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

PLANNING BILL 2022

SUPPLEMENTARY EXPLANATORY STATEMENT

**Presented by
Mick Gentleman MLA
Minister for Planning and Land Management**

BACKGROUND

This supplementary explanatory statement relates to amendments to the Planning Bill 2022 (the Bill) as presented to the ACT Legislative Assembly on 21 September 2022. It complements the explanatory statement previously tabled with the Bill.

The information provided in this explanatory statement responds to comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Scrutiny Committee) in its Scrutiny Report 21 in relation to the Bill. The Government amendments to the Bill respond to comments made by the Standing Committee on Planning, Transport and City Services (the Committee) in its report on the Inquiry into Planning Bill 2022.

CONSULTATION ON THE PROPOSED APPROACH

As outlined in the explanatory statement previously tabled with the Bill, developing the Bill, the Government consulted with the public and stakeholders in a number of ways. Additional public consultation was undertaken by the Committee in the conduct of the Inquiry into Planning Bill 2022.

The Consultation report has been updated since the introduction of the Bill and is available on the EPSDD's website at www.planning.act.gov.au.

ACT Government Directorates were consulted throughout the development of the Government amendments.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Bill and Government amendments due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HRA).

Section 28(2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected
- b) the importance of the purpose of the limitation
- c) the nature and extent of the limitation
- d) the relationship between the limitation and its purpose
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Scrutiny Committee requested further information on:

- why any limitation of the right to equality in the granting of leases is reasonable in consideration of the HRA;
- what alternatives to the restrictions on judicial review rights presented by the Bill were considered, and why these restrictions, without any residual judicial discretion, are considered proportionate; and
- whether procedural fairness rights are being limited by not requiring the issuance of a notice of intention to issue a rectification direction and prohibition notice.

The relevant parts of the human rights analysis have been updated below.

Cultural and Other Rights of Aboriginal and Torres Strait Islander Peoples

The Bill seeks to strengthen Aboriginal and Torres Strait Islander peoples' enjoyment of their culture and ability to engage in their distinct cultural practices relating to their use and enjoyment of land, natural resources and place. The Bill provides that activities engaged in as part of continuing cultural practices are regarded as exempt development. In particular, paragraph 143(1)(b) includes 'land management practices undertaken in accordance with Aboriginal tradition and prescribed by regulation' and paragraph 143(3) which defines 'Aboriginal tradition'.

Right to equality and non-discrimination - Granting of leases

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 8 of the HRA provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. Section 261 of the Bill allows the Territory Planning Authority (Authority) to restrict the people eligible for the grant of a lease under section 259 of the Bill by stating in the notice of auction, tender, ballot or direct sale, a class of people eligible or ineligible for the grant of the lease. Section 261 of the Bill could be considered to limit a person's right to equality before the law as certain classes of people may be ineligible to participate in a lease sale process.

2. Legitimate purpose (s 28(2)(b))

The purpose of the limitation is to encourage and facilitate housing and land supply in accordance with ACT Government policy to a wider variety or specific segments of the community. Housing supply and affordability is a well established issue within Australia and there are a range of initiatives and

programs that the Government is pursuing and mechanisms such as this one to support the Government in providing housing and choice for the people of the ACT.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

The proposed amendment will be effective in achieving the legitimate aim, which is to provide housing and choice for the ACT community. To enable this, it is important for the Authority to continue to be able to restrict the classes of people eligible in accordance with ACT Government policy to participate in a lease sale process. This is essential to realise Government objectives from time to time to release land for the benefit of a particular class of people. For example, the Government may wish to restrict those eligible for the direct sale of single dwellings to persons undergoing a degree of financial hardship. The criteria in this circumstance may be based on income, previous ownership, stamp duty concession eligibility or other criteria or combination of criteria.

4. Proportionality (s 28(2)(e))

The limitations on the equality before the law are considered proportionate to the legitimate purpose.

This Bill seeks to promote wider property/home ownership in the community or the provision of affordable rental, to address access and equity barriers by allowing the Government to target certain disadvantaged or vulnerable groups in the community. While the restriction on granting of leases will affect equality, without this framework, the Government could not address equity for the community, and it would be more difficult for financially and socially disadvantaged or vulnerable people to obtain property/home ownership or enter the rental market. This is just one of several initiatives the Government may pursue to unlock quality, affordable property/housing supply for the community.

On balance, any limitation of rights under the HRA is reasonable and proportionate, noting the public interest benefits that arise from home ownership or affordable rental.

Right to a Fair Trial - Judicial review rights

1. Nature of the right and the limitation

The right to a fair trial is protected by section 21 of the *Human Rights Act* (HRA). Section 21 protects the right to procedural fairness, and can

also extend to protect third parties whose substantive legal rights may be affected by a determination, for example in planning decisions.

The Bill limits the right to a fair trial by placing some restrictions on review rights. For example, the ability to review Territory Priority Projects declared under section 215 is restricted by section 216, which limits a person starting a proceeding in court in relation to a decision to make a territory priority project declaration more than two months after the declaration was made.

Section 80 similarly limits the ability to challenge the validity of a Territory Plan provision. Challenges cannot be brought 3 months after the day the provision or amendment commenced. The validity of a provisions cannot be challenged only because the major plan amendment was inconsistent with the Planning Strategy or District Strategy.

In addition, the Bill also limits the right by setting out in Schedule 7 which development assessment matters are exempt from third party ACT Civil and Administrative Tribunal (ACAT) review. These provisions, particularly the exemptions for development in town centres and Territory Priority Projects, limit the right to procedural fairness in having disputes settled.

