ACT Planning System Review and Reform Project

ACT Government

Planning Bill – Policy Overview March 2022

Acknowledgment to Country

Yuma
Dhawura nguna ngurumbangu gunanggu Ngunnawal.
Nginggada dindi dhawura Ngunnawalbun yindjumaralidjinyin.
Mura bidji mulanggaridjindjula.
Naraganawaliyiri yarabindjula.

Hello
This country is Ngunnawal (ancestral/spiritual) homeland.
We all always respect elders, male and female, as well as Ngunnawal country itself.
They always keep the pathways of their ancestors alive.
They walk together as one.

The Environment, Planning and Sustainable Development Directorate acknowledges the Ngunnawal people as Canberra's first inhabitants and Traditional Custodians. We recognise the special relationship and connection that Ngunnawal peoples have with this Country. Prior to the dislocation of Ngunnawal people from their land, they were a thriving people whose life and culture was connected unequivocally to this land in a way that only they understand and know, and is core to their physical and spiritual being. The disconnection of the Ngunnawal people from Culture and Country has had long-lasting, profound and ongoing health and well-being effects on their life, cultural practices, families and continuation of their law/lore. The Environment, Planning and Sustainable Development Directorate acknowledges the historic dispossession of the Ngunnawal people of Canberra and their surrounding regions. We recognise the significant contribution the Ngunnawal people have played in caring for Country as for time immemorial they have maintained a tangible and intangible cultural, social, environmental, spiritual and economic connection to these lands and waters.

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FOREWORD

Over the past two years, the Environment, Planning and Sustainable Development Directorate has been reviewing the ACT planning system to improve and modernise the way we plan for our city's future. We have heard extensively from the community and industry on how our planning system can be improved and, as Minister for Planning and Land Management, I am determined to carry out reforms that support our city's growth while maintaining its valued character.

Our vision is for a modern planning system that is accessible, easy to use and delivers improved development outcomes across the ACT. Through the ACT Planning System Review and Reform Project we've found parts of our current legislation to be complex, cumbersome and prohibitive to achieving this vision. So, we are drafting a new Planning Act, keeping the parts which are still effective and building the best planning system to meet the needs of current and future Canberrans.

The new Planning Act will be a fundamental feature of our reformed planning system. It will be the main mechanism for delivering a simpler and easier to use system and will focus on improving development outcomes. Through the Act, we will set the framework for an 'outcomes-focussed' Territory Plan which will allow us greater flexibility in the way we assess developments. This will place an emphasis on improving design quality and built outcomes so that developments can perform well within their local context.

In developing the draft legislation, we have examined the reform process of other jurisdictions across Australia that have undertaken planning reforms in recent years. We've adopted elements where they suit our context and learnt from how they've communicated the shift from 'old' to 'new' with their communities.

I recognise the interest that our industry and community partners have with this work and their input has been greatly appreciated. We've been working closely with a number of stakeholders, sharing policy ideas and capturing their feedback along the way. This work has helped inform our final policy positions, outlined in this paper, and allowed us to balance community and industry needs through the processes within the Act.

Designing and implementing a modern, outcomes-focussed planning system which enables us to deliver a sustainable and compact city has been my top priority as Minister for Planning and Land Management. As the ACT Planning System Review and Reform Project draws towards a close, and we look towards implementation through a new Planning Act and reformed Territory Plan, I am proud of the innovative work undertaken which will set our city on the right path for decades to come.

Mick Gentleman MLA

Minister for Planning and Land Management

INTRODUCTION

This paper has been prepared to outline the major policy positions contained in the Planning Bill. The paper provides information on changes from policy positions contained in the Planning and Development Act 2007 (2007 Act) and the policy rationale for the changes contained in the Planning Bill.

The Planning Bill is being prepared as an outcome of the ACT Government's Planning System Review and Reform Project (the Project). The paper details how the Planning Bill incorporates the proposed directions for reform included in the Directions Papers.

In preparing the Directions Papers and as part of ongoing work, a range of planning systems of other national and international jurisdictions have been examined, with some referred to within this paper where one may have been relevant to the approach proposed for the ACT.

A new Planning Act is a fundamental element of the reformed planning system. The Planning Bill retains many existing policy positions which are fit-for-purpose and remain effective.

The Government has agreed to release a public consultation draft of a new Planning Bill for a three-month period to provide an opportunity for broad community comment on the proposed legislation.

This paper is one in a series of policy papers to support the ongoing reform outcomes from the Project.

PLANNING SYSTEM REVIEW AND REFORM PROJECT

The ACT Government recognised the need for change to the planning system and agreed to the broad scope of the Project in March 2019. It is neither a 'light-touch' approach to reform nor a full-scale 'start from scratch' approach. It is a holistic review and proposed reform that will deliver a more 'spatially-led' and 'outcomes-focussed' planning system.

This means a greater emphasis on strategic planning and spatial direction for the Territory at different scales, from the city level to the local-area and site levels of planning, as well as improved planning and built form outcomes.

In establishing the scope, the following were identified as not being considered as part of the Project:

- the structure and role of ACT Government planning bodies
- incorporating the National Capital Plan into the Territory Plan
- a developer contribution scheme
- incentive schemes
- the creation of separate suburb-specific plans
- removal of the leasehold system
- an additional/alternative development approval model, such as planning panels
- changes to the ACT Planning Strategy 2018.

The Project purpose is to deliver a planning system that is clear, easy to use and facilitates the realisation of long-term aspirations for the growth and development of Canberra while maintaining its valued character.

The Project objectives are:

- enabling the sustainable growth of the city without compromising its valued character
- providing clarity of processes, roles, and outcomes for the city's community
- providing flexible assessment pathways that are appropriate to the scale and scope of development.

