

Australian Capital Territory

Building (General) Amendment Regulation 2024 (No 2)

Subordinate law SL2024-25

made under the

Building Act 2004

EXPLANATORY STATEMENT

This explanatory statement relates to the *Building (General) Amendment Regulation 2024 (No 2)* (the **regulation**) as made by the Executive. It has been prepared to assist the reader of the regulation. It does not form part of the regulation and has not been endorsed by the Legislative Assembly.

This statement must be read in conjunction with the regulation. It is not, and is not meant to be, a comprehensive description of the regulation. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

OVERVIEW

The regulation is made under section 152 of the *Building Act 2004* (the **Act**).

The regulation supports the implementation of reforms to strengthen building certification services in the ACT.

The regulation:

- prescribes the requirement for a public servant to be nominated to attend mandatory inspections in relation to stages of building work; and
- prescribes matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use.

The regulation introduces new section 33AA, which prescribes the requirement for a public servant to be nominated to attend mandatory inspections of stages of building work under section 44 (1A) of the Act. This provision allows for a team of public servants who can be drawn upon to provide this function.

The regulation introduces new section 35AA, which prescribes matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use under section 69 (4) (a) of the Act.

These amendments relating to new sections 33AA and 35AA commence on 1 July 2025.

The regulation also includes amendments related to the residential building work insurance settings as per the recommendations of the Review of Residential Building Work Insurance Regulatory Settings undertaken in 2023.

The regulation also amends:

- the minimum amount for insurance cover for insurable residential building work from \$85 000 to \$200 000; and
- the period of claims for insurable residential building work from 90 days to 180 days.

These two amendments commence on 1 January 2025.

CONSULTATION ON THE PROPOSED APPROACH

In developing the regulation the Government consulted with key stakeholders on the implementation framework for the reforms to strengthen building certification services in the ACT.

Stakeholders consulted include Access Canberra in the Chief Minister, Treasury and Economic Development Directorate and the Australian Institute of Building Surveyors.

Consultation was undertaken with community, industry and key stakeholders throughout the development of the policy proposal.

REGULATORY IMPACT STATEMENT

Amendments at clauses 7 and 8 are subject to a regulatory impact statement that has been prepared separately to the explanatory statement.

A regulatory impact statement is not required for the remaining clauses in the regulation as they do not impose any appreciable costs on the community, or part of a community under section 34 (1) of the *Legislation Act 2001*.

Building defects cost Australians (homeowners and industry) in the order of \$2.5 billion per year, of which \$1.3 billion directly impacts apartment buildings. Defects and compliance failures can lead to delays in completion, high rectification costs, safety risks to the public, additional building management and maintenance fees and higher insurance premiums. Building defects reduce confidence and investment in the industry and as demonstrated in high profile cases, a loss of value for affected buildings significantly impacting homeowners financially, mentally, and physically.

In administering and regulating the building and construction industry, the ACT Government works from the position that prevention is better than cure and a notional position that rectifying a defect in design phase costs \$1, \$10 during construction and \$100 in the occupation phase. Therefore, reforms and regulatory effort are best targeted to the identification and rectification of defects at the earliest possible time. Balancing housing affordability and public protection by increasing accountability without increasing unnecessary regulatory burden reduces the likelihood of significant

and costly building defects and increases community and investor confidence in the sector in the ACT.

CONSISTENCY WITH HUMAN RIGHTS

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) terms of reference require consideration of human rights impacts of subordinate legislation, among other matters.

This regulation introduces the requirement for a public servant to be nominated to attend mandatory inspections in relation to stages of building work, and prescribes matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use. As such, it may engage and limit the following human rights under the *Human Rights Act 2004* (the HRA):

- Section 12 - Right to privacy and reputation
- Section 27B – Right to work and work-related rights

These new requirements may engage the right to privacy through requiring access for a public servant to enter a property that is a home. They may also engage the right to work through introducing additional government oversight of the private sector.

Nature of the right and the limitation (s28 (a) and (c))

This regulation provides for the nomination of a public servant to attend a mandatory inspection of prescribed stages of building work. There is currently no explicit requirement for a public servant to attend such an inspection, although it is allowed under section 69 (4) of the Act. The introduction of attendance by a public servant may limit the right to privacy by allowing a right of entry to a property which is a home.

The introduction of attendance by public servants at mandatory inspections of stages of building work and the prescription of matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use, may limit the right to work through introducing additional government oversight of the private sector.

Legitimate purpose (s28 (b))

The new provisions require a public servant from a specific team to be provided with access to premises in order to attend mandatory stage inspections with the appointed building certifier, which in limited cases will be a home. This is deemed necessary in order to increase the likelihood of building defects being picked up during the certification process.

The prescription of matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use is deemed necessary in order to increase the likelihood of building defects being picked up during the certification process.

Rational connection between the limitation and the purpose (s28 (d))

The requirements introduced by the regulation are rationally connected to the objective of strengthening building certification services. The provisions in the regulation will assist in protecting the community from adverse outcomes associated with building defects by requiring adding additional design documentation audit and construction inspection requirements to increase the likelihood of building defects being picked up during the certification process.

