly, to set some mandatory triggers for when the authority must do a strategic environmental assessment—at the moment it is purely discretionary—and, secondly, to specify the minimum content. The current land bill is silent on content. I can provide that in written form. We have suggested that we use the European Union model, which has a similar SEA process and suggests quite sensible minimum content that is not too restrictive.

It needs to specify the requirements for public consultation. If it is linked to the territory plan variation, then you can use the existing statutory process. Otherwise, we recommend as good practice a minimum of six weeks to allow community groups a reasonable time to engage in an issue. It also needs to specify what the minister or the authority does with a strategic environmental assessment once one has been prepared. We suggest that the authority should be required to consider any written comments or representations and to take those into account, to report on their response to those and to release the document to the public.

The impact assessment process is quite a different process from what we have at the moment. As we have said in our submission, we acknowledge the current failings of the preliminary assessment process. A general comment is that what is proposed is mostly an improved process compared with the current PA process. However, there are some elements that require attention and improvement—namely, that members of the public need to have the opportunity to comment on a draft EIS. At the moment, in fact, we have public comment on the scoping document but not on the draft EIS document. It is vital that members can comment on that so they feel they have had sufficient opportunity to be heard in this process. Again, we would recommend a minimum of six weeks to allow that to be adequately done.

There is also a requirement for the authority to take into account the comments made during that process so that it is not just window dressing, and there is an opportunity to inform the impact assessment. There may be different views on the point at which it would be most appropriate for that to take place, but we can see that there would be benefit in it being carried out by the proponent. Comments made by the public could inform the proponent's development proposal and also provide the opportunity for a dialogue to seek solutions that would overcome the environmental impact but not prevent the development from proceeding.

We also need transparency around the final decision making. What does the minister do with an environmental impact statement once it is received? We would like to see that publicly available, and also with a report on what the minister took into account and why the decision was made to approve, if that is the decision. The time frame there will be important. The minister only has 15 working days after receiving a final EIS to determine whether to establish an inquiry panel. We argue that the EIS would need to be publicly available within a time frame before the end of that 15 days, to allow members of the public to make representations to the minister suggesting an inquiry if they are dissatisfied with the EIS or concerned with the environmental impacts of the development.

It does not seem to cover the situation at the moment where an EIS would be conducted that involves site selection. It can be a useful process to look at a number of sites as an option for a potential development. The prison is an example where that has taken place. It may be that SEA or an EIS is used, but it can be a useful process to engage the community and to find a satisfactory outcome for all parties. We believe that, if that process had been followed with East O'Malley, we may have avoided some of the community conflict or upset that was caused there and minimised the environmental impact.

This is probably a small matter in the scheme of things, but the land management agreements on rural lands are an important conservation mechanism for rural lands to preserve biodiversity. An issue we constantly face is that the conservation elements of those land management agreements are not publicly available. We would argue that they should be made available upon request, so the community can be engaged in that conservation as well.

There is also the issue of third party appeal rights, and the definition of "materially affected". In the draft land bill we are limiting the third party appeal rights and adopting a

more restrictive definition of "materially affected". We would argue that liberal third party enforcement processes, where in place, have not opened a floodgate of litigation, and that their existence and occasional use is of value in ensuring compliance in environmental laws and in testing environmental best practice, which is still a new and emerging field of understanding.

We note that the proposal is that there be no appeal rights for proposals in code tracks. There will be some appeal rights in the merit track, where that development is notified, and in the impact track, but only where material detriment can be demonstrated. We would like to see a system that keeps a broad definition, at least for the merit and impact track. If there is concern that third party appeal rights are motivated by commercial interests, then it would be possible to restrict that without restricting all community rights to third party appeals. Those are my comments.

THE CHAIR: Thank you very much, Trish. I would like to ask a couple of questions with regard to the strategic environmental assessments. You have talked about the European Union model. Could you expand a little bit on where you see the difference would be between those.

Ms Harrup: The European model has a European Union SEA, or similar process. It specifies the minimum content. I will provide that to you in written form. It essentially sets out what the report must contain. It is not overly onerous. It is pretty much commonsense, including that it must look at a zero option. That is looking at the "do not proceed" option. That is something that was missing with many of the contentious developments in the ACT.

For example, more than 10 years ago, people who were engaging in the debate around the Gungahlin Drive extension—or John Denman Drive, as it was known then—always felt that there was never adequate attention given to the "do not proceed with development; do not build the road" option and also to simple things like a map pointing out where the development would be, demonstrating that you had looked at the alternatives and identified the significant impacts—and the provision of a non-technical summary.

THE CHAIR: With the content of the SEA, you do not think it is sufficient that it is prescribed by legislation or by regulation?

Ms Harrup: I think it should be but it is not at the moment. At the moment, there is nothing about the minimum content. Preference would be that it goes into the legislation. We have not heard a reasonable argument as to why it could not.

THE CHAIR: Do you think environmental impact assessments could be done through regular environmental audits, for example, or do you think that the environmental legislation, such as the Environment Protection Act, is adequate?

Ms Harrup: On environmental impact assessment, we are reasonably happy with what has been put into the land act—the draft bill. There are some areas that need to be improved. I have not had an opportunity to cross-check the schedule, which describes when impact assessments should be triggered, with the Environment Protection Act to ensure it is picking up the same kinds of developments. But on environmental impact

assessment, we believe it would be approved if we had public consultation on the draft document, transparency around why the final decision was made and how the issues were weighed up by the minister or the authority.

THE CHAIR: Your recommendation 17 calls for cat-free zones adjacent to Canberra Nature Park under the Domestic Animals Act 2000. The minister can declare an area where cats have to be confined to premises during stated times. Has there been any problem, that you are aware of, with the declaration of the suburbs under the Domestic Animals Act?

Ms Harrup: We were the champions of adopting some cat-free zones around nature parks that contained species that were going to be threatened by predation by cats. This is only for a few select suburbs around important ecological areas, but the government decided to deal with it under the Domestic Animals Act. We believe it should have been done under the lease and development conditions, so that you could actually declare cat-free suburbs, rather than cat-contained suburbs.

We are yet to see whether cat containment is going to work, because those suburbs are yet to be developed. It will require anyone who owns a cat to contain them within a cat run. We would like to have seen that done as an outright ban on cats in those suburbs and for that to have been done through the planning legislation. My understanding is that the authority did not want to then have responsibility for enforcement. They did not want to have to go around and be cat police. However, I think it is possible to have the requirement under the land act and the enforcement carried out through people who enforce dog and other domestic animal issues.

MS PORTER: I was just going to ask how you would imagine that would be done, given that a dog on the street is easy to see and a cat in the house is not.

Ms Harrup: That is why it would have been simpler to have them banned.

MS PORTER: No. That is why I am asking you. If they were banned, how would you anticipate the rangers—I presume you are talking about the rangers, because the rangers currently enforce the dog legislation—enforcing a ban on cats, given that cats are mostly inside a house?

Ms Harrup: If they are inside a house, they are probably not a threat. The key issue would be the ability to deal with them when they are in the nature reserve. If they were banned, it would make it simpler to deal with a stray cat trapped in the nature reserve. That is what we want to get to.

MR SESELJA: You mentioned third party appeals. You spoke about how the merit and impact tracks allow third party appeals, but they are somewhat restricted. What kind of model of third party appeal would you prefer to see for those tracks?

Ms Harrup: For the merit and impact assessment, under the proposal someone has to demonstrate material detriment. I believe that will also allow for community groups to demonstrate material detriment where it relates—

MR SESELJA: In fact, it goes wider with community groups because—

Ms Harrup: —to their objects and objectives.

MR SESELJA: Yes. It essentially allows most community groups, if they really want to, to set themselves up so they can—

Ms Harrup: Not that we want to go around and set up the Orange Valley parrot protection group, et cetera.

MR SESELJA: No, but no doubt there will be some such groups set up. Given that those are the parameters, what would you prefer to see—just the current system staying in place—or even prior to the recent changes where essentially any concerned person can appeal, or would you like to see some restrictions?

Ms Harrup: I do not think anyone has demonstrated that community organisations like the conservation council and others are abusing third party appeal rights or using them to achieve protracted, drawn-out processes to prevent legitimate proposals from going ahead. I think we should get our policy right and leave the option of scrutinising that policy open through liberal third party appeal rights.

THE CHAIR: Thank you very much for coming in and providing that for us, Ms Harrup. We will provide a copy of the transcript as soon as we can.

COHEN, MR PAUL, President, Planning Institute of Australia (ACT Division)

THE CHAIR: Mr Cohen, were you in the room when I read out the card a little earlier?

Mr Cohen: I had to go out at one stage.

THE CHAIR: Okay, I will just remind you. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed to by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

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Mr Cohen: Yes. Thank you very much to the committee for hearing us this afternoon. I act as the president of the ACT division of the Planning Institute of Australia, and our role is to promote good town planning for the benefit of the community and for the benefit of our members. We are not a trade union but a professional body with that simple aim of good town planning.

We generally support the bill, but we have a number of reservations about it. One of our concerns is that the emphasis that has been placed on promoting the bill or explaining the bill over the period since its release has been directed towards development approvals. Our concern is to make the committee aware this afternoon of the broad range of matters that are covered by the bill and to provide some focus on that broad range of matters.

We have made a written statement to you comprising a summary of our views and a number of annexes. The annexes cover a range of matters, such as the legislation that applies to planning in the ACT. We draw that to your attention because of the fact that we have listed the principal legislation that applies to planning in the ACT, but there are a number of other enactments which touch on planning and which can, for the planning practitioner, for the developer, for the community, affect the way in which they are able to achieve their ends in planning. So we have given you a list of the main acts.