In November 2020, the Environment, Planning and Sustainable Development Directorate released a set of Directions Papers which detailed the outcomes of the investigation and benchmarking phases of the Project and set the future directions for reform. The Planning Bill gives effect to many of the reform directions and provides the detailed policy changes to deliver the legislative framework for the reformed planning system.

The Project team has shared policy proposals for the new legislation with key community and industry stakeholders in engagement forums such as the Environment and Planning Forum, the Project's Stakeholder Working Series and a technical legislation working group. The testing of ideas and feedback received has helped to inform the final policy positions contained in this paper and to guide an appropriate balance between competing policy outcomes across the Bill.

THE PLANNING BILL – POLICY

KEY PRINCIPLES

The Planning Bill has several key principles which respond to the directions of the Project and which have guided the development of policy positions included in the Bill.

FIGURE 1: KEY CONCEPTS IN THE REFORMED PLANNING SYSTEM

Easy to use

This principle refers to people's interaction with the planning system and the customer experience across all elements of the planning system. It includes clear and user-friendly processes for applications, clearer linkages between different processes and (where able to provide) digital platforms that support the planning system being focussed on the user experience. Ease of use is about having information that is easy to find about important matters, like how the planning system works, what an area is proposed to look like in the future (strategic planning) and what you can do on a piece of land.

The principle has also guided attempts to reduce the number of layers within the planning system, including the Act and the Territory Plan, and reduce the complexity of legislative processes and provisions of the Territory Plan.

The principle does not mean a simplification of the planning process or trying to make planning a simple task. Planning is complex and involves the consideration and coordination of competing ideas and expectations, priorities and outcomes. Overall, the planning system should be able to be used by everyone, not just planning professionals and the planning authority.

Certainty

The principle of certainty applies to both strategic and statutory processes within the planning system. The principle supports better information on the strategic planning work that is undertaken to provide a greater indication of the desired future for areas. This will benefit both the community and industry in understanding how areas are intended to look, change and be developed, guided by strategic planning to meet the evolving needs of Canberrans.

This also includes certainty of the considerations when deciding on an application and what statutory documents need to contain. The principle of certainty also applies to timeframes for the processes within the planning system. It also means certainty of rights and responsibilities. Certainty does not mean certainty of receiving an outcome or an approval. All proposals will be subject to assessment on their merits against the relevant planning processes and provisions that apply.

Flexibility

Flexibility means being less prescriptive and more outcomes focussed within the reasonable parameters set by the planning system. Flexibility will be achieved through an outcomes-focus; however, flexibility will be limited where it could lead to unacceptable impacts. Flexibility doesn't mean anything goes, but it does refer to there being more than one way to achieve a desired outcome.

At the strategic planning level, this means indicating areas where change can occur and having strategic planning and development controls that can facilitate good planning outcomes, which may be in more than one way. At the development level, there will be flexibility on how developments can be proposed to be delivered within the parameters of the performance provisions of the Territory Plan.

We want the planning system to encourage innovative and flexible planning and design solutions and an outcomes focus through the wording of processes and provisions, noting that some may include a mandatory component to be met. Flexibility will also be considered for the types of uses which can be undertaken in zones, if it is consistent with other uses in the zone and will not negatively impact on the primary uses desired for the zone. For built form development outcomes, flexibility will be informed by design guidance material and examples of how to meet outcomes-focussed provisions.

Certainty and flexibility are concepts that are not in conflict, as they refer to different aspects of the planning system.

Transparency

Transparency is a necessary feature to build trust and confidence in the planning system and to go together with increased flexibility and an outcomes-focussed system. The new Planning Act explores ways to make processes and decision-making more transparent and considers the use of the planning website in a much greater capacity to provide easier access to information.

Transparency is also reflected through engagement with community at important stages of planning and communicating in a clear way.

The increased transparency includes:

- proactively publishing development application documents beyond the public notification period
- publishing formal advice from the authority to an applicant, as well as the applicant's response
- adding exemption declaration applications and decisions to the public register.

These measures will allow the community to see how applications are being assessed and follow the assessment of an application through the process.

Outcomes focussed

An outcomes-focussed planning system means that our primary focus is on the achievement of good planning and development outcomes across the various processes of the planning system. Good planning outcomes can be achieved at the different scales of the planning system. An outcomes focus goes beyond the built form and considers the broader policy outcomes that can be achieved through the planning system, such as wellbeing, health, recreation, employment, housing and environment outcomes.

This means a system that focuses on the substantive matters to be addressed without specifying in detail how that will be achieved. It is one that is centred on the quality, results, and performance of planning system outcomes, rather than rule compliance.

For strategic planning and spatial planning, this might be expressing the physical, environmental, economic and social outcomes that are desired and what that might mean and look like with regard to public realm, housing, connectivity and a range of other features.

Under our current system, buildings are too often designed with a focus on complying with minimum rules to achieve development approval. Often a design doesn't add to and connect with its context, and this can lead to missed opportunities and not the best development or community outcomes.

In the reformed system, the authority will be more descriptive of what good planning outcomes are, and what the desired outcomes are for an area. This will be informed by strategic and spatial planning policy work, with desired planning outcomes set by the strategic planning and given effect through the Territory Plan and controls.

For developments, the focus will be on how the development performs from a range of considerations rather than a limited focus on whether it meets individual prescriptive planning rules. Developments must perform well in their site context. This includes consideration of built form, public spaces and interactions with surrounding blocks, amongst other planning considerations.

With the outcomes-focussed planning system, a hybrid approach is proposed for the new Territory Plan which will allow for many provisions to be written with an outcomes focus, but this doesn't preclude mandatory provisions, which will be included where it is considered relevant, for example, to limit impacts on neighbours and public spaces and control unsuitable development. This could also mean mandatory requirements for maximum height limit, site coverage or setbacks in residential zones that meet other performance outcomes as well.