Under Schedule 6, third parties who may wish to review a decision to grant development approval under section 177 need to have made a previous representation about the application, which may exclude some third parties whose interests are nonetheless affected and limit their rights under section 21 of the *Human Rights Act 2004*.

2. Legitimate purpose

The objective sought to be achieved by these provisions is to facilitate projects that achieve wider policy and public benefit, especially for significant proposals that achieve a major government policy outcome, substantially effect the achievement of the desired future planning outcomes, those that significantly benefit the people of the ACT, or where residential property owners have an interest in developing their property subject only to necessary interferences. This will guarantee that planning and development occurs in a way that supports and enhances the Territory's liveability and prosperity, and promoting the well-being of residents, thus creating an effective, efficient, accessible and enabling planning system.

3. Rational connection between the limitation and the purpose

Restricting challenges to the validity of Territory Plan, and to the declaration of Territory Priority Projects in the ways described above makes sure that these challenges are made promptly, and for some reason other than an inconsistency with the Planning Strategy or a District Strategy.

Exempting some developments from third party ACAT review in Schedule 7 allows certain activities which are not significant development, and which meet certain conditions such as being on land that is at least 50m from any block within a residential zone, under the legislation to proceed.

Requiring that third parties who may wish to challenge development applications to have made a previous representation limits review rights to those that have proactively engaged in the approval process, meaning fewer parties are able to seek ACAT review.

Reducing the number of potential reviews on these development decisions will maximise efficient decision-making in the context of low-risk developments and where the ACT Government seeks to undertake significant development that contributes to planning outcomes and provides benefits to the ACT, in a timely manner.

4. Proportionality

The limitations on the right to a fair trial are considered proportionate to the legitimate purpose.

In the case of development assessment matters, Schedule 7 exempts from third party ACAT review matters considered low-risk development activities as discussed above.

In the case of limitations on the ability to review Territory Priority Project, the limitations are proportionate to the significant benefits the project provides to the ACT community, such as the benefits to public transport received under the Light Rail project. They enable the benefits of such projects to be progressed in a timely manner.

Limiting the ability to review decisions made under section 177 is justified on the basis that parties who have engaged and made previous representations can apply for review, and division 7.5.4 includes extensive public notification requirements for development applications. This limitation on the right to a fair trial is also balanced against a property owners' interest in having their development applications decided promptly and subject only to necessary interferences. The latter has implications for the right to privacy and home.

The Bill has several key principles that have guided the development of policy positions included in the Bill, including certainty. It is important that the principle of certainty is applied to timeframes for processes within the planning system.

The time restrictions set out in the Bill seek a balance between providing sufficient time for a person to consider their appeal rights and providing certainty to proponents to all projects to be progressed in a timely manner.

There are significant benefits to the ACT community from these types of projects, such as the benefits to public transport received under the Light Rail project. In making the decision to declare a Territory Priority Project, the Minister is directly accountable to the Legislative Assembly. Major amendments to the Territory Plan require consultation with the community and the National Capital Authority, approval by the Minister, and are referred to a Legislative Assembly committee for consideration. They are also subject to Legislative Assembly review and disallowance.

Two alternate options were considered for inclusion in the Bill. These were providing no time limit on judicial review, or allowing a Court to extend the timeframe in certain circumstances, such as where the Court is satisfied there are sufficient grounds for the extension. An open-ended time period would provide an unacceptable risk to large-scale and important development projects, which as outlined above, often involve the delivery of critical infrastructure for the ACT, potentially delaying the benefits of the project to the ACT community.

On balance the limitations provided in the Bill are considered to be proportionate, reasonable and justified.

Right to Privacy and Reputation - Rectification Directions and Prohibition Notices

1. Nature of the right and the limitation

The Bill may limit the right to privacy and reputation. The Bill will impact on private life by providing inspectors with powers of entry to premises under section 459, general powers on entry to premises under section 464, giving directions about how rectification work is to be undertaken under section 465, requiring help on entry under warrant under section 466, taking samples on entry under warrant under section 467, seizing things on entry under search warrant under section 468 and requiring names and addresses under section 469. The Bill also authorises inspectors to the use of force to gain entry

to a property under sections 444, 445, 483, 486 and 487. The use of force is limited to property only.

To the extent that the Bill restricts what would otherwise be a home-owner or resident's unencumbered ability to deal with their property and home entirely as they choose, the Bill creates several limitations on the right to privacy and home. These include requiring people to apply under section 164 for development approval to undertake work on their properties; to comply with controlled activity orders under section 420 which may direct the person to whom it is directed to undertake activities set out in section 425, such as not beginning or carrying out development without development approval; and to comply with rectification directions, work orders and prohibition notices under sections 433, 439 and 448.

The Bill provides for the cancellation of leases, including residential lease, as a consequence of breach of chapter 12 (development offences and controlled activities). Although this may engage and limit the right to privacy and home, this is intended only to operate as a matter of last resort for the most egregious of breaches, and reflects that in the ACT, residential leases are contracts with the government, and there need to be consequences for serious breach of that contract.

2. Legitimate purpose

The objective sought to be achieved is to make sure that unauthorised or prohibited development is not undertaken in the ACT and for the adverse impacts of unauthorised development activities to be rectified, including where that would unduly interfere with other people's interest in peacefully enjoying their homes. The objective is also to enable inspectors to be able to conduct their duties under the Bill. This will guarantee that planning and development occurs in a way that supports and enhances the Territory's liveability and prosperity, and promoting the well-being of residents, thus creating an effective, efficient, accessible and enabling planning system.