The new provisions will primarily involve government attendance at construction sites, rather than private homes, and so the intrusion on privacy of the owners of the buildings is more limited. The nominated public servant will attend mandatory inspections alongside the appointed private certifier, who is appointed by the landowner.

The nominated public servant will be selected based on their ability to assess and write reports on this matter, which relates to their ability to assess safety and other legal concerns, potentially providing benefits to the landowner with their expertise as well.

A nominated public servant will not have a legislated right of entry. However, a refusal by the property owner will impact their ability to obtain a Certificate of Occupancy and Use (COU), which can trigger a visit from a building inspector who does have right of entry and seizure powers under the Act. Some nominated public servants may also serve as building inspectors under the Act, and therefore, the nominated public servant who was denied entry may work in the same team as a building inspector who will have the right of entry.

Access by a nominated public servant to perform the functions outlines in the regulation will only ever be undertaken with the building certifier, who is appointed by the property owner, and is therefore granted consent to enter the property by the owner.

Proportionality (s28 (e))

The HRA permits reasonable and justifiable limits on human rights. The requirements in the regulation have been designed to be the least restrictive approach and with sufficient safeguards to ensure the limitation on the right to privacy and the right to work can be considered reasonable and justifiable.

Delayed commencement of the new requirements is designed to ensure sufficient lead in time to support those working in the industry and the ongoing provision of services without disruption. The new requirements will be supported by engagement and advice to industry to ensure that certifiers understand the new requirements.

Public servants have obligations under the *Public Sector Management Act 1994*, including obligations regarding conflict of interests and disclosing confidential information. As such, the nominated public servant is required to deal fairly with the

property owner as they have the obligation to make all reasonable efforts to help public members to understand their entitlements, and any requirement the person is obliged to meet, under a territory law and other obligations.

Other mechanisms in place to mitigate privacy concerns, include the property owner's right to access any information produced by the nominated public servant through the under the *Freedom of Information Act 2016*.

SCRUTINY COMMITTEE PRINCIPLES

This regulation and explanatory statement has been developed in accordance with the Committee principles and technical and stylistic standards expected by the Assembly.

CLAUSE NOTES

Clause 1 Name of regulation

This clause provides that the name of the regulation is the *Building (General) Amendment Regulation 2024 (No 2)*.

Clause 2 Commencement

This clause provides for the commencement of regulation. The regulation (other than sections 7 and 8) commences on 1 July 2025. Sections 7 and 8 commence on 1 January 2025.

Clause 3 Legislation amended

This clause provides that the regulation amends the *Building (General) Regulation 2008*.

Clause 4 New section 33AA

This clause inserts a new section 33AA into the *Building (General) Regulation 2008*.

New section 33AA prescribes the requirement for a public servant to be nominated to attend mandatory inspection of stages of building work under section 44 (1) (a) of the *Building Act 2004*. This provision allows for a team of public servants who can be drawn upon to undertake the functions prescribed in new sections 33AA and 35AA.

This provision prescribes that the regulator must be satisfied the nominated public servant has adequate knowledge and experience to prepare a written report about an inspection that they attended and a report prescribed in new section 35AA, provisions (1) (b) and (1) (c).

This provision prescribes that for a stage inspection:

- a nominated public servant may attend all or part of the inspection; and
- if a nominated public servant attends the inspection, they must prepare a written report about the inspection and give the report to the regulator as soon as practicable after the inspection.

Clause 5 New section 35AA

This clause inserts a new section 35AA into the *Building (General) Regulation 2008*.

New section 35AA prescribes matters that must be considered by the Construction Occupations Registrar in deciding whether a building is fit for occupancy and use under section 69 (4) (a) of the *Building Act 2004*.

This provision prescribes the following reports that must be considered:

- each report about any inspection attended by a nominated public servant;
- if guidelines have been made under section 139BA of the *Building Act 2004*, a report setting out the extent to which the building work meets the standards set out in the guidelines; and
- for a class 2 building, a report giving advice about the application for a certificate of occupancy that includes:
 - the extent to which the building has been completed in accordance, or substantially in accordance, with the prescribed requirements for the building work;
 - the extent to which the building as erected or as altered is fit for occupation and use as a building of the class stated in the approved plans for the building work; and
 - if the building work was carried out other than in accordance, or substantially in accordance, with the approved plans for the building work, the way in which the building work is inconsistent with the approved plans for the building work and the impact, if any, of the inconsistency.

This provision defines nominated public servant to mean a public servant nominated under new section 33AA (1).

Clause 6 Section 35B heading

This clause substitutes the section heading as a result of a new section being inserted before it.

Clause 7 Section 39

This clause amends the minimum amount for insurance cover for insurable residential building work from \$85 000 to \$200 000.

Clause 8 Section 41

This clause amends the period of claims for insurable residential building work from 90 days to 180 days.

Clause 9 Dictionary, note 2

This clause signposts the definition of ‘public servant’ as a term that is defined in the *Legislation Act 2001*.