CHAPTER 1 – PRELIMINARY

This chapter contains administrative provisions for the Act, including the naming of the Act as the *Planning Act* and providing for the commencement of the Act to occur on a date fixed by the Minister by written notice. This will allow an appropriate transition period between the 'old' planning system and the 'reformed' planning system.

CHAPTER 2 – OBJECT, PRINCIPLES AND KEY CONCEPTS

UPDATED OBJECT

In establishing the reformed planning system, the Planning Bill requires a new object provision that considers the broader purpose of the reformed planning system and its integration with other ACT Government policies and strategies, and how the planning system can support and enhance the lives of people living in the Territory.

The object of the 2007 Act is focussed on the limited concepts of orderly and sustainable development, and social, environmental, and economic aspirations. The reform of the planning system, and the development of a Planning Bill, presents an opportunity to be more aspirational and consider the wider context of the planning system and its ability to deliver liveability, prosperity, and the wellbeing of residents through an outcomes-focussed planning system.

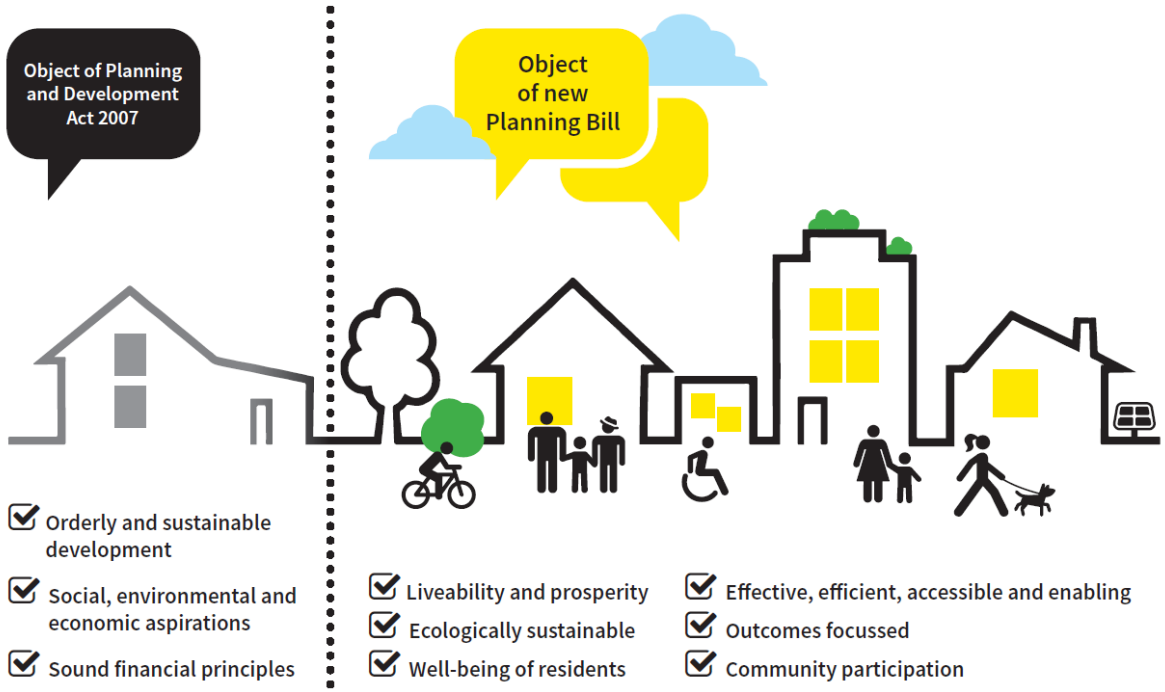
The broadened object clause provides a new starting point for thinking about planning in the Territory and goes beyond the bricks and mortar focus to make sure that the planning system delivers for the wide-ranging and often changing needs of all parts of the ACT community.

The Planning Bill recognises that the following concepts are important to achieve increased liveability, prosperity and wellbeing for Canberra's residents:

- the knowledge, culture and traditions of the traditional custodians of land within the Territory, the Ngunnawal people
- planning for population growth alongside the protection of the natural, cultural and built aspects of the Territory that make it an attractive place to live
- Canberra's biodiversity and landscape setting, including integration of natural, built, cultural and heritage elements
- high-quality, people-focussed, and design-led built outcomes
- a sustainable and resilient environment.

A comparison of the concepts in the 2007 Act and the Planning Bill is provided in Figure 2 below. The object provision in the Planning Bill draws inspiration from the South Australian Planning, Development and Infrastructure Act 2016.

FIGURE 2: COMPARISON OF CONCEPTS IN THE OBJECT OF THE PLANNING AND DEVELOPMENT ACT 2007 AND THE PLANNING BILL



PRINCIPLES OF GOOD PLANNING

The reformed planning system will encourage an outcomes-focussed planning system and will place a greater emphasis on strategic and spatial planning. In the reformed system, strategic and spatial planning will be vital to investigating and determining the desired future planning outcomes for the Territory.

Planning is often a complex task, with the need to consider, balance and prioritise sometimes competing policy goals. To highlight the importance of good strategic planning, and the range of planning principles to be considered when undertaking strategic and spatial planning, the Planning Bill proposes to include *principles of good planning*.

The principles of good planning are a helpful tool in directing policymakers and those administering the Act to the relevant frameworks and considerations when preparing strategic planning policies and exercising functions under the Act. This helps sets a benchmark for how planning will be undertaken under the reformed planning system created by the Act. It also assists with communicating to the industry and the public about the purpose of planning and how good planning should occur.