3. Rational connection between the limitation and the purpose

The Bill achieves this purpose by providing inspectors with powers of entry to premises, to give directions about how rectification work is to be carried out, require help on entry, take samples, seize things under warrant and require names and addresses so that they can effectively perform their duties in ensuring that development is being undertaken in accordance with the Act.

Requiring people to apply for development approval to undertake work on their properties comply with controlled activity orders and to comply with rectification directions and prohibition orders make sure that development activity adheres to the ACT Government's plans and strategies for a liveable Territory. This objective could not be achieved and the broader planning system undermined if the ACT Government could not assess applications against the outcomes promoted by these plans and strategies and address non-compliance and activities that undermined the achievement of these outcomes through controlled activity and rectification or prohibition orders.

4. Proportionality

The limitations on the right to privacy and reputation are considered proportionate to the legitimate purpose.

In the case of the need to provide inspectors with powers of entry to premises for the purposes of inspection or to directions about how rectification work is to be carried out, require help, take samples or seize things under warrant, and require names and addresses, the Bill includes safeguards that they can only do so with the occupier's consent obtained in accordance with the provisions of the Bill or with a warrant. In the case of a warrant, it may only be issued through the courts and a judicial process, which has inherent safeguards. The power to grant a warrant depends on a magistrate being satisfied there are reasonable grounds for suspecting that there is a particular thing or activity connected with an offence under the legislation and that this is engaged in at the premises, or may be engaged in at the premises. Furthermore, inspectors must announce themselves before entering pursuant to a warrant, and details of the warrant and details about rights and obligations must be given to the occupier or someone representing them.

In instances where consent to enter is sought, there are further protections guiding how this consent must be sought. For example, the inspector must produce an identity card and explain important details such as the purpose of entry, the resulting powers to seize evidence and that consent may be refused. Another protection is that consent, if given, must be recorded and can be challenged later in court. The actions the inspector can undertake when on a premises is limited to those actions set out in the Bill. Consent can also be withheld, meaning a warrant would need to be sought.

While the Bill also enables authorised officers to seize things, the Bill includes safeguards that limit the exercise of this power. These include, that inspectors

can only seize things that are consistent with the purpose of entry told to the occupier, when seeking their consent or authorised under the warrant. The power to seize is confined to seizing things consistently with the purpose of the entry told to the occupier when seeking their consent. A receipt relating to things seized under the legislation must also be given. Furthermore, when inspectors give directions for a person to provide personal details, they are limited to the details and circumstances set out in the Bill.

In the case of the Bill enabling inspectors to use reasonable force to gain entry to a premises, this is limited to force against property, not a person. This has been included to facilitate an inspector to exercise their enforcement powers. It is proportionate in that the power is limited to the reasonable use of force on property only and additional safeguards are included to make sure that any interference with human rights is not unlawful or arbitrary. These include: entry to premises must be authorised under warrant which must specify reasonable force may be used (discussed above); a warning is given that hindering an inspector is an offence; only a police officer may use force against a person; any personal property that is seized must be returned or reasonably compensated; during enforcement action damage must be minimised and reasonable compensation is payable for loss arising from exercise of enforcement powers.

In the case of requiring people to apply for development approval to undertake work on their properties the approval is only required for non-exempt development. Any authorised use of land, or of a building or other structure on land, is exempt from requiring development approval. Both the process for obtaining, and the grounds for refusing a development application are prescribed with a high degree of clarity and detail. A person may apply to a works assessor or building surveyor for an assessment of whether a development is an exempt development. Applicants for development approval can apply for a reconsideration under the Bill and/or have the decision considered by ACAT where a decision for development is refused.

In the case of requiring a person to comply with controlled activity orders which may direct the person to whom it is directed to undertake certain activities the Territory Planning Authority must first provide the person with a show cause notice of the Authority's intention to make the order. It is also limited to the activity on the notice and detail whether the activity is the subject

of a complaint. There is a further safeguard in that the person given the notice may provide the Authority with reasons explaining why the order should not be made and the Authority must consider these reasons before deciding to make a controlled activity order. The controlled activity orders can only relate to the activities set out in the Bill. The limitations effected by the order are not indefinite as the order ends on a day in accordance with the order, or when it is revoked. A person bound by the order may apply to have it revoked, and a decision to refuse this is reviewable. Finally, the person who is the subject of a controlled activity order can apply to ACAT for review of the decision to make the order.

In the case of requiring a person to comply with rectification directions and prohibition notices the direction/notice is limited to the activity set out in the order. A magistrate can only make a rectification direction for the purposes set out in the Bill. Similarly, the Territory Planning Authority can only make a prohibition notice for the purposes set out in the Bill. While the Territory Planning Authority may authorise a person to enter a premises to which a direction to undertake rectification applies, the authorised person must not enter the premises for the first time unless accompanied by an inspector or will have to leave if the occupier withdraws consent to the person being on the premises.

The person who is the subject of a rectification direction can apply to ACAT for review of the decision to make the direction. The person to whom a prohibition notice is directed to, apply to the Territory Planning Authority for the revocation of the notice.

Finally, the limitation on privacy is achieved using the least restrictive means possible, in part because these entry powers do not extend to a part of the premises that is used only for residential purposes.

A prohibition notice or rectification direction will only be issued under extreme circumstances. The non-use of a notice of intention is considered reasonable given the urgent nature of the circumstances where a direction/notice would be issued. An offence against the requirements set out in the direction/notice is unlikely to be inadvertent as the content of the rectification work and prohibition orders explicitly state what conduct is required.

Consideration was given to introducing a requirement for a notice of intention to be issued prior to issuing a prohibition notice or rectification direction.

However, it was assessed that this could potentially significantly increase the risk to the community and may leave the Government liable for damages incurred.

