

2020

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2020

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Gordon Ramsay MLA
Minister for Building Quality Improvement**

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2020

The Bill has not been declared a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to the *Building and Construction Legislation Amendment Bill 2020* (the bill) as presented to the ACT Legislative Assembly.

It has been prepared to assist the reader of the bill. It does not form part of the bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the bill. It is not, and is not meant to be, a complete description of the bill. This statement provides information about the intent of the provisions in the bill; however, it is not to be taken as providing a definitive interpretation of the meaning of a provision.

OVERVIEW OF THE BILL

The bill amends laws under the policy responsibility of the Environment, Planning and Sustainable Development Directorate that apply to building, construction and related work in the Territory.

The bill amends the following laws:

- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Construction Occupations (Licensing) Act 2004*

The bill implements provisions that relate to the ACT Government's Improving the ACT Building Regulatory System reform program <https://www.planning.act.gov.au/build-buy-renovate/reviews-and-reforms/building-reforms> (link current at time of presentation) by introducing legislation for a residential building dispute resolution scheme in the ACT.

The bill introduces a new power for the Minister administratively responsible for the functions of the Construction Occupations Registrar (Registrar) to make a statement of expectations in relation to the Registrar's functions. The bill also includes other minor and technical amendments to building laws to clarify their intended operation.

Building Act 2004

The proposed amendments to the *Building Act 2004* are to introduce a new dispute resolution scheme in the ACT for residential building disputes. The bill:

- inserts a new part into the Building Act to provide a legislative framework for an alternative dispute resolution scheme for disputes between building owners and building practitioners in relation to residential building work; and
- includes a note to clarify the intended operation of the provisions for certificates of occupancy and use.

Residential Building Dispute Resolution

The ACT Government previously carried out a review of the Building Act and the building regulatory system. The review identified that there had been a substantial increase in the number of formal complaints about building matters since 2010, including about relatively minor or contractual matters not generally regulated under the Building Act. It further identified that while many people were managing issues outside of the technical building complaints process, there was varying degrees of success managing both technical and non-technical disputes. It also indicated that more could be done to encourage early resolution of disputes.

Reform 43 in the resulting Improving the ACT Building Regulatory System program is to implement an alternative dispute resolution (ADR) model for residential buildings and residential building work. The broad parameters for an ADR model were subject to consultation in 2015-16, and generally supported by both industry and community stakeholders. This bill includes amendments that would establish the framework for an ADR scheme. The provisions of the bill provide for regulations to determine the more detailed operational aspects of the scheme.

The bill inserts a new Part 6A in the Building Act for a new dispute resolution scheme in the ACT for residential building disputes. The intention of this part is to facilitate constructive and productive dialogue between parties to a dispute, to ensure relatively rapid and low-cost solutions that are technically and legally workable while not requiring complex legal negotiations. The scheme is also intended to help resolve simpler matters without parties having to have the matter heard in the ACAT or a court.

As outlined in new section 127D, the purpose of a dispute resolution process under Part 6A is to enable parties to a residential building dispute to do 1 or more of the following:

- (a) resolve a residential building dispute;
- (b) agree an amount to be paid to a party or the basis upon which an amount is payable to a party;

- (c) if a residential building dispute is not resolved—narrow the matters in dispute and, as far as practicable, agree on the future progress of the dispute.

The provisions are intended to capture disputes between residential building owners and commercial building practitioners and/or developers. They are not intended to capture industry contractual disputes such as those between a commercial unit title developer and a licensed builder, or a builder (including an owner-builder) and a sub-contractor, or payment disputes that are subject to the Building and Construction Industry (Security of Payment) Act 2009. The dispute resolution scheme is not for review of administrative decisions that relate to building and construction regulation. Other processes are available for review of administrative decisions.

New section 127C provides for a range of matters that residential building matters, which could be considered under the dispute resolution scheme, being any matter in relation to a residential building work contract, the carrying out of residential building work, or the carrying out of a related building activity such as installing a driveway or swimming pool or other structures prescribed by regulation.

These matters may include:

- breach of a warranty set out in Division 6.2 (Statutory warranties) of the Building Act;
- a contravention of subsections 42 (1)(a)-(d) for requirements for carrying out building work;
- failure to maintain the standard or quality of building work specified in a residential building contract;
- failure to complete the residential building work required by a residential building contract in accordance with the terms of the contract;
- failure to pay for residential building work carried out under a residential building work contract.

A regulation may prescribe other matters that can be residential building matters, or exclude matters for the purposes of the scheme.

The scheme is not constrained to only those structures to which specific building standards apply under the Building Act, or covered by existing statutory warranties or residential building insurance provisions. Disputes may relate to other ancillary structures that are generally included in the scope of works of a residential building contract, such as driveways, external paving, and swimming pools.