The categories of principles of good planning included in the Planning Bill are set out in the figure below. The principles have drawn on recent changes in South Australia (among other areas) and the South Australian Planning, Development and Infrastructure Act 2016 and considered for the ACT context.

FIGURE 3: PRINCIPLES OF GOOD PLANNING

PRINCIPLES OF GOOD CONSULTATION

The reformed planning system recognises the importance of public consultation in planning processes. The Planning Bill introduces a new key concept: *principles of good consultation*. The Minister is given power to make a guideline setting out principles of good consultation and how those principles will be implemented under the Planning Bill. During public consultation on the Planning Bill, community views will be sought about the principles that should be included in the guidelines and how the principles should be given effect in the reformed planning system.

DEVELOPMENT, EXEMPT DEVELOPMENT AND USE

These concepts are unchanged in the Planning Bill from the 2007 Act. However, the provisions have been reordered to bring a reference to *exempt development* into the key concepts of the Act, to highlight the importance of this feature in the planning system. Changes to the provisions for exempt development types are discussed in further detail below.

ECOLOGICALLY SUSTAINABLE DEVELOPMENT

The term *ecologically sustainable development* has been included in the Planning Bill and expands on the term sustainable development that was used in the 2007 Act. The term *ecologically sustainable development* has been included as a fundamental feature of the object of the Act.

The proposed object refers to the planning system promoting and facilitating ecologically sustainable development as an integral element in enhancing liveability and wellbeing of residents and ensuring environmental and sustainability considerations are at the forefront of the planning system.

The definition of the term *ecologically sustainable development* retains the existing elements of the term sustainable development from the 2007 Act, while also incorporating contemporary ideas, with inspiration drawn from section 3(2) of Queensland's Planning Act 2016. The expanded definition of *ecologically sustainable development* broadens the concepts to be considered from the 2007 Act and requires the effective integration of:

- the protection of ecological processes and natural systems at local, Territory and broader landscape levels
- the achievement of economic development
- the maintenance and enhancement of cultural, physical and social wellbeing of people and communities
- the precautionary principle
- the inter-generational equity principle.

These terms are further defined in the Planning Bill.

CHAPTER 3 – TERRITORY PLANNING AUTHORITY AND CHIEF PLANNER

NAMING

The drafting of a new Planning Act and the move to an outcomes-focussed planning system is a significant shift from the 2007 Act. It is considered necessary and appropriate to create a new entity as the planning authority, to signify this change and differentiate the new system from the old system.

The authority under the Planning Bill is named the *Territory Planning Authority*. This aligns the name of the Authority with its primary function. Similarly, the Planning Bill provides for the appointment of the Chief Planner as the statutory officeholder who performs the functions of the Territory Planning Authority.

The renaming of the Territory Planning Authority is proposed to delineate the role of the authority in the outcomes-focussed reformed planning system from the planning and land authority's role in the existing system. This will provide a clear distinction for the Territory Planning Authority from its predecessor and recognises the expanded role of the authority in seeking better development outcomes and considering development applications from a performance perspective.

FUNCTIONS OF THE AUTHORITY

In the reformed planning system, the Territory Planning Authority has expanded functions. These additional functions are not just to decide applications for development approval, but to promote the strategic planning of the Territory, high-quality design and good planning outcomes.

The functions for the authority in the reformed planning system are (with added functions in bold):

- to prepare and administer the Territory Plan,
- to continually review the Territory Plan, propose amendments **and consider initiated** amendments as necessary
- to plan and regulate the development of land
- to advise on planning and land policy, including the broad spatial planning framework for the ACT **and the achievement of desired future planning outcomes**
- **to promote and implement the ACT Planning Strategy and district strategies**
- **to promote high-quality design and good planning outcomes**
- to maintain the digital cadastral database under the Districts Act 2002
- to make available land information
- to grant, administer, vary and end leases on behalf of the Executive
- to grant licences over unleased Territory land
- to decide applications for approval to undertake development
- to take enforcement action under this Act and other Territory laws
- to provide planning services, including services to entities outside the ACT
- to review its own decisions **and participate in external review processes**
- to provide opportunities for participation in planning and decision-making processes
- to promote public education about, and understanding of, the planning system, including by providing easily accessible public information and documentation on planning and land use.

The following chapters include complementary provisions enabling the authority to perform its increased functions throughout the planning system.

CHAPTER 4 – STRATEGIC AND SPATIAL PLANNING

The need to more clearly outline the relationship of strategic elements of the planning system was identified in the Directions Papers. An amended chapter focussing on strategic and spatial planning is proposed which delivers on the reform directions for the Project, including:

- placing a greater emphasis on strategic and spatial planning
- providing a clear relationship between plans
- improving the line of sight from strategic planning processes to the Territory Plan
- better integrating other planning-related Government policies and strategies into the reformed planning system.

The purpose of the various plans will continue to be reviewed as the district strategies and the Territory Plan are developed. This may result in refinements, with the purpose being to set a clear hierarchy of plans with a clear purpose toward guiding and achieving good planning outcomes.

KEY PRINCIPLES

Emphasis on strategic and spatial planning

Through the new object, the reformed planning system signals the important role of planning in shaping the Territory and providing a framework through which the liveability, prosperity and wellbeing of residents can be achieved.

The Project has identified opportunities to provide improved spatial policy for how the Territory's growth should be managed. The need for more consideration of planning outcomes at a district-scale has been identified, as the existing Planning Strategy has a Territory and city-wide focus. Through district-level planning we can identify those areas of value, and those areas where growth and change need to occur, and tailor provisions in the planning system to implement the Planning Strategy at the district-scale and give effect to the object of the Act.

