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23/04450

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Chair

Standing Committee on Justice and Community Safety

By email: scrutiny@parliament.act.gov.auDear Chair 

I write in response to comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Committee) in its *Scrutiny Report 21* in relation to the *Planning Bill 2022* (the Bill). I apologise for the delay responding to the Committee.

I thank the Committee for its comments relating to the Bill. The Committee's comments requesting a response are addressed below.

Right to recognition and equality before the law

The Committee requested further information on why any limitation of the right to equality in the granting of leases is reasonable in consideration of the *Human Rights Act 2004* (the HRA).

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 widespread issue within Australia and there are a range of initiatives and programs that the ACT Government is pursuing to make housing more accessible. Mechanisms such as this one 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 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.

A supplementary explanatory statement will be notified to reflect this information.

Right to Privacy and Reputation

The Committee requested further information on whether it would be possible for a complainant to identify themselves, but request their identity and the information which may reasonably lead them to being identified, to not be disclosed further without their consent.

Complainants can identify themselves, but request that their identity and information which may reasonably lead to them being identified not be disclosed further without their consent. The request would be considered on a case-by-case basis. Such requests would still be subject to other relevant laws, for example the *Freedom of Information Act 2016* and *Information Privacy Act 2014*.

Section 410 of the Bill sets out the form a complaint must take, which includes providing the name and address of the person making the complaint in writing. However, pursuant to 410(2) the Authority can accept a complaint in another form, including anonymously.

Individuals who make complaints may prefer to do so anonymously in some circumstances, however this may affect their ability to be informed of the action taken in response to their complaint and thus affect their third-party appeal rights in the ACT Civil and Administrative Tribunal (ACAT).

Section 416 of the Bill provides that the Authority may make guidelines about the action that may be taken in relation to complaints and the circumstances in which the action may be taken. The Authority will explore options for a person to withhold their identity, but still be notified of the action taken in response to their complaint.

It should be noted that the Bill includes serious penalties for a person who causes or threatens to cause a detriment to someone else because of a complaint (refer section 406 of the Bill). A maximum penalty of 50 penalty units, imprisonment for 6 months, or both, would apply.

Rights in Criminal Proceedings

The Committee requested further information on why a maximum penalty of 60 penalty units for certain strict liability offences is considered necessary in order to achieve the objectives of the Bill.

As outlined in the Committee's comments there are six instances where the maximum penalty slightly exceeds that provided by the Guide to Framing Offences. These are for behaviours where development has commenced without approval, or counter to the approval provided, where a controlled activity order, a direction to undertake rectification work or a prohibition order has been contravened. This behaviour can have serious and/or permanent impacts on the community and/or environment, which in some instances, will not be able to be rectified. It is considered that a reduced penalty would not reflect the seriousness of these offences.

As the Bill does not have a licensing framework for development or other mechanisms to provide non-financial penalties, there is a need to make sure that strong penalties apply to act as a deterrent and stop future offences from occurring. A low financial penalty may not deter this behaviour, especially where significant income is generated from a development. Contravention of these offences will undermine the operation of the entire planning system. Relevant defences are provided for in the Bill for the defendant, however in most cases, the defendant will likely be well aware of their obligations when committing the offence.

Right to a Fair Trial

Judicial Review Rights - Territory Priority Projects and Territory Plan

The Committee sought further information on 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.

As the Committee notes, the Bill limits the right to a fair trial by placing some restrictions on review rights. For example, the ability to review a Territory Priority Projects declaration under section 215 of the Bill is restricted by section 216 of the Bill, 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 of the Bill similarly limits the ability to challenge the validity of a Territory Plan provision, where challenges cannot be brought 3 months after the day the provision or amendment commenced.

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 or education from a school expansion project. In making the decision to declare a Territory Priority Project, the Minister and the Chief Minister are 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 Chief 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. A supplementary explanatory statement will be notified to reflect this information.

Procedural Fairness – Rectification Directions and Prohibition Notices

The Committee sought further information on 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.

As outlined in the explanatory statement, the use of rectification directions and prohibition notices may limit a person's human rights, such as the right to privacy and reputation. This is considered proportionate, in order 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. Several safeguards are included in the Bill in relation to the use of these powers, including that the direction/notice is limited to the activity set out in the order, a Magistrate or the Territory Planning Authority can only make a direction/notice for the purposes set out in the Bill and appeal rights are established.

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. A supplementary explanatory statement will be notified to reflect this information.

Creation of offences by regulation

The Committee sought further justification on why it is appropriate 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. It is worth noting there is currently only one offence proposed to be included in the regulations, which carries a maximum of 10 penalty units. A supplementary explanatory statement will be notified to reflect this information.

Henry VIII Clause

The Committee sought information on why it is necessary to include the Henry VIII clause, and what alternatives were considered and why they are not sufficient in the context of the Bill.

The transition between the *Planning and Development Act 2007* and the Bill is relevant to many development contracts and approvals as well as arrangements relating to projects of varying sizes and complexity. It is important to make sure that unforeseen or minor technical issues do not unnecessarily impact these projects. This has the potential to impact the community, where a project is providing benefits to the community.

Transitional provisions have been included in the Bill to resolve any unforeseen issues to support the commencement or operation of the Bill. There is a risk, given the number of arrangements in place under the current legislation and the complexity of these relationships, for unintended consequences to impact these arrangements. It is important for the Government to be responsive and be able to identify and deal with any unforeseen challenges that may emerge during the transition period.

The power to make transitional regulations only allows the Executive to respond in a temporary way to matters of a transitional nature, which may arise within three years after the Bill has commenced, particularly to provide for a smooth and efficient transition period to the new planning scheme. The regulation itself is disallowable and any extension to this time period would be subject to disallowance by the Legislative Assembly. As the power to make transitional regulations is limited in its scope to transitional matters, it does not represent an inappropriate delegation of Territory powers.

A Henry VIII clause was deemed a reasonable means of being responsive whilst still being accountable through the regulation making process. During the development of the Bill the Government has considered whether it was necessary to include a Henry VIII clause and instead bring any identified amendments through the normal Cabinet and Assembly process. However, as outlined above, due to the need for a timely response, this was not considered practical.

Incorporation of instruments and displacement of section 47(6) of the *Legislation Act 2001*

The Committee sought further information on why it is considered necessary to provide for the incorporation of instruments, as in force from time to time in sections 48, 96, 243 and 519 of the Bill and to displace section 47(6) of the *Legislation Act 2001*. The Committee also sought further advice on the alternatives considered and why it was not sufficient to allow regulations to displace section 47(6) of the *Legislation Act 2001* for instruments, where copyright or other reasons prevent notification.

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. As outlined in the explanatory statement, the Bill was drafted to allow for the incorporation of instruments that may be required to support the Territory Plan and the Design Review Panel. The disapplication of subsection 47(6) of the *Legislation Act 2001* would 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.

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.

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 it is true that 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.

A supplementary explanatory statement will be notified to reflect this information.

I trust that this response addresses the Committee's comments in relation to the Bill.

Yours sincerely

A black rectangular box redacting the signature of the Minister for Planning and Land Management.

Minister for Planning and Land Management

21/2/2023