The sorts of issues that can arise can arise through the Tree Protection Act 2005 and the Heritage Act 2004, which can impact in various ways on proposed development. That sort of legislation does have impacts on development in the territory, but there are a number of others which I have listed and some which I have not listed that the committee

ought to be aware of.

In the second annex, I have set out in precis form the principal aspects of the legislation. The bill itself runs to 396 clauses spread over 339 pages, and that is quite a task for anyone to take on and to properly assess. I had intended in the first instance to prepare that annex and then to make individual comments on each section, but the task was overwhelming. Although I will do it in the future and I am happy to make my comments available to you before the legislation is presented to the Assembly in its final form, it was just too big a task to do it at this stage.

But I have listed the principles and I have taken out a number of matters which are inserted in there in order to give the reader an explanation about the way in which the legislation is meant to travel and to put things beyond doubt. I would say to you that some of the notes which were intended to put things beyond doubt actually raise doubts because they seem to be contradictory to the legislation itself. So there are issues there that I think justify making an annex of that size.

I have also prepared annexes which show the regulations that will be prepared because the regulations are a very important part of this legislation. They are the devil in the detail. They are the matters which will bear on the way in which the legislation is provided. There is one regulation provided at the back of the exposure draft and I think that that may be, to some extent, unintentionally misleading because it may bring you to the conclusion that that is what the regulations under the bill will comprise, but there are a number of issues set out in the bill in various places, and I have noted them for your benefit, where there will be regulations made and those regulations will bear very heavily on the way in which the final act operates.

There is also the issue of disallowable instruments, which are the criteria that will apply when decisions are made. Once again, we do not know what those disallowable instruments are, but we know by reference to the existing land act that there is a wide range of disallowable instruments, a wide range of regulations and heaps and heaps of notifiable instruments all on the legislation register at the particular time, and those will all have to be repeated. So, if the legislative framework that is being presented to you in the bill appears to be overwhelming, it is only the tip of the iceberg in relation to the plethora of regulations, disallowable instruments, notifiable instruments in guidelines that will be produced as time goes by.

The institute is very concerned about the fact that we are being asked to look at the bill without being able to see the restructured territory plan. It is like wanting to buy a car that is in another country or somewhere else under canvas and you are being given the repair manual on which to decide whether you want to buy the car. We feel somewhat concerned about the fact that, although there is a brochure which is helpful and the authority itself has run seminars and workshops to discuss various aspects of the development approval aspects of the proposed territory plan, we have no idea what is going to be in the early parts which deal with the strategies and the principles. We are told they will contain aspects of the Canberra plan, the spatial plan and so on, and that concerns us because they are documents which we believe ought to be tested more fully before they are adopted in toto in the territory plan.

In respect of the territory plan itself, we are concerned about what the language is going

to be in the part of the territory plan which deals with the codes and which deals with the assessment tracks. We are concerned about it because experience has shown that over the years there has not been very much dispute about the land act in terms of what the land act says. There has not been a great need to take the land act either to the Administrative Appeals Tribunal to talk about the sections in the land act or to the Supreme Court. My knowledge of the issues that the Supreme Court has dealt with has really boiled down to the times when the land and planning appeals board was in effect before the AAT.

However, there have been a number of occasions when the Administrative Appeals Tribunal has had to deal with the provisions of the territory plan itself, had to interpret those, and they have caused no end of grief, no end of concern and no end of cost to parties before the tribunal while they have tried to sort out what the non-legal language of the territory plan means. So, as an institute, we believe it is prudent not to simply say, "Yes, we will look at the bill, give you a view on the bill and hope that when the time comes to look at the territory plan everything will be okay." Therefore, we think that it would be wise for the Assembly to be able to see the restructured territory plan before it determines where it is going to go with the bill.

In relation to the bill itself, the purpose of the bill is to bring together the Land (Planning and Environment) Act 1991 and the Planning and Land Act 2002. The first one is an omnibus act which has dealt with planning, environment, heritage, land administration and development control and has served us from 1991 until the present. The Planning and Land Bill 2002 established the authority, established the Land Development Agency and established the Planning and Land Council.

The council has now gone and the new legislation, the Planning and Development Bill 2006, does not contain a reference to a planning council. We think that that is an unfortunate move, that there is a need for a body of experts who are independent of both the government and the authority and who can steer the authority or the minister, can provide advice to the minister about planning matters, can bring experience from other parts of Australia and can bring experience from other parts of the world in a range of disciplines and talk with the authority on a regular basis to enrich the authority's knowledge and the way in which it practises. The previous council, unfortunately, did not have a particularly generous charter given to it. It could only respond to the minister or the authority on matters that were referred to it. It tried to reach outside its charter and it is no more, and that is unfortunate. We think that that is a matter that really needs to be looked at again.

Running through our paper is the theme that it is very important that the planning authority be properly resourced. The chief planning executive is appointed for a period of five years under contract, but the staff of the planning authority come from the public service generally. That puts the planning authority in a difficult position. Its staff can go up and down according to budgetary objectives, but the role of the planning authority becomes more onerous each year. As the authority develops as a planning organisation, the demands that are made upon it in terms of urban design particularly, in terms of speed of response, in terms of accuracy of what they do and in terms of justice become more onerous, yet the staff keep getting cut down.

I was at one stage a member of the National Capital Development Commission, from 1975 until its demise in 1988, and I was a member of the following planning authorities

until 1997, when I left the public service. On a regular basis we saw members of the authority disappear. The following day we would be assembled and told by whoever was running the place at the time that X number of people had disappeared yesterday and that the role that we were now going to perform in the future would be more onerous than what it was. We were expected to work twice as hard with half the resources and that was the general tenor of being in the planning authority, and it does not seem to be changing, yet the planning authority is going to be whipped if something goes wrong because we demand a high level of planning proficiency but we are not prepared to provide the staff for it.

One of the areas where this is going to become apparent is in the area of compliance. There is a very strict and a very broad-ranging compliance regime imposed by this legislation. There are penalties of up to $1.25 million for a corporation carrying out development without approval. There are a number of strict liability offences created by it. Embedded in another part, away from the offence provisions, there is a provision which allows the authority to determine or terminate a lease where the leaseholder has not complied with a condition of the lease.

We do not say that the penalties are excessive, we do not say that the penalties are unfair, but we do say that the sort of staff that you need to have to enforce that compliance regime has to be dedicated, has to be extremely well-trained and has to be very skilful in the preparation of documents. If you were going to prosecute somebody, you would really need to be very good at the way in which you put together your briefs and your evidence in order to make those provisions stick.

One of the problems with compliance is that we produce legislation about compliance and then we do not enforce it. A law that is not enforced or a law that fails because the enforcement is bad is worse than no law at all. So, once again, there is this need for dedicated, properly trained, skilful staff who get out there and do their job rather than sitting in an office and writing policy about it. So that is another issue.

There is the issue of third party appeals. We endorse the view of prescribing matters which are dealt with by third party appeal, which is the first part of schedule 4. That is a good step forward. We are a bit concerned about the activities that can generate third party appeals, which is the second part of the annex, which sets out a whole range of matters which, aside from being in the merit or impact assessment portion of the legislation, can generate an appeal.

We are concerned about the material detriment provisions. We believe that the material detriment provisions will not restrict the range of people who are likely to be a party to an appeal because of the fact that the definition of material detriment says that an entity, an entity by definition under the Legislation Act being a person, corporation or whatever whose interests in land are adversely impacted or affected or whose interests in land are likely to be adversely affected may be a party to an appeal. That seems to widen the legislation to where it currently is under section 237 of the land act.

The second part of the material detriment provision is the one that relates to entities or bodies which have in their objectives a matter which is dealt with by their memorandum of agreement or a memorandum of incorporation. Although they are not required to be incorporated, they simply have to have in their objectives a matter which is subject to a

third party appeal and they are on board. So it seems to me that the provisions for appeal have been widened, not narrowed, in the way in which the legislation has been established.

We are also concerned, and I think a bit may have been made about it, about the way in which the minister has effect in terms of the bill. We have provided you with an annex of the matters in which the minister can give directions, can make decisions, has roles and responsibilities in relation to planning. The point that we would make is that the legislation is likely to go on for some considerable time. Our comments are not in respect of the present minister or any other minister. The present minister, we acknowledge, has a deep interest in planning and a wide knowledge of planning, and that is fine. But other ministers may follow him, and in this jurisdiction all ministers are multiportfolio.

We believe that, if it is appropriate for the minister to exercise those powers, responsibilities and duties, he would need to have professional advice independent of the planning authority and independent of the agencies and the special interest groups that will bear upon him to make decisions in one way or another. If you read the draft bill, you will ask yourself the question: how does the minister become aware in some cases of the fact that he needs to go to the authority and ask the authority to do something? What makes him aware or what is his antenna? Is his antenna other agencies which say, “Minister, you should look at this”? Is it interest groups which say, “Minister, we are concerned about something we think the authority is going to do”? He gets advice from a range of areas. How does he bring that advice together? How does he look at that advice, distil it, find the essence of it and decide what he is going to do? We say that, if he wants to have a mini ministry, it has to be professionally staffed rather than left to whatever device the minister comes up with, as it is at the present time.

At the end of the day, I think our position as set out in the paper is that we generally support the thrust of the bill but, without the capacity to have the questions answered that we have raised and without the benefit of seeing the restructured territory plan, we would like to reserve our position in terms of whether we support the bill or not until a point when those matters which have been raised are finally determined.