Improved line of sight

The Project has identified that there is often a disconnect and delay between new planning policy positions and their being translated into the Territory Plan. The proposed response to this is twofold:

i) To provide strategic and spatial planning at the district scale.
ii) To simplify processes and identify more efficient ways to turn Government policy into planning provisions that developments must consider and be assessed against.

An example of this is the master plan program, where from a strategic and spatial perspective the ACT Government completed significant policy work with the community to develop master plans for commercial centres and indicated proposed integrated change that would occur.

This type of planning is proposed at the district scale to provide integrated strategic and spatial planning for the future of the district.

From the process side, the master plans had to have new statutory consultation and consideration processes for the Territory Plan variations to give effect to the policy positions outlined in the master plans. The process was onerous and lengthy, both in terms of delivering outcomes and certainty for the community, lessees and government administration. We have heard this in feedback from a range of stakeholders.

The Project has also found the need to better integrate other Government policies and strategies into the strategic planning processes of the reformed planning system. The planning system can often be the vehicle for delivering Government's policy agenda, for example the ACT Climate Change Strategy and ACT Transport Strategy each contain planning-related actions that require an integrated approach to deliver.

The proposed improvements in the strategic and spatial planning chapter will make explicit reference to the strategic planning documents being able to incorporate the outcomes and actions from other Government strategies and policies.

FIGURE 4: STRATEGIC AND SPATIAL PLANNING IN THE ACT

THE PLANNING STRATEGY

The Planning Bill retains, strengthens and clarifies the role of the Planning Strategy within the planning system as the key strategic planning document in the Territory. The Planning Strategy must set out the long-term planning policy and goals for the ACT, consistent with the object of the Act. It must also include an overarching spatial vision, strategic directions for the ACT and the desired future planning outcomes.

Importantly, the Planning Strategy may also include planning-related policy from other ACT Government policies and strategies. This responds to the Project directions to place a greater emphasis on strategic and spatial planning and better integrate other planning-related Government policies and strategies into the planning system. It is proposed to add a legislative requirement that the Executive must undertake public consultation before making the Planning Strategy.

The Planning Strategy must be taken into account when the Minister is considering whether to approve a draft major plan amendment, and by the Territory Planning Authority when reviewing the Territory Plan and preparing amendments to it.

The Executive will be required to consider whether to review the Planning Strategy at least once every five years. The Planning Bill sets out that, in deciding whether a review is warranted, the Executive must consider whether the strategy continues to reflect the long-term planning policy and goals for the ACT. This will be a check in the system to ensure the Planning Strategy and Territory Plan are aligned and working together.

The 2018 Planning Strategy will be transitioned to be in effect under the new Planning Act, once enacted. A new Planning Strategy will be prepared under the new Act for the reformed planning system.

DISTRICT STRATEGIES

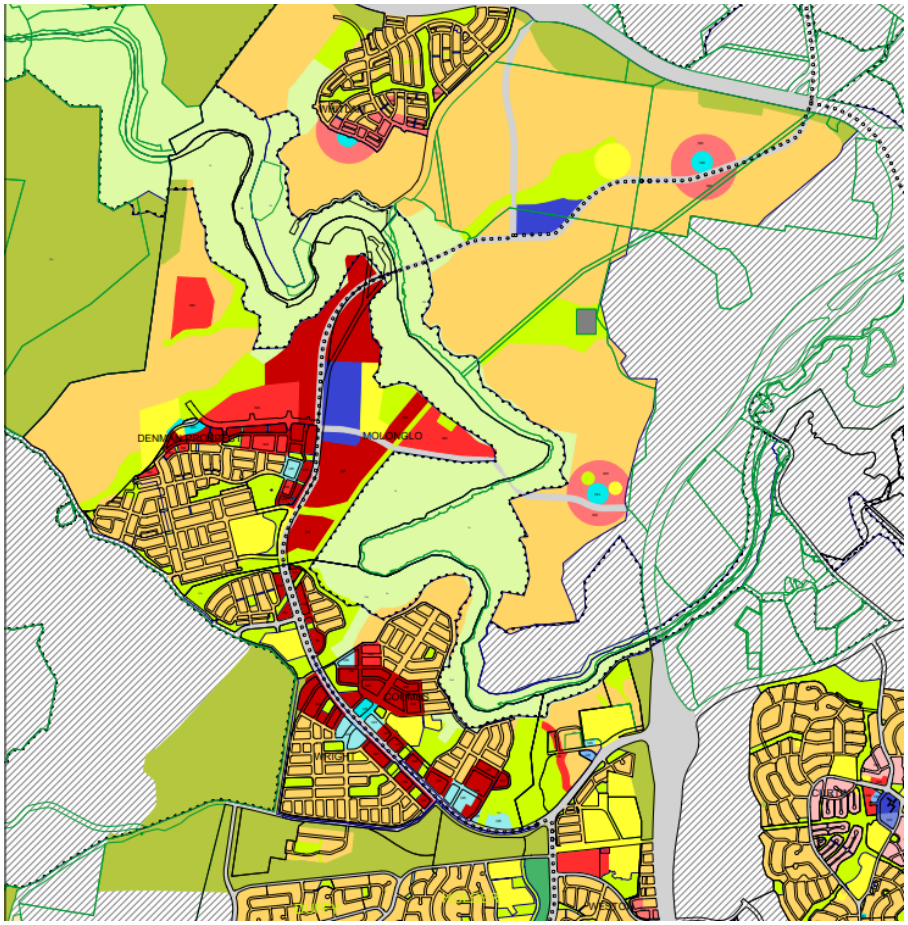
The Directions papers, released in November 2020, identified limited linkages between city-wide strategic planning and the detailed, and site-specific, Territory Plan. Building on the 2018 Planning Strategy, the project directions identified an opportunity to fill the gap with district-level planning.