On balance, it is considered reasonable and justified that the current framework remains in place.

Climate Change Implications

There are no climate change implications from the Government amendments.

CLAUSE NOTES

Clause 2 Commencement

This clause provides for the commencement of this Act. Section 38 and Part 20.3 will commence on the day after this Act's notification day. The remaining provisions of this Act commence on a day to be fixed by the Minister by written notice.

Sections 36, 49A and 49B and Part 20.2 have been added to commence on the day after this Act's notification day.

Clause 3 Dictionary

This clause provides for the dictionary to be located at the end of this Act.

A full stop has been placed after the word 'dictionary' in Note 1 in line with current drafting practices.

Clause 7 Object of Act

This clause sets out the object of this Act to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by creating an effective, efficient, accessible and enabling planning system.

Subsection 7(1)(b) has been amended by removing reference to 'that is consistent with planning strategies and polices' to broaden the object of the Act.

The reference 'community participation' has been amended to 'public participation, to provide consistent terminology in the Act.

Subclause 7(3)(c) has been amended to 'the knowledge, culture and tradition of, and cultural and spiritual connections held by, the traditional custodians of the land' following consideration of the recommendation in the Inquiry into the Planning Bill 2022.

Additional notes have been included at subclause 7(3) to reinforce that the Territory Planning Authority must exercise its functions, if relevant, in accordance with the object of the Act; the object of the Act must be considered in developing planning strategies, plans and policies and the planning strategy must be consistent with the object of the Act; and that the Territory Plan must give effect to the planning strategy.

Clause 9 Meaning of ecologically sustainable development

This clause amends the defined term 'ecologically sustainable development'.

Subclause 9(1)(a) has been amended to include the protection 'and enhancement' in the principles for ecologically sustainable development while subclause 9(1)(b) has been amended by removing the reference to 'growth' in the principles.

The heading of ‘protection of ecological processes and natural systems’ at subclause 9(2) has also been amended to include the protection ‘and enhancement’ of ecological processes and natural systems.

This change has been made to not limit the meaning of ecologically sustainable development to the protection of the environment and ecological systems, but also to encompass the enhancement of these systems.

The meaning of ‘achievement of economic growth and prosperity’ has been amended by removing the reference to ‘growth’ in the meaning.

This change has been made to disconnect economic growth from other ecologically sustainable development considerations so that the achievement of these considerations are not dependent on economic growth.

Clause 10 Principles of good planning

This clause lists the principles of good planning. The principles of good planning direct policy makers and those administering this Act to the relevant frameworks and considerations when preparing strategic planning policies and exercising functions under this Act. This helps set a benchmark for how planning will be undertaken under the reformed planning system created by this Act. It also assists with communication to industry and the public about the purpose of planning and how good planning should occur.

The reference to ‘of good planning’ has been replaced with ‘(the *principles of good planning*)’ as a defined term in the Act.

Subclause 10(1) has been amended to include housing affordability as a principle of good planning that must be considered to achieve good planning outcomes in developing planning strategies, plans and policies. A definition has been added at subclause 10(2).

The definition of ‘high-quality design principles’ has been amended by adding that development should also provide appropriate solar access.

The definition of ‘natural environment conservation’ has been amended by adding cumulative and incremental environmental impacts to be considered.

The definition of ‘key threatening process’ has also been added at clause 10(3) to provide clarity to the meaning.

Clause 18 Authority functions

This clause lists the functions of the Territory Planning Authority.

Subclause 18(3)(b) has been amended to remove reference to ‘section 10’ as the principles of good planning are a defined term in the Act.

Clause 36 Planning strategy

This clause requires the planning strategy to be considered by the Territory Planning Authority, the Minister and the Executive.

The words 'consistent with the object of this Act' in subclause 36(1)(a) have been moved to the chapeau to remove any doubt that the planning strategy must be consistent with the object of the Act.

Clause 37 Consideration of planning strategy

This clause requires the Executive to make a planning strategy for the long-term planning policy and goals for the ACT in order to strengthen and clarify key strategic planning outcomes, consistent with the object of this Act.

The section reference to which the Executive must consider the planning strategy has been amended.

Clause 39 Planning and response report

This clause provides for the Territory Planning Authority to propose amendments to a district strategy through a planning and response report. The report provides future detailed planning for an area that is consistent with the policies and principles for development applying to the district.

The reference to 'related amendments to the Territory Plan' has been removed as this clause only applies to proposed amendments to a district strategy. The note has also been removed to remove any ambiguity.

It is intended that amendments to a district strategy may propose changes to the principles and policies for development of the district set out in the district strategy, provided it is consistent with the planning strategy. Clause 39 (4) has been removed to allow for this. A planning and response report must be consistent with the planning strategy.

Clause 40 Amendment of district strategy

This clause allows the Minister, where satisfied, to amend a district strategy arising from a planning and response report.

The reference 'community consultation' has been amended to 'public consultation' to provide consistent terminology in the Act.

Subclause 40(b) has been amended to require that an amendment to the district strategy be consistent with the planning strategy, rather than the principles and policies for the development of the district set out in the district strategy for improved consistency and clarity.

Clause 43 Subdivision design applications

This clause prescribes the information to be included in a subdivision design application. An application must include a detailed plan that is consistent with the principles and policies set out in the district strategy and the provisions of the Territory Plan.

Subclause 43(1)(a) has been amended to clarify that a subdivision design application must be consistent with the provisions of the Territory Plan as the document against which development applications are assessed. Clause 43(1)(a)(i) has been removed to allow for this.

The matters that may be included in a subdivision design application may now be prescribed by regulation. The definition of 'Mandatory provision' has also been removed as it no longer appears in this clause.