One matter which I have missed and which I should bring to your attention is the vexed matter of change of use charge, which used to be known as betterment. Over a number of years, betterment has been determined by the new value of the land minus the old value of the land, divided by 75 per cent. We have become used to that. The present legislation has nothing in there at all in relation to change of use charge, simply a note that says, “If we do not codify change of use charge when the territory plan comes out, we will revert to the old section 187 system of new minus old over 75 per cent.” That, to my mind, is a fair example of the fact that we really need to know about the new territory plan before we go along and say, “Yes, this is a great bill.” Thank you for listening to me.

THE CHAIR: Thank you for your very detailed and expert submission. The committee appreciates the time and effort that you and your associates have put into this submission. We do not have a lot of time left, Mr Cohen, but I bring you to your paragraph 30 about the territory plan and ask: isn’t a proposed planning strategy like the Canberra spatial plan a broad planning framework to guide variations to the territory plan? Hasn’t it worked well so far?

Mr Cohen: Are you asking me about the spatial plan?

THE CHAIR: Yes.

Mr Cohen: We have concerns about the spatial plan, about the way in which it was put together and about the range of expertise that was put together to make that sort of plan. Previously we had plans like the metropolitan policy and structure plan, I think it was called, which brought together a whole range of narratives about various aspects of employment, transportation, employment centres and so on and which was much more transparent than the spatial plan, which, to some extent, is a number of statements about various issues which do not have, in my view anyway, the backing that they ought to have. It is a shallow document.

Maybe the concepts in the spatial plan, the overall conclusions, are the right ones, but we would want to see more expert backing. We would want to see the papers that were prepared, the research that was done, to back each of the assertions that are made in the plan. Plans like the transport plan and the economics white paper were probably better developed in the way in which they were put together than the spatial plan. So we've got some reservations there. We do not want to see that go holus-bolus into the territory plan, which might compound a situation that we do not really want.

MR SESELJA: I am mindful of the time. There is a lot in that and I have probably got lots of questions that I would to ask you but, just quickly, one of the things you touched on was the resourcing of ACTPLA. Is it just a numbers issue at the moment? Is there sufficient expertise in the organisation currently?

Mr Cohen: No.

MR SESELJA: Is that as a result of a skills shortage or is it simply because we have not been able to recruit as perhaps we should have?

Mr Cohen: There is a skills shortage in the planning profession. Almost everybody is looking for qualified planners, so there is a skills shortage in the planning profession. There are three issues in the planning authority. The first one is to get into the planning authority professionally qualified planners. The second one is to train those people in the unique system that operates in Canberra, which is based on specific law, two planning jurisdictions that have to work together and an ethos about the planning of Canberra which pervades everything that happens in Canberra. It does not matter whom you talk to; almost everyone in Canberra understands the ethos of the planned city. So you have to train your planners to understand that and carry that one forward. So there is the issue of getting the people and getting them trained in the way that we want.

But there is the third one: that if the number of planners that you have is tied to budget, then you have a problem. There is a fourth issue, I suppose, and that is in terms of expert planning, and that is that this bill has a clause in it that prevents the chief planning executive from being a member of the board of the Land Development Agency. It seems to me to be an inexplicable omission that the chief planning executive, who is probably the most knowledgeable person in terms of settlement strategy, urban design and development control and who ultimately is required to issue the leases that the Land Development Agency generates, is the only person in the ACT excluded by

legislation from being a member of the land planning board. Once again you have this issue of skills and possibly a view that you do not need planners in management positions, that if you have got a good manager the good manager can do anything. We would refute that. A good planner is a good planner is a good planner. A good planner might be a good manager, but a good manager is not necessarily a good planner.

THE CHAIR: Thank you very much once again, Mr Cohen, for that input. We will get a copy of the transcript off to you as soon as we can.

ARTHUR, MR RICHARD JOHN, Barrister, Blackburn Chambers

THE CHAIR: Mr Arthur, were you here earlier when I read the witness statement?

Mr Arthur: I was.

THE CHAIR: Do you understand those requirements?

Mr Arthur: I do.

THE CHAIR: Thank you. Would you like to make some opening comments?

Mr Arthur: Thank you. I am a private practising lawyer. I have practised in the territory since 1980. I have been involved in the town planning area since the early 1980s, first as a solicitor and for the past 15 years as a barrister. I come to this exercise bringing just that expertise.

I do not have any particular points of view to express, although I have to say that any opinions expressed are definitely my own. I have looked at the bill from the point of view of a practising lawyer asked to advise a client as to what it is all about. In that sense, I suppose it is a fairly good test of the workability of a piece of legislation because what I am doing is what a court would do if a court were asked to rule on a dispute or deal with the legislation; that is, look at the legislation and only the legislation and work out what it means and how it works.

It was not until I had done that that I actually discovered that the planning authority or the government had put out a guide to the legislation, so it was with some interest that I read that and encountered in several areas a significant mismatch between what seemed to be the expectations of the planning authority and the government in relation to the legislation and what the legislation is actually doing. I have not raised those matters in the short notes that I have given to the committee, but I will raise them later.

Just in a general sense, if we are looking for a simplification of the process, then I think the committee probably understands that we have not achieved it by means of the actual legislation itself. Whether we have a simpler process is one thing but, if asked to give an appraisal of how complicated this legislation is relative to its predecessor, then I would say we have gone up a notch in complication, unfortunately. It may just be a structural thing and it may be that with more thought given to the designing of the concepts, which I want to come to in a minute, then expression will become simpler and it may become more easy to work your way through it.

The thing that struck me in looking at this is that at this stage I suspect that the designing of the concept or the concept design has not been fully road tested. I think there are a number of areas—in particular, the code or the track assessment, this is the development approval area—where, even allowing for the fact that we do not have the development tables to be able to ascertain what is really going to happen, there are still some issues that had not been fully thought through, and I hope I will be able to illustrate that.

I thought I would if I might, just by way of developing the various points that I have got in hopefully a more interesting fashion, work through one of the case studies that is part

of the package of material made available by the authority. I have three copies here. This is case study No 2. It is the code assessment track and merit assessment track. It does not deal with all the issues that I would want to raise, but it certainly deals with some. There are three reasonably sized copies and one complete one. When I say reasonably sized, larger print.

This is intended to be an illustration of the way in which the development approval process operates. What is going to be different in the proposed legislation from the existing system whereby now you put in a development application and it is gone over with virtually all of the armament that the planning authority is able to bring to bear? The planning authority rightly points out that in many cases it is overapproved, and that is a waste of time and resources. The new proposal is to try to identify applications which are going to be quite simple and treat them very simply and treat them very quickly, to separate them from applications which involve more complex issues, particularly issues that are likely to concern neighbours and other members of the community. Thirdly, and separately from those first two categories, to identify matters of significant environmental impact and give them a much fuller treatment and, necessarily, a longer treatment.

As you can imagine, whenever you engage in a sorting process there are always problems of "which box do I put this one in?" That is essentially the issue that has yet to be grappled with, as I see it. Let me illustrate. We have got Mr and Mrs Johnson, who are building a new house on a vacant block in an established suburb. They go to the authority for pre-application advice. Pre-application advice is covered in section 127. The point I want to make about it is that it looks very much as though the advice will be of benefit to people, and I am sure that in many instances it will be of benefit. There is a sting in the tail, however, and that is that whatever the authority says to you really must be taken with a grain of salt because in no way are they at all bound by any advice that is given. Indeed, if the authority has given wrong advice, it is not even a situation in which the authority may decide, "In these circumstances, we have put them in the wrong track." The authority has no discretion. Once an application is in a track, it remains in that track irrespective of what happens, and I will illustrate that.

The authority says, "Right, you've got an application here. It looks to us as though the code track will apply." How do we know that? The only way in which we can tell at the moment is by looking at the sample development table which is with the outline of the territory plan restructure. That has a table which has a number of uses, starting with animal care facility, going through apartments, boarding houses, defence installations, and plantation forestry and ending up with zoological facility, but touching on single dwelling housing along the way.

Against single dwelling housing is the letter "C" and the key tells us that that means this is in the code assessment track. The legislation tells us that, if it is in the code assessment track, then, as long as it meets the specific requirements of the code, it must be approved. Furthermore, there is no notification needed to anybody and that includes referral to any agencies, such as Actew. There is a sample code which follows, I think, a couple of pages after the development table and it is in a relatively familiar format. It is very similar to the existing single dwelling code as we have.

Mr and Mrs Johnson have had their plans looked at and they are told this is a code and,

because the development table says, “Single dwelling housing code,” then, according to the act, this is in the code track. I want to emphasise that. The act says that if a development table says it is in the track, it is in the track. Notwithstanding that, when they come to make their development application it seems they have omitted a tree on the plans, which is picked up by a technical officer, presumably on the first day that this is lodged.

The interesting thing about this is that, as a result of picking up the tree, we learn that the authority requests further information. I am jumping ahead a little. As a result of that further information, the authority decides that, in fact, this is a protected tree and the development may affect its roots. So, according to this case study, the authority then says, “This is not in the code track. This is in the merit assessment track.” There is nothing in the legislation that says that. There is no mechanism which is in the legislation or in any of the documents that have been provided that would allow that decision to be made.

One can only assume that the development tables will be much more sophisticated than the sample that has been given, but exactly how they will identify all those things is going to be critical. I want to endorse one thing that Mr Cohen said. In fact, I would happily say that I do not disagree with anything Mr Cohen said about the legislation or the legal effect of the document; in particular, the need for the plan, now a critical part of this process, to be well drafted and effectively drafted. It is in the way in which the development tables are drafted that this legislation and the development approval process will happen or not.