A district strategy is a continuation of strategic and spatial planning (expressed through the Planning Strategy) at the district-level but looking at the same long-term timeframe. District strategies will contain the long-term planning policy and goals for a district and must be consistent with the Planning Strategy.

They will include strategies, spatial policies and desired future planning outcomes for the district to guide and manage change in the district in the future. They will set out principles and policies for development of areas within the district, including future urban areas.

Finally, district strategies may identify areas within a district for future detailed planning, such as planning studies and investigations. Here, the Planning Bill retains the important concept of further plans to set further detail for an area, including future and existing urban areas.

FIGURE 5: TERRITORY PLAN ZONING FOR THE MOLONGLO DISTRICT



The Planning Bill recognises this important role in the relationship of further levels of strategic and spatial planning documents and how these set the strategic policy basis for provisions of the Territory Plan.

This approach also supports the Government's policy of toward 70% of new residential development within the urban footprint (Planning Strategy 2018), by providing the tools necessary to facilitate strategic planning in all contexts throughout the Territory.

District strategies will allow for the integration of other relevant Government strategies and policies. Workshops were undertaken by EPSDD in 2021 to hear from the community on what they would like district planning to recognise and value in their district. There are currently eight districts identified.

A district strategy is likely to evolve and be added to over time as more spatial and strategic planning is undertaken for a district. The district strategy may be updated from time to time, to ensure it reflects the desired planning policy outcomes for the district and remains consistent with the Planning Strategy.

It is proposed to add a legislative requirement that the Executive must undertake public consultation before making a district strategy.

ESTATE LEVEL PLANNING

Estate planning will continue as an important component of the strategic and spatial planning process. See further detail in the Significant Development chapter.

STATEMENT OF PLANNING PRIORITIES

The renaming of the Statement of Planning Intent (SPI) to a Statement of Planning Priorities addresses an issue with the 2007 Act that the SPI lacks a clarity of purpose. This presents an opportunity to refocus the role of the Minister's statement to be a statement given to the planning authority of the key priorities arising from the Planning Strategy and the actions required to deliver those priorities.

This will provide a focus for the work of the authority, including planning policy development and legislative change, over the short–medium term period (e.g. up to five years). The statement is renamed as a statement of planning priorities to reflect its purpose, as well as linking it to delivery of the planning principles identified in the Planning Strategy.

This achieves a clear purpose for the statement in the reformed planning system.

CHAPTER 5 – TERRITORY PLAN

The Australian Capital Territory (Planning and Land Management) Act 1988 (Cth) (PALM Act) applies to the ACT. Relevantly, section 25 of the PALM Act requires the ACT Legislative Assembly to make laws conferring on the Territory planning authority the function of preparing, administering, reviewing and proposing amendments to the Territory Plan. The Territory Plan must not be inconsistent with the National Capital Plan.

The PALM Act also provides the object of the Territory Plan: *to ensure the planning and development of the Territory to provide the people of the Territory with an attractive, safe and efficient environment in which to live and work and have their recreation*.

The Territory Plan must define the planning principles and policies for giving effect to the object of the Territory Plan, and it may include the detailed conditions of planning, design and development of land and the priorities in carrying out such planning, design and development.

Chapter 5 of the Planning Bill gives effect to the requirements of the PALM Act. The chapter establishes a legislative link between the Territory's planning strategies and the Territory Plan. The Chapter also provides a connection to other Government strategies, policies or plans that contain planning-related outcomes, which may be given effect via the Territory Plan.

In accordance with the PALM Act, Chapter 5 of the Planning Bill includes procedures for amending the Territory Plan as well as ascertaining and seeking the views of the public and the National Capital Authority. As with section 50 of the 2007 Act, the Territory, the Executive, a Minister or a Territory authority must not do any act, or approve the doing of an act, that is inconsistent with the Territory Plan.

MAKING A NEW TERRITORY PLAN

The Planning Bill will require a new Territory Plan to give effect to strategic and spatial planning outcomes within the reformed, outcomes-focussed planning system. The Planning Bill details the procedures required for the making of the new Territory Plan.

The process for making the new Territory Plan will involve the Territory Planning Authority preparing a draft Territory Plan, not inconsistent with the National Capital Plan, and undertaking consultation.

The process for approving the initial Territory Plan will be similar to the process that was provided in the 2007 Act, whereby the Legislative Assembly may approve the plan by motion. Once the Territory Plan is approved by the Assembly, it is a notifiable instrument placed on the Legislation Register.

Giving effect to strategic and spatial planning

The Territory Planning Authority, in preparing and proposing amendments to the Territory Plan, must give effect to the Planning Strategy and district strategies. These provisions of the Planning Bill achieve a more direct link between planning policies and the development controls within the Territory Plan.

Improved connection with Government strategies

The Planning Strategy and district strategies are the main strategic policy documents which set out the policies within the Territory for planning and development. However, other Government strategies, policies and plans may also include outcomes which can be achieved through the planning system.

As such, the Planning Bill permits the Territory Planning Authority, when preparing the new Territory Plan or preparing amendments to it, to give effect to them in the Territory Plan, provided there has been adequate public consultation. This improved connection and visibility is considered more effective than the limited and abstract statement of strategic directions that is part of the 2008 Territory Plan.

CONTENT AND STRUCTURE

The Planning Bill provides high-level requirements for the content of the Territory Plan and establishes the outcomes focus of the plan. The Planning Bill requires the Territory Plan to contain:

- a map (the Territory Plan map) identifying districts and designating land-use zones in the ACT
- the policy outcomes to be achieved by the plan
- requirements and outcomes against which development proposals are assessed
- provisions that support compliance with requirements for undertaking development.