Clause 47 Territory plan to give effect to strategic planning outcomes

This clause requires the Territory Plan to promote principles of good planning, give effect to the planning strategy and district strategies and gives effect to relevant outcomes related to planning contained in other government strategies and policies.

Subclause 47(a) has been amended to make it clear that the principles of good planning the Territory Plan must promote are the principles at section 10 of the Act.

A note has been included at subclause 47(b) to reinforce that the object of the Act must be considered in developing planning strategies, plans and policies and the planning strategy must be consistent with the object of the Act.

Clause 48 Contents of territory plan

This clause requires the Territory Plan to consist of:

- (a) a map that identifies districts and designated land use zones; and
- (b) set out the planning principles and policies for giving effect to the object of the plan.

It also provides for section 47 (6) of the *Legislation Act 2001* to not apply to any instrument applied, adopted or incorporated in the design review panel rules. Section 47(6) of the *Legislation Act* prohibits subordinate legislation from referencing the latest version of external documents that change from time to time unless this power is specified in the Act.

The Bill was drafted to allow for the incorporation of instruments that may be required to support the Territory Plan. The disapplication of subsection 47(6) of the *Legislation Act 2001* will allow for the incorporation of instruments that may be subject to another organisation's copyright or, in the case of the Design Principles for the ACT - are developed by the Environment, Planning and Sustainable Development Directorate (EPSDD) and are available on the EPSDD website. This maintains the approach taken under the Planning and Development Act 2007.

The Bill significantly increases transparency for processes and decision-making and provides for the use of the EPSDD website in a much greater capacity to provide easier access to information. Any instruments incorporated will be continually monitored by EPSDD and any relevant amendments will be communicated to Panel members, applicants and the broader community through the enhanced website. This will allow for the community to have immediate access to up-to-date information.

The Bill seeks to apply a consistent approach across both copyrighted and non-copyrighted instruments to make sure that the Territory meets its

obligations under copyright law and to allow for the efficient use of resources. While not all instruments may be subject to copyright, it is not considered practical to create a framework where only some of the instruments/standards are notified. This would create considerable uncertainty for users of the planning system, and so on balance, it is considered sensible if all of these types of instruments are published in the one location – the EPSDD website. This will create a single point of information.

Clause 49A Design guides

This clause provides for the Minister to make Design Guides to support the Territory Plan and provide design guidance for development proposals.

Design Guides must be published on the Territory Planning Authority's website.

Clause 49B Technical specifications

This clause provides for the Chief Planner to make technical specifications to support design guides and the Territory Plan.

Technical specifications must be published on the Territory Planning Authority's website.

Clause 53 Definitions—pt 5.2

This clause defines the terms 'background papers', 'consultation comments', 'consultation notice', 'consultation period', corresponding major plan amendment', 'draft major plan amendment', interested person', 'major plan amendment', 'proponent-initiated amendment', 'public availability notice', and 'supporting report' to provide a consistent meaning in this part.

The definition for 'supporting report' has been amended to require a statement to be given on how the proposed amendment would give effect to the planning strategy and any relevant or proposed district strategy.

Clause 69 Consideration of draft major plan amendments by relevant Assembly committee

This clause requires the relevant Assembly committee to tell the Minister whether or not it will prepare a report on the draft major plan amendment.

The timeframe in which the committee must tell the Minister has been amended from 10 working days to 15 working days to provide more time for the committee to consider preparing a report while maintaining an improved overall efficiency of the planning system and providing a greater certainty to proponents.

Clause 82 What is a minor plan amendment and is consultation needed?

This clause explains what a minor plan amendment is and, under certain circumstances, when limited consultation may be required to be undertaken.

An amendment to include subclause 82 (1) has been made to clarify that public consultation is not required for a minor plan amendment to add or change a reference to a design guide.

‘minor plan amendment’ in subclause 82(2) has been amended to ‘**minor plan amendment**’ in line with current drafting practices.

Subclause 82(2)(c) has been removed and replaced with an amended subclause 82(2)(e) to provide clarity on when a minor plan amendment requires consultation.

Clause 87 Minor plan amendments—future urban areas

This clause sets out the types of amendments the Territory Planning Authority can make to the Territory Plan in regard to future urban areas.

The reference to ‘code’ has been replaced with ‘policy’ as the new Territory Plan introduces new naming conventions.

Clause 88 Consideration of whether review of territory plan necessary

This clause requires the Minister, at least once every 5 years, to consider whether the Territory Plan needs to be reviewed to ensure it still meets the object of this Act.

Subclause 88(2)(a)(iv) has been amended to remove reference to ‘section 10’ as the principles of good planning are a defined term in the Act.

The reference ‘community’ has been amended to ‘public’ to provide consistent terminology in the Act.

Clause 92 Meaning of significant development

This clause explains that a proposed development is a significant development if it requires a subdivision design application; consultation with the design review panel; or an environmental impact statement.

The reference to the sections when consultation with the design review panel for a significant development is required has been amended for improved consistency and clarity.

‘**(EIS)**’ has been added after ‘environmental impact statement’ at subclause 92(2) in line with current drafting practices.

Clause 96 Rules for design review panel

This clause provides for the Minister to make design review panel rules for the design review panel including rules about terms of reference for the panel, constitution of the panel, conducting meetings of the panel and processes and procedures for reviewing development proposals.

It also provides for section 47 (6) of the *Legislation Act 2001* to not apply to any instrument applied, adopted or incorporated in the design review panel rules.

The Design Principles for the ACT - are developed by the Environment, Planning and Sustainable Development Directorate (EPSDD) and are available on the EPSDD website. This maintains the approach taken under the Planning and Development Act 2007.