Anyway, coming back to Mr and Mrs Johnson, further information is requested. That is currently done. A significant point, and this is new, is that, as long as the information is requested within the first 10 working days after the application is lodged, extra time is added to the time in which the application is to be decided. In the case of merit assessment, that is 30 working days, or 45 if notification is required. Just on the time aspect, I am puzzled as to why it should take 20 working days for a code assessment process to be undertaken if it is as simple as looking at the code and seeing if it meets all the requirements. Under this case study, that seems to have been done by a technical officer on the first day. If that is the case, then why indeed can’t we have an approval issuing on day two? I really can’t see where another 19 days of assessment is necessary, which only suggests to me that there is probably a whole lot more that has to happen which we are not being told about at the moment.

Interestingly, if information is requested after the first 10 working days by the authority, then that does not add to the time, but that is just one of a number of anomalies, or not so much anomalies but what you might call Clayton’s protections. It seems to work for the applicant, but in fact all that will happen is that the planning authority will just continue on doing things in its own time, and I do not mean that disparagingly, it will get past the 30 days or the 45-day limit, it will under the legislation be a deemed refusal, but the planning authority will still continue to keep working on it because it has until the AAT finally decides if there is an appeal in which to decide the application. So there is a bit of, as I say, Clayton’s protectionism in these time limits.

Anyway, as a result of the Johnson application going into the merit assessment track, there is a need for it to be notified publicly, and two people become involved. One is a

neighbour, Mrs Smith. She expresses concern about the location of a window, but is advised that it complies with the code requirements, which are deemed to satisfy. What that is saying is that although there is an aspect of the development which does not meet the code requirement—that is, the tree—it seems everything else does. So, although this has been notified to the neighbours and Mrs Smith says that she does not like the location of the window, the answer is, "Sorry, but that's covered by the code, and therefore you don't have anything to say about that. It will be approved irrespective of what you say."

That is an unusual and, may I say, strange situation, and I am not sure that it would be correct. Firstly, there is nothing again in the proposed bill which says that that would be the case. One would imagine that, as currently is the case, anything, if it is to be assessed at a discretionary level rather than a non-discretionary level, even if it is within the stated setback in the code, may nonetheless be refused if it is not appropriate in the particular circumstances.

A second issue about notification is Mr Green. He is somewhat distant and he raises a concern about the loss of personal enjoyment obtained by walking past the tree with his dog every morning. There are in the guide several references to the material detriment test. I think I actually differ slightly from both previous witnesses. I don't think the material detriment test changes anything. I think it reflects almost exactly what we have currently. So that if you are going to be able to appeal—that is to say, you are not precluded by the regulations, which we have not seen yet—then the AAT is not going to put you through any smaller or larger hoop than it currently does.

However, there is one interesting thing. The guide keeps referring to adverse impact on a person's use and enjoyment of their land. The act talks about land in general, not restricted to an individual's own land. So Mr Green's use of the road to walk his dog is use of land which would be covered, but strangely, according to the guide, it would not be covered. This is an example of where I am picking up mismatches between what is intended and what is being delivered.

Coming back to the Johnsons and their situation, it does seem odd that something that was so close to going through as a code application gets the full notification treatment. Why couldn't it have been treated as a code application but subject to a condition that they only have their approval if they ensure that the tree survives? That would have protected the tree and it would have followed through with the intent of keeping things as simple as possible and yet, strangely, there isn't any kind of flexibility in the process.

The legislation does not allow a code application to be approved with conditions other than conditions that have been specified in the regulations, and we haven't seen those yet. I guess what I am trying to say is that if somebody puts in an application and they put it in as a code application and it is deficient only in the sense that it is half a metre over on one side on the setbacks, you would think that it would be simple to give that an approval on the condition that you set it back half a metre, bring it within the code. But that is not possible. Apparently it has to be suddenly put into the merit assessment track, even though there is nothing in the legislation which would allow that.

Quickly dealing with just a couple of matters that have been missed, the mismatches between the expectation of the authority and what the legislation delivers, the ability to move from one track to another, is not reflected in the legislation. There is also a

statement that there will be broader lease purpose clauses for commercial leases. Again, there is nothing in the legislation which reflects that. Just on that question, because it probably affects commercial leases more than others, the current legislation has section 12, which says that the plan is not to have retrospective effect.

The committee will be aware that many leases have a range of uses given when they are granted for shops, offices, personal service establishment, whatever, but only one might be used at any particular time. There is a significant change in this legislation in that we now move to a different definition of development which picks up use. In a situation where a person got a lease granted to them for offices and shops and set it up as a shop, it would now not be possible for them to close the shop and reopen as an office without getting development approval.

That is good from a planner's point of view because in a 99-year span things may have moved on, circumstances may have changed and an office may not be appropriate in that environment. It may not be so good from the point of view of the person who believes they have paid for that right. The previous legislation had section 12, which preserved that right. It is questionable whether the current legislation operates the same way. It seems to. There are about three or four, maybe five, provisions which taken together would seem to come close to the effect of the old section 12, but I am not sure that they do.

I just want to say one other thing in relation to the environmental impact statement. Again, this is an illustration of where I do not think the concepts have been worked through. The time allocated for an impact application is 30 days or 45 days, depending on whether notification is to take place. But that is on the assumption—it has to be on the assumption—that the environmental impact statement will be lodged with the application. Indeed, it is a requirement that you do lodge your environmental impact statement with your impact application. However, how do you know that it is an impact application and how do you know—presumably, the development table will tell you—what sort of environmental impact statement to provide? The answer is that there is a whole set of provisions dealing with environmental statements which seem to assume that there is already a development application on foot. The cart and the horse are being simultaneously put in front of each at the present time. I am conscious of the time. There are one or two other things that I could deal with, but I do not want to outstay my welcome.

THE CHAIR: We are running a bit short, I suppose. Are there any questions for Mr Arthur?

MR SESELJA: I think there are lots, but there is probably nothing that we could cover quickly. I would be happy to talk to you at another time as well, but I will also look very closely at your evidence. You have raised a number of significant issues that we will be looking at concerning some of the apparent legal holes in terms of what can and cannot be done as opposed to what the planning authority perhaps thinks can be done. That will have to be reconciled. I will be looking very closely at that, but probably there would be too much detail to go into at this point.

Mr Arthur: I am particularly concerned that there has not been enough thought about that sorting process, how you determine that something will be in a track and how you

change it from one track to another. I suspect that, if that is not done well, then we will end up with something more complex and more unworkable than the present situation. So, whilst we have the opportunity for good, we could easily produce something which is not good.

Could I, with the committee's indulgence, say one thing? You will appreciate that over some 20 years I have operated under the old pure leasehold system and also operated under this system. What we now have is a leasehold system on top of which there has been placed a statutory planning and control system. That has a significant problem, in my view, which is best explained in this way: when the leasehold system was introduced, it was state of the art as far as planning control was concerned. That was back in the early 20th century. Over the course of the 20th century, statutory planning control systems were evolved, became very sophisticated and are now what we see in other jurisdictions.

We adopted our own statutory planning control system and placed it on top of the leasehold system. As a result, we really don't need a leasehold system any more. There isn't anything that the leasehold system can do which cannot now be done by a statutory planning control system. Indeed, having the two running side by side very often leads to complications, particularly for administrators and particularly, echoing something that Paul Cohen was saying, for administrators who have come from other systems which would be statutory planning control systems and are not familiar with a leasehold system. I often see situations which have arisen because of the duality of administrative levels that we have to operate under. I would encourage people to start thinking positively about removing leases from our system. We can still have all their benefits without the administrative complexity that they bring.

THE CHAIR: Thank you very much, Mr Arthur, for your presentation. We will get a copy of the transcript to you as soon as we can.

Mr Arthur: I will be happy to answer any questions if Dr Jaireth wishes to put them to me via email.

THE CHAIR: Thank you very much.

PURDIE, DR ROSEMARY, Commissioner for the Environment

MR SESELJA: We have got a new card to read. You have heard the other one a million times, but this is a special new one.

Dr Purdie: I do not know any of the cards.

MR SESELJA: The committee has authorised the recording, broadcasting and re-broadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings. Before the committee commences taking evidence, it will be placed on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to the discharge of functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in-camera evidence or confidential submission will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

Welcome, Dr Purdie. I believe you want to make a statement.

Dr Purdie: Yes. Firstly, thank you for inviting me to come. I assume that you have got a copy of the comments that I have prepared. I thought it might be useful if I first try to summarise my main concerns, because I am conscious that going through, in a serial way, a bill like this does not necessarily put a comprehensive picture together.

I guess my first comment is that I am taking these documents at face value. I do not pretend that I have got an understanding of the current planning system. I confess I have never read the current planning law, mainly because I have not had to. So my comments are very much in the context of taking these at face value.

The other comment that I would make is that it is quite difficult to comment on these when so much of the detail, as the previous witness attested, is yet to be revealed—whether they are the objectives or the policies in the various zones that will be articulated in the revised territory plan, whether it is in the detail of the codes, whether it is in a host of regulations that have been talked about as part of the bill. I am conscious that it is trying to talk about one bit when a whole lot of other crucial bits are yet to be developed and revealed. Having said that, let me quickly go through concerns and issues that I see are the most important ones.

It is excellent that they are proposing to embed concepts of sustainability in both the territory plan and in the final act, but I suggest that there is a need to integrate the sustainability principles more clearly throughout the document. My own experience is: it

is one thing to say, in a very early clause, we will adhere to the principles of sustainability ever hereafter; it is an entirely different thing to show how or whether those sustainability principles have been adhered to and how they have been taken into account as part of the decision-making processes. In my detailed submission, I have made a number of recommendations about ways in which both the things that are going to be placed in the territory plan as well as the act itself can be strengthened with respect to the sustainability principles.