It is intended that the scheme operates independently of building regulatory functions, as well as other consumer complaint processes. The scheme will be overseen by a new statutory office holder – the Residential Building Dispute Administrator (the Administrator) – a public servant who holds relevant qualifications and experience relating to dispute resolution, including in the building and construction industry. The Administrator is supported by dispute resolution officers, and technical assessors qualified to assess residential building work.

ADR refers to a broad range of processes that enable parties to resolve their disputes without the need for litigation. These processes, which may be facilitative, advisory, determinative, or a combination, can be tailored to particular dispute types and circumstances. To support the effective use of ADR processes, disputants should be matched with the most appropriate dispute resolution process. The bill provides that the regulations may prescribe kinds of dispute resolution, including those that may or must be used for particular types of disputes.

The bill also outlines the framework for the lodgement of disputes, obtaining further information, recording agreements, technical assessments, protection from liability for appointed officers, and confidentiality of information.

In recognition that not all disputes may be suitable for resolution through the scheme, the bill also provides for the Administrator to dismiss disputes in certain circumstances as well as refer disputes to other statutory officers where the dispute may be better addressed by another process.

The bill provides for the establishment of a dispute resolution trust account to enable the holding of amounts in dispute, as it is often where full payment is required that substantial disagreement exists regarding defective or unfinished work. For disputed payments, payments held in trust shows that the party who has withheld the payment is willing to engage in the process in good faith and can assist in the resolution of disputes.

The bill also requires parties engaged in a dispute resolution process to make a genuine effort to resolve the dispute.

Certificates of occupancy and use

Section 69 provides for the Registrar to issue certificates of occupancy if satisfied that a building, or part of a building, is fit for occupation and use as a building of a certain class. Subsection 69 (4) allows the regulation to prescribe what must be considered by the Registrar in deciding whether a building is fit for occupation and use, and the requirements that must be satisfied before a certificate of occupancy is issued. Otherwise, the Act does not prescribe generally how the Registrar must satisfy her or himself of fitness of occupancy. The provisions give the Registrar discretion to determine this on a case-by-case basis.

The power to issue a certificate of occupancy allows for scrutiny of documentation and building work before a certificate is issued, where the regulator considers it prudent or appropriate. This is why the Act does not simply require the Registrar to accept the documents submitted by the certifier and the recommendation of the certifier about whether a certificate should be issued. However, it is expected that the Registrar may consider this information adequate to be satisfied in some cases.

There is confusion amongst some stakeholders about whether section 69 obliges the Registrar to effectively duplicate the approval and final inspection processes of the certifier, or conduct a comprehensive audit of all building work subject to the certificate, before a certificate of occupancy can be issued. The bill clarifies in a new note to section 69 (4) that unless prescribed by a regulation, the Registrar is not required to conduct a physical inspection of a building, or a detailed audit of the approved plans or other submitted documents, in deciding whether to issue a certificate of occupancy.

Building (General) Regulation 2008

The proposed amendments to the Building (General) Regulation 2008 are technical amendments that respond to a change of terminology in the Building Code of Australia. In that document 'alternative solutions' are now called 'performance solutions'.

Construction Occupations (Licensing) Act

The proposed amendments to the *Construction Occupations (Licensing) Act 2004* (COLA) are to:

- incorporate consequential ADR amendments by expanding the range of actions the Registrar can take when handling complaints by allowing the Registrar to refer complaints to the Residential Building Dispute Administrator; and
- allow the Minister responsible for the business unit the Construction Occupations Registrar is located in to issue a statement of expectations to the Registrar.

Referral of complaints to ADR scheme

People may make complaints to the Registrar about construction occupations licensees. In some cases these complaints may not relate to licensable work or may include matters best addressed under a dispute resolution model.

The facilitate matters being addressed under the most appropriate process, the bill allows for the Registrar to refer complaints to the residential building dispute administrator for resolution, where suitable and appropriate in the circumstances.

Ministerial Statement of Expectations

The Registrar is a statutory office holder who fulfils a regulatory and enforcement role for the licensing of construction occupations under the COLA. The Registrar also exercises functions under other Acts, including the Building Act, the *Electricity Safety Act 1971* and the *Water and Sewerage Act 2000*. These functions are exercised at arm's length of government.

The bill introduces new provisions to enable the responsible minister to issue a statement of expectations in relation to the Registrar's functions. This allows the minister to clearly outline the general expectations for the role, while preserving the independence of the Registrar to determine how best to exercise his or her functions. The provisions will place formal ministerial engagement with the Registrar, and the Registrar's response to those expectations, within the parameters in the bill.