As outlined in clause 48, the Bill significantly increases transparency for processes and decision-making and provides for the use of the EPSDD website in a much greater capacity to provide easier access to information. Any instruments incorporated will be continually monitored by EPSDD and any relevant amendments will be communicated to Panel members, applicants and the broader community through the enhanced website. This will allow for the community to have immediate access to up-to-date information.

Clause 99 Advice of design review panel

This clause requires the design review panel to provide advice about how the proponent's development proposal could be made consistent, or more consistent, with any design advice.

The note has been amended to remove reference to 'for a prescribed development' for improved consistency and clarity.

Clause 100 Outline of environmental impact assessment

This clause explains that for certain proposals, a formal assessment of a development proposal's potential environmental impact assessment is required. This is typically in the form of an environmental impact statement or where the proposal is not likely to have a significant adverse environmental impact, an environmental significance opinion may be produced.

The reference to '(an *EIS*)' has been removed as it is no longer required in this clause as clause 92(c) has been amended to include the reference.

Clause 106 Designated proponents for certain EIS decisions

This clause allows a relevant Minister to designate a person or Territory authority as the proponent in relation to a defined decision on certain environmental impact statement decisions.

The reference 'a statement or inquiry—the statement' has been amended to 'an EIS or inquiry—the EIS' in line with current drafting practices.

Clause 107 Application for EIS scoping document

This clause requires a proponent of a development proposal to apply to the Territory Planning Authority if an environmental impact statement is required for the proposal.

Subclause 107(3) has been amended to 'a regulation may prescribe consultation requirements for the preparation of a scoping document' to make sure there is sufficient power to make regulations governing not just with whom the Territory Planning Authority must consult, but when and how.

Clause 110 Preparing draft EIS

This clause requires a proponent to prepare a document that addresses each matter raised in the scoping document.

The regulation making power in relation to the preparation of a draft EIS in subclause 110(3) has been moved to the general regulation making power for the Act in section 519 in line with current drafting practices.

Clause 116 Revision of draft EIS

This clause sets out the requirements for the proponent to revise the draft environment impact statement.

The reference 'revised EIS' has been amended to '**revised EIS**' as a defined term to reduce any ambiguity.

Clause 143 Meaning of exempt development

This clause defines the term 'exempt development' to provide a consistent meaning in this Act.

An additional exempt development has been added to exempt land management practices undertaken in accordance with Aboriginal traditional and prescribed by regulation from requiring development approval.

Subclause 143(2) has been amended by removing reference to 'paragraph (b)' as is no longer necessary resulting from the above addition.

A definition of Aboriginal traditional has been added.

Clause 163 Advise on development proposals

This clause requires the Territory Planning Authority to advise the proponent about the likely requirements and assessment process for the development proposal.

Reference to which entities the Authority may refer a development proposal has been reworded for clarity that referral may be made to any referral entities rather than separately listing some individual entities.

Clause 169 Further entity referral—more information or amended application

This clause sets out when the Territory Planning Authority is required to further refer a development application previously referred to an entity on the application being amended.

Subclause 169(1)(a)(ii) and (2)(b) have been reworded from 'referred to' to 'given to' for improved consistency and clarity.

Clause 173 Authority must publicly notify development applications

This clause requires the Territory Planning Authority to publicly notify a development application.

The planning regulations set out which development applications are exempt from certain public notification requirements. This clause has been amended to clarify which development applications are not required to undertake certain public notification requirements.

Clause 176 Further public notification—changed application

This clause sets out when the Territory Planning Authority is required to publicly notify a development application that has already been publicly notified but where the development application has been amended.

Subclause 176(1)(c) has been added to provide that further public notification does not apply to a development application for a significant development.

Clause 176A Further public notification—significant development

This clause sets out the public notification requirements for significant developments following the completion of the first public notification period.

Two stages of public notification will occur for all significant developments. The time period for each period is set through *the Planning (General) Regulation 2023*.

Following the first public notification period, the applicant must give a statement to the Territory Planning Authority. The second public notification period cannot commence until a statement is provided and published.

Clause 182 Deciding development applications

This clause sets out the types of decisions a decision-maker must make on a development application, what to consider when making a decision on a concurrent application and matters involving approvals relating to regulated trees. The Minister as the decision-maker for Territory Priority Projects must receive advice from the Territory Planning Authority before making a decision.

The definition of ‘tree management plan’ has been moved to the dictionary while the definition of ‘regulated tree’ has been added to this clause in line with current drafting practices.

Clause 183 Considerations when deciding development applications

This clause sets out the matters a decision maker must consider when making a decision on a development application.

‘Any applicable design guidance in a design guide’ has been added to clause 183 as a consideration a decision maker must take into account when deciding a development application.

Clause 186 Restrictions on development approval

This clause sets out what a development proposal must be consistent with for a decision-maker to consider approving a development application, the status of entity advice, and when a decision-maker may refuse an application.

The definition of 'registered tree' has been added in line with current drafting practices.

Clause 189 Time to decide development applications

This clause sets out the timeframes for deciding a development application.

The timeframe for making a decision on a development application where the application has been referred to the Commonwealth Minister under section 188, has been increased by 10 working days.

The timeframe for when the Territory Planning Authority asks for more information in relation to development application has been amended to include significant developments.

A 2-stage notification process for significant developments has been added to Table 189 to allow for extended public input into the application process.

Clause 204 Exception to s 203 (1) (b)—referral requirements

This clause sets out that the decision maker only needs to refer an amendment to a development application to an entity where it would affect a part of the development application where advice was provided, or it contains matters which it reasonably expects the entity would provide comment on.