One thing I was quite concerned about was, very early on in the bill, the main object of the act, section 6. In my view, 6A is inconsistent with sustainability because, if you are trying to contribute to the orderly and sustainable development of the ACT, consistent with the social, environmental and economic aspirations of the people of the ACT—if those aspirations are unsustainable, and there is a fair amount of evidence that there are elements of them that are very unsustainable—then you are in trouble right from the word go. One of the things that I have suggested is that the main object of the act warrants some rewording.

The territory plan obviously is going to be a critical document. It will contain the zone objectives, the various zone policies and the codes in all of the so-called development tables and will really set the framework for how the act will operate. To my mind, it is really important that, when all of that material is developed for the territory plan, it is critical that there be not just community consultation but quite broad-scale community education. If the community is not aware at that stage that, unless they comment on it then, it is going to be too late further down the track. I can see that creating problems.

It gets back to what the previous witness was talking about in terms of third-party rights and people's perception of what they can or cannot do. It is always difficult. How do you get the community involved at this stage, knowing that, if they do not, they could be disadvantaged down the track? There is a whole process of community education that precedes any process of community consultation about the changes to the territory plan.

One of the things that I was quite interested in—and this is very much taking the planning bill at face value—is that it is quite obscure to me where social impacts are covered. There is a definition of the natural environment in the new bill, and that is taken straight from the Nature Conservation Act. It only refers, I am assuming, to the biophysical elements of the environment. It refers to the built environment, although there is no definition of the built environment in the act.

Key parts of the bill talk about minimising adverse effects on the environment, but it is only talking about the environment as defined in a natural environment sense and the built environment. I assume that the bill is intended to cover all social impacts and impacts on the community, but it is not explicit at all. That is something that needs to be raised and made quite explicit.

The other thing is a follow-on from what the previous speaker was talking about. While I can see the advantages in providing an increased level of certainty for people who are seeking development applications, there is a need to make sure that that does not compromise people's rights to third-party appeal, et cetera. I do not know enough about that to know the issues. I have certainly had a number of people informally say to me that they are really worried about that aspect of the bill. Based on what the last speaker and

possibly other ones said, it is something that the committee will need to pay careful attention to, because it is the one that is likely to create the most problems down the track.

There are quite a few processes that are proposed in the bill that I believe either lack transparency or accountability or what I consider to be plain bad process, and that needs to be addressed. I have made various suggestions in my detailed comments.

The act will need to be sound with respect to environmental protection. I have suggested that there are some definitions that warrant broadening out. The act will need to be explicit about the ways in which some of the government entities, like the conservator or the Environmental Protection Authority will be involved, where they will be involved, the nature of that involvement or the activities that they should be involved in.

For example—and these are two that I have drawn up; there are more—certainly the conservator and, say, the EPA would need to be involved in preparation of regulations under the act to deal with environmental impact statements or the scoping of those. They will certainly need to be involved in compiling the list of consultants that will be preparing the environmental impact statements. You can say, "We assume that they will," but, for transparency and certainty, it is worth saying in the act itself that they will be involved and that it be a mandatory requirement—not for everything, but to be clear about when it will be mandatory. That is worth putting in.

Finally, there are a couple of areas of both the territory plan and the bill itself where I suggest it is worth saying that they will be reviewed. One of them is the codes themselves. This seems to me to be quite a new way of approaching development applications. I suggest that it is worth stating somewhere that the codes will be reviewed perhaps 12 months or 18 months after the new act comes into being, so to speak. There is certainly the opportunity to revise the codes, but it sounds at the moment as though any revision of the codes is just a very ad hoc process.

When you are bringing in a new system like this, it is worth being clear that there will be a review at a set time to look at, for example, the inadvertent consequences that some of these codes might bring that have not been thought about now. Making a commitment to review is good practice.

Another area where I think it is worth saying that there will be regular reviews is the list of the environmental impact consultants.

I guess they are, in general, the main things that are issues or of concern. I am happy to take questions about any other detail that I have put in the tables.

THE CHAIR: Thank you very much, Dr Purdie.

MS PORTER: You mentioned, on page 7 of your tables, the minister deciding to refer development applications. You said "strengthen re sustainability, see sustainability table". I was wondering whether you could tell me a bit more about that.

Dr Purdie: Yes. Let me go to the relevant section. Section 147, which is on page 113 of the bill, talks about the minister presenting to the Legislative Assembly a statement when

he has decided an application under section 148. That statement to the Legislative Assembly must include a description of the development, details of the land where the development is proposed to take place, the applicant's name, details of the minister's decision and the grounds for decision. I am really saying that the minister's grounds for the decision should include an assessment of how the minister has looked at those sustainability principles back in earlier sections.

My sneaking suspicion is that, even though the act is saying the minister should be doing that, it is very easy not to do that. By inserting that type of requirement there, it is one way of making sure that the ministers and the people in ACTPLA, in other sections of the bill, will be explicitly referring back all the time to those sustainability principles.

MS PORTER: Paying attention to them.

Dr Purdie: Yes. Firstly, it will show that they have addressed them. In this section, if the minister is required to give the grounds for the decision, it will show how the minister has taken those sustainability principles into account. That is often one of the most difficult things. It is the balancing act between the social, the environment and the economic.

If you look at the sustainability principles, they are quite strong on environmental aspects. Often there is a perception that the decisions are made purely on economic grounds. By requiring that the minister take account of all of those principles and say how he or she has addressed them, then it is either explicit it has been on economic grounds predominantly—that is more transparent—or it shows the extent to which or the way in which he has taken some of those other principles into account that relate to the environment.

THE CHAIR: You talked earlier about social impact analysis. Would you be able to explain how your office incorporates social indicators in your state of the environment reporting and how you think social impact analysis—or if you could expand on that perhaps—might be incorporated in the proposed legislation?

Dr Purdie: I do not know that I can talk very much about social impact analysis per se. Certainly in the state of environment reports we include a number of indicators that are related to the social environment generally. They are things like socioeconomic equity, health services, community health, infrastructure services to the community. There are a range of things in the state of environment report that are very specifically about community wellbeing.

Those are based not so much on my understanding of social impact assessment but on the information that would give a sense of the overall health of our community. They are based on: are there enough beds in hospitals? Is there enough crisis housing for youth or indigenous people, et cetera? It is all there in the definitions under the indicators of the state of environment report. It certainly covers off on that community wellbeing side.

The new act needs to make sure that, along with the impact on the biophysical environment—and that is very explicit in, I think, schedule 4, and that also includes the built environment—there is a commitment to look at the impact on people in the community. A good example of that at the moment would be the dragway. All the

complaints I am getting about the dragway are related to the impact of noise on people. At the moment I could not see in here explicitly where the noise impact on people would be addressed as part of this bill.

There are well-tried and tested methods for social impact assessment. It is not my area of expertise, so I really do not feel able to talk more about it.

THE CHAIR: Thank you very much for your submission and presentation. We will get a copy of the transcript to you, if you need to make any editorial changes.

PREST, Dr JAMES, Principal Solicitor, Environmental Defender's Office (ACT) Inc.

THE CHAIR: Good afternoon, Mr Prest. I will read the card to you. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings. Before the committee commences taking evidence, let me place on record that all witnesses are protected by parliamentary privilege in respect of submissions made to the committee in evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to the discharge of functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing. Would you like to make an opening statement?

Dr Prest: By way of introduction, I am here to give evidence on behalf of the Environmental Defender's Office (ACT) Inc. The EDO is a community legal centre operating here in the ACT. Our function, broadly, is to assist the community by way of giving advice on environmental and planning law issues. We are engaged in a number of activities. Apart from giving legal advice to specific clients, we also have a mandate of participating in the law reform process in general. That is really why I am here today. Given the significance of the reform here proposed, in terms of ACT planning and environmental law, we figured it was imperative that we make some input to the process.

I draw the attention of the committee to a submission we made in 2005 to the planning authority in relation to the proposals as they stood at that point in time. At this stage, I am making a verbal submission. I will be making a written submission in several days time to the committee. I might attach a copy of our previous submission. Many of the points in fact have not changed significantly from the previous submission.

I want to cover a number of points today: firstly, the question of the objects of the legislation; secondly, the question of appeal rights; thirdly, some points in relation to environmental impact assessment; and, fourthly, some points around draft variations to the territory plan. I will turn to the first points I would like to make in terms of the objects of the proposed bill.

I note that these are essentially the same as the Planning and Land Act 2002. One argument might be that the horse has already bolted in relation to that, so why change things. But, on the other hand, I think you can make a substantial argument here that there is an opportunity to have a look at whether those statutory objectives best represent the policy objectives of the legislature.

I suppose it is instructive to have a look at similar objects clauses in the legislation of other jurisdictions. For example, section 5 of the Environmental Planning and

Assessment Act in New South Wales specifically refers in subparagraph (a) (vii) to ecologically sustainable development. Something that I note in this proposed objects clause is that the reference is to sustainable development, rather than ecologically sustainable development.

In that sense, we have some difficulties with the way it is drafted. There is a passing reference to a couple of the principles of ESD—the principle of intergenerational equity and the proportionary principle. But we do not seem to have a mechanism by which these objects are really to be brought into effect, other than to say, "Well, broadly, we are going to interpret the legislation"—if there were a question of statutory interpretation—"in accordance with the objects." If we were to engage in that exercise, we would look at, say, 6 (a) and (b), where there appears to be a double counting for economic considerations. You have in (a) "economic aspirations of the people of the ACT" and in (b) "in accordance with sound financial principles".