Policy outcomes will describe the intent of planning provisions and the desired policy outcomes intended to be achieved. They will aid the interpretation of provisions by describing the overarching policy objective.

Provisions are intended to be predominantly qualitative measures and describe how a proposed development should perform in relation to a particular element, or aspect of an element. Provisions will be aimed at achieving, at a more detailed level, the intent of applicable desired outcomes for a zone.

Expressing provisions in this performance-focussed way provides a stronger message in terms of the type and quality of development the planning system is seeking to facilitate and gives the Territory Planning Authority greater scope to consider more innovative proposals. For a development to obtain development approval, it must meet all performance provisions.

Acceptable measures or the like may be used to provide a quantitative or definitive path to achieve compliance with a performance provision. Any specified acceptable measure would not be the only way of achieving compliance with the associated performance provision and will likely be more than the minimum outcome to satisfy the provision.

Further detail on the proposed approach to detailed structure and content will be provided during the public consultation period. A draft of the new Territory Plan is currently being developed and will be the subject of public consultation processes throughout 2022. This will allow for meaningful engagement with technical and community stakeholders on the development of the new Territory Plan. Following the consultation processes and the finalisation of the draft plan, the proposed approach may be formalised through changes to the Planning Bill.

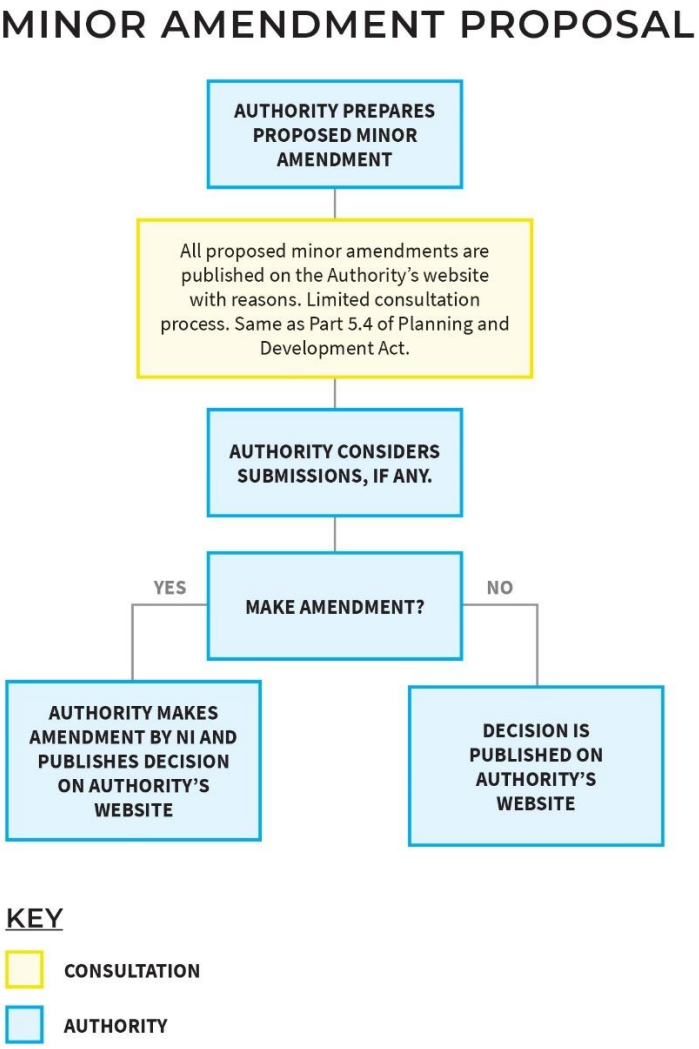
AMENDMENT PROCESSES

The Planning Bill provides mechanisms for the Territory Plan to be amended. The Territory Planning Authority is responsible for preparing proposed amendments to the Territory Plan. There are two types of amendments to the Territory Plan in the Planning Bill: minor and major.

Minor plan amendments

Minor amendments to the Territory Plan are the same as technical amendments under the 2007 Act and are prepared and approved by the Territory Planning Authority following any required consultation. The minor amendment process is detailed in Figure 6 on the following page.

FIGURE 6: PROCESS FOR MINOR (TECHNICAL) AMENDMENTS



Major plan amendments

Major amendments to the Territory Plan require public and NCA consultation, are approved by the Minister, may be referred to a Legislative Assembly committee for consideration, and are subject to Legislative Assembly review and disallowance (for a five-day period). The Minister may direct the Territory Planning Authority to prepare an amendment to the Territory Plan. This is the same process as is provided in the 2007 Act.

Under the Planning Bill there is a new process to initiate an amendment to the Territory Plan: proponent-initiated amendments. A revised process also applies to amendments to give effect to planning objectives contained in Government strategies, policies and plans.

Proponent-initiated amendment applications

The purpose of including this new process is to increase transparency in circumstances where a person other than the Authority suggests an amendment to the Territory Plan.