Subclause 204 has been amended to extend this exception to all entities, not just the conservator of flora and fauna or the Commonwealth Minister responsible for administering the *Environment Protection and Biodiversity Conservation Act 1999*. This is consistent with current practice under the *Planning and Development Act 2007* and will ensure developments are not delayed unnecessarily through mandatory referral to entities where consultation is not required.

This amendment has been made to remove ambiguity and to streamline the clause.

Clause 215 Declaration of territory priority projects

This clause has been amended to provide for the Minister together with the Chief Minister to declare a development proposal as a territory priority project if satisfied that the proposal would achieve a major government policy outcome that is of significant benefit to the people of the ACT **and** would substantially facilitate the achievement of desired future planning outcomes **and** is for significant infrastructure or facilities, that are of significant benefit to the people of the ACT.

The Minister and the Chief Minister would also need to be satisfied, before jointly declaring that a development proposal is a territory priority project, that sufficient consultation has been undertaken.

A note has been added to clarify that development proposals for community, social and public housing projects of any scale are included within the scope of significant infrastructure or facilities.

The requirement for the Minister to present the reasons for making a declaration of territory priority project to the Legislative Assembly has also been removed due to the addition of clause 215A which establishes a process for a territory priority project declaration to be presented to the Legislative Assembly.

Clause 215A Presentation of declaration to Legislative Assembly

This clause sets out the process for the Minister to present a territory priority project declaration and statement setting out the reasons for making the declaration to the Legislative Assembly once made.

The Legislative Assembly, by resolution, may either approve or refuse to approve the territory priority project declaration within 2 sitting days.

Clause 217 Meaning of protected matter

This clause defines the term 'protected matter' to provide a consistent meaning in this Act.

A note has been added that the Minister may consider relevant matters under the *Nature Conservation Act 2014* or any other ACT law when making a declaration.

Clause 259 Granting leases

This clause sets out the processes to be used by the Territory Planning Authority in granting leases by either auction, tender, ballot or direct sale.

There are two subclause (2) in this clause, the second one has been renumbered to subclause (3).

Clause 267 Report before granting leases

This clause allows the Territory Planning Authority to prepare a report in relation to a proposal to grant a lease.

The reference 'planning' has been removed to remove any ambiguity around the current meaning of a planning and response report in this Act.

A reference has also been added for what must be included in the report to be prescribed by regulation.

Clause 275 Leases to which restriction under s 276 applies

This clause lists the types of leases which contain a provision requiring the approval from the Territory Planning Authority under section 276 before any dealings can take place on the lease by the lessee.

Subclause 275(1)(c)(ii) has been amended to no longer reference 'prescribed by regulation' in relation to a single dwelling house lease and is replaced with requiring the prior written approval from the Territory Planning Authority in line with current drafting practices.

Clause 291 Grant of community lease by tender

This clause sets out the requirements for the Territory Planning Authority when considering whether to grant a community lease by tender and satisfied the land will only be used for community lease uses.

The reference 'block' has been removed and the reference to 'section – see the *Districts Act 2002*, dictionary.' has been amended to 'section, in relation to land – see the *Districts Act 2002*, dictionary.' in line with current drafting practices.

Clause 305 Development application to remove concessional status of lease

This clause sets out the process for when the Territory Planning Authority refers a development application seeking to remove the concessional status of a concessional lease to the Minister for a decision.

The reference 'to the community' has been amended to 'to the public' to provide consistent terminology in the Act.

Clause 362 Declared leases

This clause sets out what the Minister and another Minister must consider to be satisfied that a declared lease is in the public interest.

The references 'ACT community' have been amended to 'public' to provide consistent terminology in the Act.

Clause 416 Guidelines for taking action on complaints

This clause provides the Territory Planning Authority to make guidelines about the action that may be taken in relation to complaints under this part.

The requirement for the guideline to be a notifiable instrument has been removed as an Accountability Commitment has already been established with Government.

Clause 419 Definitions—pt 12.3

This clause defines the terms 'complainant', 'ongoing controlled activity order' and 'show cause notice' to provide a consistent meaning in this part.

The definition of 'show cause notice' has been moved to the dictionary.

Clause 420 Controlled activity orders

This clause has been updated to provide that a person, may make an application to the Territory Planning Authority to make a controlled activity order.

Clause 421 Show cause notices

This clause has been renamed to 'show cause notices' and has been amended to address how the Territory Planning Authority deals with show cause notices when a controlled activity order application has been received from a person.

Clause 422 Time for making controlled activity order

This clause states that where the Territory Planning Authority, after providing a show cause notice, fails to make a controlled activity order within the prescribed time, unless extended by the Chief Planner, the Authority must provide a new show cause notice before making the order.

Subclause 422(4) has been added that where the Territory Planning Authority fails to decide an application within the time period set by regulation, the Authority has decided not to make the order.

Clause 423 Decision on proposed controlled activity order

This clause sets out the requirements that the Territory Planning Authority must consider before deciding to make a controlled activity order. The clause has been amended to take into account that a controlled activity order application may also be received from a person.

Clause 426 Notice of making of controlled activity orders

This clause lists to whom the Territory Planning Authority must provide a notice to advising them of the making of the controlled activity. The clause has been amended to take into account that a controlled activity order application may also be received from a person.

Clause 427 Who is bound by a controlled activity order

This clause states that a controlled activity order binds each person to whom it is directed.

Subsection 427(3) has been amended by replacing 'to which' with 'in relation' for improved consistency and clarity.

Clause 512 Basic fences between leased and unleased land

This clause explains where the erection of a basic paling fence is a development requirement between open space and a block boundary, that the requirement has been complied with if another type of fence has been erected.