I think that, if a court were asked to interpret some other section of the act in accordance with the objects of the act and some argument was going along the lines of "well, you are required to have regard to the principles of ecologically sustainable development, for example, as it applies in New South Wales" that type of argument, given the way this objects provision is drafted, might be unlikely to be very successful. This comes down to, I suppose, the fundamental objectives of the legislation. It seems to me that the objective of environmental sustainability of development is perhaps being put to one side in favour of the other objectives of quicker approval of development and more certainty for developers.

From my own observation of the situation with approval of developments in the ACT, I can see quite clearly that there is a disproportionate amount of time and energy put into scrutiny of projects that are very minor. From that point of view, the EDO is of the opinion—we essentially agree with what the planning authority is saying in their documentation—that there is a disproportionate amount of time spent on assessing developments that are essentially of minor significance, and that developments perhaps of greater impact do not get the amount of scrutiny that they should.

One of the points we made in our submission last year was that there was a discussion of exemptions and the type of development that should perhaps be exempt. For us, one of the guiding principles should be that exemptions perhaps should be granted. This is a way of offering an incentive to developers to say that, if they want to get their development through faster and subject to fewer constraints and so on, if they go along with an accreditation of a five or six star type of green building code, at that stage there will be an opportunity for the planning authority to offer an incentive to developers by saying, "Okay, you can have the fast track if you offer us, in return, an improved environmental performance when judged against some objective criteria."

One of our concerns in looking at the bill is that it does not, to some extent, take into account the need to ensure some of those broader sustainability objectives. I suppose I have to ask the question: how is this bill going to fit in with the government's proposed sustainability legislation in the future? The concern I have is that the emphasis is on the sustainability of development, rather than the sustainability of ecological systems.

We recognise that development is going to go ahead and that it is important and essential.

However, there is a need here just to have a look at whether it is necessary to, I suppose, give the economic considerations in the legislation a double opportunity to be considered. We will attach a copy of the New South Wales objects to our submission. We will provide that for the interest of the committee.

Moving on, I really want to get to some points around appeal rights, because this is perhaps our area of primary concern. There is obviously a need to be measured in relation to this. We understand that at the moment there are no appeal rights in terms of an AAT review of development applications, say for a single residential construction.

Obviously, we are not advocating holus-bolus appeal rights against every single thing. If anyone came to that conclusion they would be misconstruing the perspective of environmentalists. But I think there are some concrete, specific problems with the bill in terms of the merit track. In the bill at the moment essentially there is insufficient detail to indicate which types of developments in the merit track are going to be subject to what is described as major public notification.

This is really quite crucial, because appeal rights are essentially hinging on this. If there is not a requirement for a major public notification, then there are no appeal rights associated with that. At the moment, the community is being asked to make a call on the adequacy of the range of notification requirements without any of the detail. ACTPLA here have essentially said, "It is going to be in the regulations, so just wait and see when the regulations turn up."

I can recall sitting in the Supreme Court watching the Supreme Court trying to work their way through the land act and the regulations. Justice Crispin was certainly having some difficulty working his way through the seven different schedules of exemptions in the regulations. He had some difficulty with the transparency of the legislation in terms of what was subject to notification rights and appeal rights.

I suppose the fundamental point here is: do we want to consume a large amount of community resources in arguments about whether somebody should have standing, whether somebody should have been notified, and whether they are materially affected or not; or do we actually want to go to the substance of what community concerns are lying behind somebody's intention to object or appeal?

The starting point I would come to is this: where is the evidence, in objective terms, that currently there is a major logjam of development being caused by abuse of appeal rights in the ACT? We have a large number of major construction projects going on. The more major ones have been called in. Therefore there are no appeal rights in relation to those, in any case, apart from judicial review rights.

There are no easily accessible appeal rights in terms of AAT review. I think the case for abolition or severe restriction of appeal rights can be overstated. That is my first point—the appeal rights being restricted by means of the classification of which track of development the development is classified under.

Secondly, we go to questions of the requirements of public notification. We have to go back to the underlying principles here. One of the reasons we have this public notification is that people in the community who live in that area might be best placed to

have some input and make comments on the impact of the development. Just to assume that the planning authority or the developer's consultants are the only people who have the knowledge or expertise relevant to a development proposal I think is shutting out a fair amount of expertise in what is quite, I guess, an unusual community in Australia, in terms of the level of scientific expertise we have, say, living around the suburbs.

To us the restriction to immediate neighbours is something that is objectionable, in that there may be other people who live in a suburb. They are part of that suburb. But just because the development is not immediately next door to them, the suggestion is that their residential amenity does not count. It is only those absolutely immediately impacted with noise from, for example, a large proposed apartment building next door to a house that would be considered to be relevant. That is really one of the difficulties we have—the restriction to anybody but next-door neighbours.

There is another point I want to make about the existing system. Our experience is that the Administrative Appeals Tribunal already has quite an approach of responding to government and developer applications for the strike-out of appeals and denial of jurisdiction. There are claims that the AAT does not have jurisdiction to hear planning appeals. I suppose I am putting to you that the AAT already have the provisions and the means to get rid of vexatious and meritless appeals, and they are already doing it.

Again I come back to the point: have you got some objective evidence that there is some kind of pressure on development that is being caused by the operation of appeal rights, or is it just that some of these mechanisms for community input are annoying and frustrating? I suppose it just depends on how far you take the argument.

Democracy in itself can be annoying, frustrating and time consuming. It might be more straightforward if we just move to some form of totalitarianism, but we have these mechanisms in place. To deny people access on the basis of—it is not about the merits of what they are putting forward or the validity of their claims—some relatively arbitrary cut-off point is problematic to us. We are going to go into that in more detail in our submission.

I have had some relatively detailed discussions with people in relation to the formula—material detriment—that is set out in proposed section 374. I might go to the commercial competition point first of all. We support this, but I think in some ways it is being used as a Trojan Horse to knock out some other types of objections.

It might be better to take the approach that is taken in Victoria and New South Wales, of allowing, under a broad heading, any person to object. I can see planning and development still proceeding in those jurisdictions. It has not been stymied by the existence of appeal rights. Those states have not ground to a halt.

I recognise that in the ACT there is a need, as a small place with its own challenges, to have economic development. We support 374 (2) but I am saying that the formula set out in 374 (1) is problematic. First of all, it is problematic because it seems that the drafting instructions were to pull it out of Victorian legislation—the Planning and Environment Act 1987, section 52.

"Material detriment" in that legislation is a term used to refer to neighbourhood

notification and obligations to notify neighbours. What has happened is that that terminology—and there is all sorts of baggage of case law associated with the interpretation of that phrase that would inevitably be brought up in litigation—has been imported from Victoria. I would be suggesting to the Assembly that it have a close look at the meaning of that term.

I did some research in relation to "material detriment". I spoke to Professor Murray Raff, who is now the head of the law school at Canberra University, in relation to this. Previously he was a professor of law at Victoria University. He certainly has some experience in Victorian planning and environment law. I asked him about the implementation of these provisions. He said, "Well, I guess one of the first things is that councils in Victoria have not been willing to make use of those provisions to restrict people's right to object." He said, "These provisions have been rarely put to the test because no responsible authority I know of has been prepared to implement the Kennett government amendments against their citizens and ratepayers with the full stringency that the drafting might otherwise justify."

He is really suggesting that, first of all, the Kennett government was involved in introducing these provisions about material detriment. Whether the Stanhope government is interested in following their lead in terms of legislative proposals is another question. Further than that, he goes to some of the questions that arise here. In the definition it says, "Material detriment: an entity suffers material detriment in relation to land."

Using the phrase "in relation to land" brings with it a whole host of implications that are embedded in, essentially, the selection of the words "in relation to land". For example, if we go to the definition of "land" in Victorian legislation, it refers to a whole host of interests, essentially property interests in land. The words are "any estate, interest, easement, servitude, privilege or right in or over land". That is included in the definition of "land" in the Victorian planning legislation.

We were looking at this from the point of view of whether "land" here would enable an organisation, for example, that was seeking to get standing under subclause (b) to have standing in relation to an area of public land. By saying "in relation to land" there is an implication of a private property right of some sort connected with that land.

I guess I would be suggesting that there is a whole host of complicated questions that arise from this definition that might not be immediately apparent. I suppose the legislature needs to have a look at whether it wants to inflict that level of complication and confusion on the Administrative Appeals Tribunal in order just to work out whether someone has standing or not, before we even get to debating or discussing the substantial issue of what people are upset about.

The more appeal rights are closed off in the AAT, essentially there are going to be some people who will seek to go to judicial review. The cost to the community of that is going to be much greater. The legal costs, for example, will be greater and I think the costs in terms of potential delay would again be greater. I would just be suggesting that the Assembly have a look at why it is the case that the ACT has to depart from the position taken in, say, New South Wales of "any person" in relation to designated development.

I recognise that the "any person" test there does not relate to all types of development

under the Environmental Planning and Assessment Act. It only relates to designated development, and that is for a merits review—the equivalent of an AAT review. But in Victoria, yes, their provision is much broader.

Once the neighbourhood notification provision has been complied with, as long as one person has essentially responded to the notification and lodged an objection, other people who are not connected with that person are also entitled to lodge an appeal in relation to a planning permit. The provisions in Victoria are much more generous. I would just be making the point that development has not ground to a halt in Victoria, so I am not too sure why it is necessary to go this way.