CONSULTATION ON THE PROPOSED APPROACH

The concept of a new alternative dispute resolution (ADR) scheme and general parameters for the scheme were subject to consultation as part of consultation on the current building reform program in 2015-16. These parameters have been refined following this consultation and consideration of schemes in operation in other states and territories.

Reform 28 of the ACT Government's reform program is to refine the proposed alternative dispute resolution model based on consultation feedback and conduct a second round of consultation. This second round of consultation will cover those detailed operational aspects not canvassed in the 2015-16 consultation and is required before details of the scheme can be finalised.

The provisions of the bill that introduce the framework for residential building disputes have a delayed commencement of 2 years to allow for development of new detailed regulations which will be developed as a result of that consultation.

CONSISTENCY WITH HUMAN RIGHTS

The bill engages and promotes access to justice by providing an alternative mechanism for people to resolve their disputes in relation to residential buildings and building work. The provisions of the bill do not limit human rights under the *Human Rights Act 2004*.

Building and Construction Legislation Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Gordon Ramsay MLA
Attorney-General

Clause Notes

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the *Building and Construction Legislation Amendment Act 2020*.

Clause 2 Commencement

This clause provides for the commencement of Part 3 and clauses 3, 4 and 18 on the day after the Act's notification day.

The remaining provisions will commence on a day fixed by the Minister by written notice. The provisions will automatically commence once 2 years have elapsed from the date of notification in accordance with the Legislation Act, Section 79 (2), Automatic commencement of postponed law.

Clause 3 Legislation amended

This clause provides that the legislation mentioned in the clause is amended by the Act.

Part 2 Building Act 2004

Clause 4 Certificates of occupancy Section 69 (4), new note

This clause includes a note in relation to section 69 to allow the Registrar to undertake such verification and confirmation considered necessary in relation to an application for certificate of occupancy. This note is to displace any presumption that the Registrar is required by this section to conduct physical inspections of work or detailed auditing of approved plans prior to issuing a certificate of occupancy.

Clause 5 New Part 6A

This clause inserts new part 6A that introduces the framework for a new residential building dispute scheme in the ACT.

Division 1 of this new part 6A sets out the objects and important concepts of residential building disputes, including the meaning of residential building dispute and residential building matter.

Division 2 of this new part 6A sets out the appointment and related matters of the residential building dispute administrator, dispute resolution officers and technical building assessors.

Division 3 of this new part 6A deals with the dispute resolution process, including referral, lodgement, and dismissal.

Division 4 of this new part 6A provides that the director-general must establish a dispute resolution trust account

Clause 6 Dictionary, note 2

This clause inserts a new term into the list of terms defined by the Legislation Act.

Clause 7 Dictionary, new definitions

This clause inserts new definitions into the dictionary relating to residential dispute resolution.

Clause 8 Dictionary, definition of *residential building*

This clause makes consequential amendments to the dictionary relating to residential dispute resolution.

Clause 9 Dictionary, new definitions

This clause makes consequential amendments to the dictionary relating to residential dispute resolution.

Clause 10 Dictionary, definitions of *residential building work* and *residential building work contract*

This clause makes consequential amendments to the dictionary relating to residential dispute resolution.

Clause 11 Dictionary, new definition of *technical building assessor*

This clause makes consequential amendments to the dictionary relating to residential dispute resolution.

Part 3 Building (General) Regulation 2008

**Clause 12 General requirements for application for building approvals – Act, s 26 (3)
Section 11 (1) (d)**

Clause 13 Section 11 (1) (d) (ii)

**Clause 14 Building erection and alteration – Act, s 26 (3)
Section 12 (2) (b) note and (2) (e) note**

Clause 15 **General requirements for plans – Act, s 27 (1) (a)**
Section 16 (2) (h)

Clause 16 **Section 16 (2) (h)**

Clause 17 **Referral of building approval applications to particular entities**
Schedule 2, part 2.2, item 6, column 2

These clauses omit the term ‘alternative solution’ and substitutes it with the term ‘performance solution’.

Part 4 Construction Occupations (Licensing) Act 2004

Clause 18 **New Section 104A**

This clause inserts a new section that allows the Minister administratively responsible for the functions of the Construction Occupations Registrar (Registrar) to make a statement setting out the Minister’s expectations in relation to the Registrar’s functions and details the conditions for making a statement of expectations, what the statement may contain, and how the Registrar may formally respond to the statement. The statement must not include directions on the exercise of particular functions or in relation to individuals.

Clause 19 **Action after investigating complaint**
New section 123 (1) (ba)

This clause expands the range of actions the registrar can take when handling complaints by allowing the registrar to refer complaints to the residential building dispute administrator.

Clause 20 **Section 123 (3) and note**

This clause makes a consequential amendment to section 123 to expand the referral requirements to include the residential building dispute administrator.