The reference to a 'block of land' has been amended to 'block' in line with current drafting practices.

Clause 519 Regulation-making power

This clause allows the Executive to make regulations for this Act, including for offences to be created by regulations.

Section 519 of the Bill limits the creation of offences and fixes maximum penalties to not more than 30 penalty units. This is within the normal range of these types of offences and is in accordance with the Guide to Framing Offences, lending to the proportionality of this provision.

The creation of low penalty amount offences by regulation is a common occurrence. Regulations are considered by the Assembly, which provides an additional layer of scrutiny and accountability. It will enable the regulatory

system to be responsive to challenges as they arise and is proportionate given the relatively low penalty unit limit set under the Bill. There is currently only one offence proposed to be included in the regulations, which carries a maximum of 10 penalty units.

Section 519 of the Bill provides that a regulation may make provision about a matter by applying, adopting or incorporating (with or without change) a standard, or a provision of a standard, as in force from time to time. This permits the subordinate legislation (for example the Territory Plan) to reference external documents such as Australian Standards. Section 47(6) of the *Legislation Act 2001* prohibits subordinate legislation from referencing the latest version of external documents that change from time to time unless this power is specified in the Act.

Section 519 of the Bill only applies to an Australian Standard or an Australian/New Zealand Standard (see s519(5)), as it seeks to reasonably limit the application of subsection 47(6) of the *Legislation Act 2001* to only those instruments that may be subject to copyright.

As outlined in clause 48, the Bill seeks to apply a consistent approach across both copyrighted and non-copyrighted instruments to make sure that the Territory meets its obligations under copyright law and to allow for the efficient use of resources. While not all instruments may be subject to copyright, it is not considered practical to create a framework where only some of the instruments/standards are notified. This would create considerable uncertainty for users of the planning system, and so on balance, it is considered sensible if all of these types of instruments are published in the one location – the EPSDD website. This will create a single point of information.

This clause has also been amended by including that a regulation may make provision in relation to the contents of a supporting report; environmental impact statements; where the Act doesn't prescribe when a development approval takes effect—when the development approval takes effect; inquiry panels; and procedures for carrying out the Territory Planning Authority's functions.

Clause 520 Review of Act

This clause requires the Minister to review the Act as soon as practicable 3 years after the commencement of clause 520 to ascertain the effectiveness and operation of the new planning system under the Act.

Clause 602 Expiry—ch 20

This clause provides for this chapter to expire 3 years after the day it commences except for certain provisions unless otherwise stated for a particular provision.

This is to make sure that particular provisions will not expire and remain in the Act for future reference.

Clause 604 District strategy

This clause has been amended to provide that public consultation undertaken on the district strategy before the commencement of section 38 of this Act is public consultation undertaken under this Act.

Clause 611 Preparation of draft territory plan before commencement

This clause has been amended to clarify that the preparation and consultation on the draft Territory Plan includes preparation and consultation that occurred prior to the commencement of this Act.

Schedule 1 Preserved leases

Schedule 1 defines preserved leases and preserved lease use. While preserved leases are a new term through this Act, the concept has been retained and builds on previous criteria under previous planning law.

This amendment is the relocation of Schedule 1 to the end of the schedules in line with current drafting practice (now Schedule 8). The context has been simplified and the elements for preserved lease amended to have a cumulative effect.

Schedule 2 Information and documents for certain development applications

Schedule 2 sets out the information or documents to be provided with a development application.

Item 1 has been reworded for improved consistency and clarity and an additional item has been added to address an application for a development proposal in relation to which a design guide applies.

Schedule 6 Reviewable decisions, eligible entities and interested entities

Schedule 6 sets out the decisions that are reviewable by the ACT Civil and Administrative Tribunal under this Act.

Items 36, 37, 37A and 37B in Part 6.2 have been updated to provide that the decisions made under clauses 420, 421 and 423 are appealable. Items 38 to 40 have been updated in line with current drafting practices for consistency with the relevant clauses.

Schedule 8 Preserved leases

Schedule 8 defines preserved leases and preserved lease use. While preserved leases are a new term through this Act, the concept has been retained and builds on previous criteria under previous planning law.

This amendment is the relocation of Schedule 1 to the end of the schedules in line with current drafting practice. The context has been simplified and the elements for preserved lease amended to have a cumulative effect.

Dictionary

The Dictionary sets out the definitions for this Act.

The definition of '**block**' – see the *Districts Act 2002*, dictionary.' has been added to the dictionary.

The definition of '**controlled activity order**' has been amended to provide its correct location in the Act.

The definition of '**design guide**' – see section 49A (1)' has been added to the dictionary.

The reference 'EIS – see section 100(2)' has been amended to 'EIS – see section 92(c)' to provide its correct location in the Bill.

The definition of '**housing affordability principles**' – see section 10(2).' has been added to the dictionary.

The reference 'preserved lease means a lease mentioned in an item in schedule 1, part 1.2, column 2' in the Bill has been amended to 'preserved lease – see schedule 8, section 8.1 (1).' to provide its correct location in the Act.

The definitions of '**preserved lease use**' and '**registered tree**' have been removed from the dictionary and included at schedule 8, 8.1 and section 186(7) respectively.

The definition of '**principles of good planning**' – see section 10(1).' has been added to the dictionary.

The definition of '**revised EIS**' – see section 116(1)(b).' has been added to the dictionary.

The definition of '**show cause notice**' has been amended to provide its correct location in the Act.

The definition of '**tree management plan**' – see the *Tree Protection Act 2005*, dictionary.' has been added to the dictionary.