There is a policy principle in relation to the operation of standing provisions. Essentially, if you are saying to the public, "We do not want you to assist in the enforcement of planning laws or environmental laws in the AAT," then you are saying that ACTPLA, the planning authority, is going to do that entire job itself. If there is ever a question of non-compliance with planning legislation, then essentially you are putting the responsibility back onto government, when one of the opportunities presented by broad standing provisions is to bring third parties into the enforcement and implementation of legislation. If government wants to be leaner and require fewer resources to carry out its job of implementing legislation, one option is to encourage the community to participate in that process. There is an opportunity available there in having broader standing provisions.

The broad point from the experience in New South Wales is that there has not been a huge flood of litigation that has held up development. On an objective basis, the Land and Environment Court has its own internal mechanisms to throw out litigation that is essentially vexatious or baseless. The legal system has developed those mechanisms over a long period of time, so they are quite reliable. I do not think I need to say too much more about that.

As to one of the questions that came up, I also discussed 374 (1) (b) with Professor Pearce at the ANU. He raised the question here of whether the objects or purposes of the entity had to relate closely to the land in question. He had an interpretation of the provision. This is Pearce as in *Statutory interpretation in Australia* by Pearce and Geddes. He is a bit of an authority on statutory interpretation. But I am not here stating that I am speaking on his behalf; it is just a question he raised here about the association. This is a question that is, again, not clear from the provision here. It talks about an entity that has objects or purposes.

The consultation material says, "We are going to provide open standing to unincorporated associations." But 374 (1) (b) does not clearly state that in relation to unincorporated associations. The implication I am drawing from it is that you have to at least have written objects or purposes, and it is unlikely that an unincorporated association will have gone to the trouble of writing those objects or purposes down. It is certainly open to argument that 374 (1) (b) is closing off the option for unincorporated associations. That is one argument in relation to the unintended consequences of the bill.

I refer again to what Professor Pearce was saying in terms of the objects or purposes of the entity. He was saying that, because it is in relation to land, you would have to look at whether the objects or purposes of the association related to that particular parcel of land.

For example, the Mount Majura preservation association may have in its objects specific objects relating to that piece of land, the Mount Majura Nature Reserve—I am just pulling a hypothetical example out of the air—whereas a national conservation organisation may not get standing under provision 374 (1) (b).

The point I have been making is this: where is the benefit to the community? If that organisation is seeking to raise a legitimate question of policy, implementation or compliance with legislation, then why should they not be entitled to at least put that before the AAT? Turning to the AAT act, in section 3A—the main objects of the AAT act—it says:

> (c) to ensure that the AAT is accessible; and
>
> (d) to ensure that proceedings in the AAT are efficient, effective and as informal as possible …

My experience has been that the policy intent of setting up the AAT in the beginning, of having essentially a non-litigious, non-lawyers' picnic, has been really turned on its head here in the AAT in terms of planning law, because there is an emphasis on the use of senior counsel and technical motions used to deny the public rights of access to that forum, going against the objects of that legislation. So we have some quite significant concerns about that. In a way, this planning legislation is impliedly amending the objects of the AAT legislation, or at least certainly denying it a fair bit of jurisdiction. Object (f) reads:

> to foster an atmosphere in which administrative review is viewed positively as a way of enhancing the delivery of services and programs …

If we look at that, the idea is that administrative review in the AAT can be of benefit to administrators because it can point out to them perhaps an issue of non-compliance with legislation that they might not have detected themselves. Or it may just, in actual fact, act as a guard against corruption in the planning system.

That is a concern in planning systems throughout Australia—to design a system that is essentially corruption-proof. The more you close off options for the public to essentially seek review of planning decisions, the more the public are left to trust the integrity of the planning authority. So it becomes a "trust us" situation. I am not sure everyone in the community wants it to go that way. That is another objective of the AAT act. Clause 3A (g) reads:

> to encourage … compliance by administrators with Territory laws.

If you know there is a risk that you might be asked to answer for your decisions in relation to administration of territory planning law in the AAT, the incentive then is for decision makers to make better decisions. If the risk of being asked to front the AAT and explain a decision is dramatically reduced by removal of appeal rights, then the quality of decision making is likely to decrease. Those are some of the downsides of removing public appeal rights. That has been discussed in many forums and in a number of articles, so I do not need to go on extensively about that.

There is another question here in relation to the policy objective of the Stanhope

government; that is, whether it wants to follow a policy process that was set up by the commonwealth government and run by DOTARS—the Department of Transport and Regional Services—which is the DAF process. If we have a look at the background and history of that, one of the underlying objectives there is to cut out public notification and public appeal rights, essentially to streamline development approval processes to the point at which what are described as red tape costs, and delays for the development industry are written out of existence.

Australian Local Government Association councillor Mike Montgomery said that the DAF proposal is an assault on the democratic right of communities to control the planning process. We are just wanting to pose a question about what is the policy origin of the gist of this bill. It has already been admitted that it was the intention to implement the DAF model here in the ACT. We have some concerns about whether some of the underlying objectives of that model have been closely looked at.

Just before I move on, I make one last point in relation to the objects of the legislation—on ecologically sustainable development. If we burrow into that a little bit in terms of international law, we will find that there is a fair bit of support for the proposition that public participation in the decision-making process is a component of ecologically sustainable development.

There is, in fact, now an international convention on the rights of the public and citizens to participate in environmental decision making—the Aarhus Convention that was signed in Denmark in 1998. I suppose, then, there is a question in terms of the interpretation of this proposed legislation as to whether it is consistent with that conception of ecologically sustainable development and the role of public participation.

I have some other points here. In terms of the last point about public appeal rights, I just want to say that there may be other factors that are a greater impediment to developers choosing to site their project in the ACT than public appeal rights. They may relate to issues around the leasehold system and the dual requirements for development approval, or there may be questions around consistency with things such as a lease purpose clause and the need to have a variation of that lease purpose clause for certain types of redevelopments.

It may also be that a developer wants to undertake a development in a particular location and the regulatory or legislative environment is not such a large factor in the decision making. There may be other, market-related, factors that are far more of an influence on their decision to invest or not. On the question about whether appeal rights are going to influence people significantly, again, where is the objective evidence to support the proposition that those differences between jurisdictions are going to have anything more than a marginal impact on decisions around investment? That is our position on public appeal rights.

I will turn now to proposed section 70 (2) of the bill. That refers to the requirement currently in section 25 of the land act for the minister to refer draft territory plan variations to this committee. Proposed section 70 (2) essentially gives the minister the option. We have significant concerns about that because it is left to the discretion of the minister.

It may well be that there are a number of draft variations that are particularly minor and non-controversial and waste this committee's time. But I suppose it is up to the committee to develop its own protocols for dealing with those low-level variations and say, "These are the criteria against which we are going to determine which type of draft variations have very few implications for planning, environmental protection and so on," and then, as they come in, to make a decision and say, "We are not going to deal with this one in great detail."

Instead, proposed section 70 (2) is essentially leaving it to the minister to make the call. It is up to the minister to work it out. He may. Again, this is going to reduce community input because of the community's role in providing input to the draft variation process here in the Assembly. I just wanted to make a point about that.

Finally, I want to speak briefly about environmental impact assessment. We may have some differences with the conservation council on this point, but my personal view is that removal of the option for preliminary assessments is just reducing the range of options in environmental impact assessment for the planning authority. I will be the first to say that the current system gives the planning minister too much discretion in section 121, as to whether or not something should be subject to detailed environmental assessment. That is probably the reason why there have been so few environmental impact statements—none, I think, in the history of the land act. Most things have been dealt with under preliminary assessment.

We certainly welcome some of the provisions proposed in relation to environmental impact statements, because they are going to lead to achieving the policy objective of taking the emphasis off minor development and, say, development applications for house renovations, home extensions and relatively minor proposals, and putting the emphasis on projects that are likely to have a greater impact on the community and the environment.

If you have a look at the commonwealth legislation, there is a range of options for environmental impact assessment. It is possible to have a scheduled approach and say, "Yes, for anything in the schedule you would have a presumption of an environmental impact statement." We support the approach being put forward here in the bill. But that does not necessarily mean that there is no need for some form of assessment of more minor developments.

In relation to environmental impact assessment, there are some broad points about the quality of environmental impact assessment. This will come in under the impact track. A perennial question around environmental impact assessment is whether the document that has been produced with the title "environmental impact statement" on the front is adequate to merit the title of "environmental impact statement".

There is a whole heap of case law that goes to this question. Unfortunately, in New South Wales it does not set a very high hurdle. Some of the pointers from the case law are that an EIS does not have to be perfect, it does not have to cover every topic or every avenue; however, it must not be superficial, and so on. This gets us to some of the practical questions that come up in looking at an EIS and asking if this is a useful document for the community and a decision-maker to look at to decide whether there are some aspects of a proposal that need to be looked at.

Professor Murray Raff has written an article wherein he sets out 10 principles of quality in an environmental impact assessment. He makes some useful points. Some of these have been taken on board in the proposed bill. One of them is the idea that the inquiry should not be restricted to site-specific environmental impacts. It talks about that in clause 116 (3). It says it does not matter whether the adverse environmental impact from the development is likely to occur on the site of the development or elsewhere. At least that point is taken into account in the bill.

I feel that there is perhaps adequate provision in the bill to deal with some other points he makes. One of them is the concept of the sham of dividing a development proposal into a number of slices or stages, and then having them each assessed separately in order to avoid the broader impact of the entire proposal from being looked at globally.

That is one of the points he makes—that projects must not be segmented in ways that disclose the scale of environmental impact and detract from the viability of alternatives to the total project. He also says that the inquiry has to look at alternatives to a proposal. So there is a question here whether the provisions in this bill really implement these principles of a quality or best practice environmental impact assessment system.

In view of the time, I might draw things to a close here. I thank you for the opportunity to give evidence to the committee in relation to the EDO's views on this bill.

THE CHAIR: Thank you very much for your presentation, Dr Prest. Are we able to come back to you with some questions once your written submission is presented?

Dr Prest: Yes, bearing in mind that the EDO is only a part-time organisation and my resources are relatively limited. But I am happy to come back with some answers or views on questions you might have.

THE CHAIR: We will send you a copy of the transcript for editing purposes as soon as we can.

Short adjournment.

BROWN, MR ROBIN, President, ACT Council of Social Service Inc.

REYNDERS, MR LLEWELLYN, Senior Officer, Media and Policy, ACT Council of Social Service Inc.

THE CHAIR: Thanks very much for coming along. I will read you the card. The committee has authorised the recording, broadcasting and re-broadcasting of these proceedings in accordance with the rules contained in the resolution agreed by the Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings. Before the committee commences taking evidence, let me place on the record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others, necessary to the discharge of the functions of the Assembly without obstruction and without fear of prosecution.

While the committee prefers to hear all evidence in public, if the committee accedes to such a request, the committee will take evidence in camera and record that evidence. Should the committee take evidence in this manner, I remind the committee and those present that it is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly. I should add that any decision regarding publication of in-camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing.

Welcome again. Would you like to begin by making an opening statement for the committee, Mr Brown?

Mr Brown: Sure. First of all, thanks very much for the opportunity to talk to you today. We have got a written submission. Do you have it now?

THE CHAIR: Yes.

Mr Brown: Sorry we could not get that to you sooner. I am sure you are quite aware that ACTCOSS is the peak body for community sector organisations and advocates for people living on low incomes or with disadvantage of some kind or other, just for the record. I guess our main issues are three.

We ask committee to consider the desirability of enshrining principles that are dear to our heart relating to social justice and equity in the planning system. The object of the bill as it stands is social aspirations, economic aspirations and so on, but we feel that the legislation could go further than that. The word "aspirations" is probably a good one. Maybe "needs" would be a good word to have in there as well, in the sense that "aspirations" embraces "needs". The statement would be a bit clearer if there were some reference to needs.

The second major concern is that the bill appears to us to quite substantially reduce oversight and appeal mechanisms. We appreciate that it is an exercise to simplify processes so that things can happen rather more speedily than they have been able to in the past, but we are not sure that the bill has the balance right. We would certainly like

the committee to look at those issues with some care. I am sure you are.

Thirdly, the bill appears to us to reduce examination of development proposals. We generally endorse a number of the proposals to improve regulation, particularly in relation to concessional leases and retaining specific community-facility land use. I guess it is our estimation that people living on low incomes or with disadvantage are those that bear the brunt of poor urban planning and are least able to correct for themselves decisions that perhaps were not the best. They have few options when choosing housing. Planning systems should help ensure that inexpensive housing is located near to employment and social services, and vice versa.

We are concerned that we are seeing in Canberra now a greater spatial aggregation of people living in disadvantage or people in poverty. I guess our vision for the ACT, for our community, is one where there is a real mixture, a pluralist community, so that that can be seen in every part of the community. That was behind the original planning ideas for the ACT. We are concerned that we are heading away from that. It does not really matter at all whether you own your house, whether you rent it from a private landlord or whether you rent it from the public as a landlord; you have an opportunity to fully participate in what our community has to offer; there is no social exclusion that is brought about by the way the city is designed.

We ask you to think about the object and definition of sustainable development and to think about including, in those words, words that enshrine the principles of social justice. That goes to provisions relating to environmental reports. There is some coverage of social issues in environmental impact statements and so on, but they are rather more limited than they should be.

On oversight and appeal mechanisms: as I have said, we are concerned that the bill appears to reduce significantly the availability of appeal mechanisms and committee oversight of the planning system. We would very much like you to think about that. Strong oversight mechanisms assist community participation in planning and do not leave, therefore, planning decisions vested in a sole decision maker. Again, it is a question of getting the balance right, getting a system that will work efficiently, but we are not sure that the balance is struck where it should be with this proposed legislation.

We are somewhat concerned about the provision relating to withholding information from the public. As we understand it, ACTPLA would appear to have a high level of discretion on the kind of information that it could withhold from the public. We wonder whether some additional words could be included there to define it a little more precisely or maybe limit its discretion. The committee should consider the ability that it would have under this legislation to disallow changes to the territory plan, including technical amendments. There is something there that the committee should look at pretty carefully.

On concessional leases, we broadly endorse the proposals in the legislation, but our understanding is that a decision on that could only be appealed by the lessee. That would appear to leave ACTPLA in the position alone of deciding on the community's behalf, I guess, how much of the community's wealth to give away. Maybe that is a misinterpretation but that is the way it looks to us. You should look at the question of third-party appeal provision in relation to that so that ACTPLA is not on its own in relation to that if there are other views in the community.

We welcome the decision to leave the community facility zoning intact. We certainly encourage greater use of this zoning, particularly in Civic and other town centres.

That is what we wanted to say at the outset. I am very happy to discuss those points or any other points further. I hasten to add that ACTCOSS does not see itself as an expert in planning law, but we have looked at this in some depth and over a period of years.

THE CHAIR: You mentioned in your presentation that Canberra was planned for affordable housing, or something along those lines. Can you tell me where you see the difference now?

Mr Brown: In the sense that, certainly when a great many of the early suburbs were laid out—I think all but one—they originally had areas of public housing, varying block sizes and so on. The intention certainly seemed to be that each suburb should be mixed, in terms of the members of the community that would be able to reside there. Clearly, the market pressures that we are experiencing now are working against that idea in many of the suburbs.

Mr Reynders: If I could just add to that, our understanding of the current situation we are seeing in the change in affordability in housing in Canberra is that we are seeing, certainly in well-located areas, a loss of existing affordable housing. A number of older houses, which perhaps are not of fantastic quality but are nonetheless reasonably affordable to rent, particularly in the rental market, are being redeveloped into quite high-cost apartments and townhouse developments.

We see quite often that the best-located land, in terms of amenity, access to services, access to transport, is becoming more and more difficult for low-income groups to access. We are concerned, and have anecdotal evidence that this is occurring, there is a shift of low-income groupings towards more distant and more poorly located areas of the city, rather than the more amenable areas.

That is the concern, and that is coming from a number of factors. It is coming from changes in transport costs and changes in housing costs, obviously. With the change in housing costs, we are also seeing a greater disparity between the rise in central areas, in particular, and the rise in more distant areas. Our concern is that the planning system does not seem to have responded to this change in demographics in the territory and acted to counteract it.

MS PORTER: Reflecting on what you said about community-facility zoning—and you made a comment about zoning in Civic and other town centres—do you see that in a similar way to what you have been describing about affordable housing, that a similar process has occurred? Or are you not concerned about that and you just welcome the fact that it remains?

Mr Brown: Certainly there have been pressures to contain community-facility zoning in, I guess, higher land value areas. We certainly welcome the provisions here that, I guess, seek to hold the line to some extent. Do you want to come in on that?

Mr Reynders: I was just going to expand on that. Originally, in the original consultation

papers, there was a proposal to amalgamate community-facility zoning with other municipal services. We are quite glad that that proposal has not progressed.

I guess, secondly, we are concerned at the loss of the community-facility zoned land within those central areas. For example, we have seen, with the section 84 development, quite a reduction in the footprint of the community-facility zoning land there.

We are also concerned that existing land that is used for community-facility purpose, although not necessarily zoned for that purpose, is being lost to redevelopment in those urban areas. For example, in City West there are a number of areas where the existing use is a community use. However, because they do not have a community-facility zoning necessarily on that block of land, those community-facility uses are being lost through redevelopment. We would like to see community-facility use land protected by the use of that zoning.

THE CHAIR: I bring you to some comments in your submissions, especially on the role of the ACT Legislative Assembly and the territory government. The proposed bill suggests, as you have indicated, that the role of the Assembly committees in relation to their scrutiny of variations to the territory plan should be reduced and the minister will now have a new discretion as to whether a proposed variation should go to the committee or not. The legislation provides that the appropriate committee is not prevented from considering the draft plan variation documents referred to it. In other words, it can self-refer. There are six committees.

This would mean that the planning and environment committee, this current committee, could self-refer territory plan variations for inquiry, should it wish to do so. You might not be aware that the resolution establishing the committee provides that the committee can inquire into matters that the committee considers to be of concern within the community and that are within its terms of reference.

Mr Reynders: If I could just respond to that: we are quite aware of that. Certainly that is at least a useful retention of that ability. My understanding, from reading section 71, is that at the moment there is a system where the committee receives a referral of the draft variation and then it has time to consider that before a final determination is made on the variation.

My understanding of the function of this section—and I am quite happy to predicate that with the fact I am not a lawyer and do not have a detailed understanding of legislative practices—is that it reads as if that requirement of the minister not to decide the final variation only applies if he refers it to the committee. If the committee self-refers, then the minister can ignore the fact that there is a committee process on and immediately determine the draft variation.

Mr Brown: So the eggs could be scrambled.

Mr Reynders: Even if material came up within the committee process, that would not necessarily feed into the minister's final decision on variation. That is my interpretation. I am happy to be corrected on that.

THE CHAIR: Thank you very much for your presentation and submissions. We will get

a copy of the transcript to you as soon as we can, if you need to make any editorial changes to it.

Mr Reynders: No problem. Thank you.

The committee adjourned at 4.34 pm.