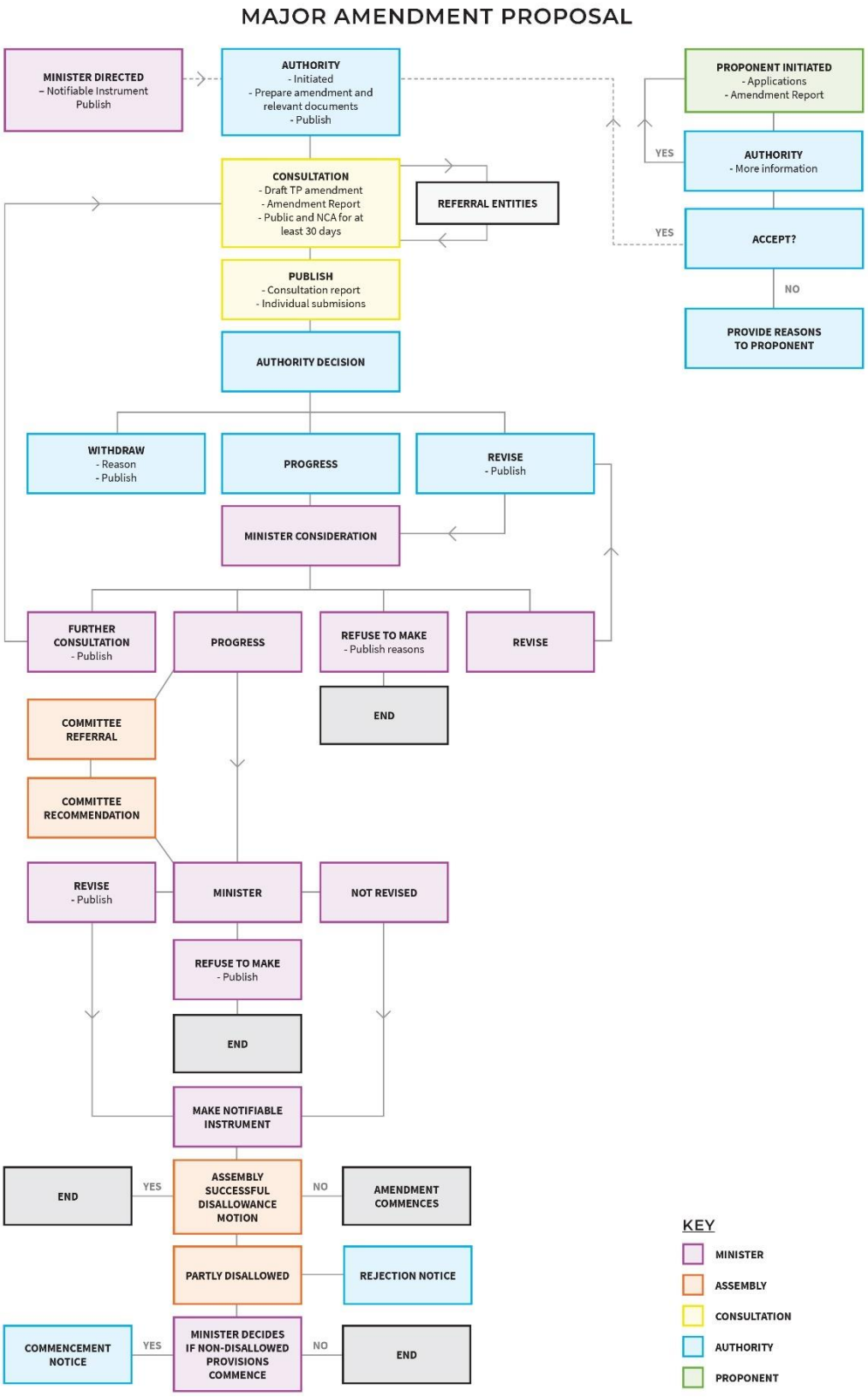
Under this new process, a proponent seeking to amend the Territory Plan may apply to the Territory Planning Authority with a proposed amendment to Territory Plan. The Territory Planning Authority then considers whether to accept the proposed amendment for detailed consideration. This two-phase consideration process allows the Authority at the outset to decline to consider those applications which are clearly contrary to Government policy or where the land in question is subject to ongoing detailed planning.

The Planning Bill sets out criteria the Territory Planning Authority must consider in determining whether to accept the application. Where the Territory Planning Authority accepts a proponent-initiated amendment application, it is the function of the Authority to then prepare a proposed amendment to give effect to the proponent's proposal, undertake necessary public and NCA consultation, and provide the proposed amendment to the Minister for consideration. It is important to note that accepting an application does not require the Authority to progress the proposed amendment or implement it in the form proposed.

The proponent's application, the material provided by the proponent, any additional information requested by or provided to the Authority and the decision to accept the application would all be published on the Territory Planning Authority's website. Subsequent documentation (the draft plan amendment, public comments) would be published in accordance with the standard process applying to Territory Plan amendments.

It is proposed to then have a discretionary power for the Minister to refer the proposed amendment to the relevant Legislative Assembly committee if it meets the criteria for Committee referral. The Minister decides whether or not to make the amendment having regard to the statutory criteria. Where the Minister approves the amendment, the instrument amending the Territory Plan is subject to disallowance by the Legislative Assembly. The process for major amendments is set out in Figure 7.

FIGURE 7: PROCESS FOR MAJOR AMENDMENTS



Formal Government policy amendments

An efficient and transparent pathway is proposed for giving effect to Territory Plan amendments where the substance of the amendment has been subject to public consultation and adopted as formal Government policy.

As set out in the Directions Papers, the Review found that the requirements of the 2007 Act sometimes resulted in duplication of consultation processes required in order for variations to the Territory Plan to be made. For example, under the master plan program, the public would be consulted during the master planning process and on the form of the final master plan.

Then, if giving effect to the master plan required variation to the Territory Plan, the Planning and Land Authority was required to undertake consultation on the Plan variation proposed to implement the master plan. The additional consultation and time required in order to give legislative effect in the Territory Plan, following approval of the master plan, was widely considered undesirable and resulted in delayed implementation. Additionally, feedback indicated that if, when consulting on master plans, the resulting changes that would occur to the Territory Plan could be indicated, that this would assist in broader understanding of implementation.

The Planning Bill provides an efficient and transparent process for amending the Territory Plan to give effect to planning outcomes contained in Government strategies, policies and plans. Consistent with the heightened importance of strategic planning in the reformed planning system, the Territory Plan is a living document that should be regularly updated to reflect and deliver current Government policy.

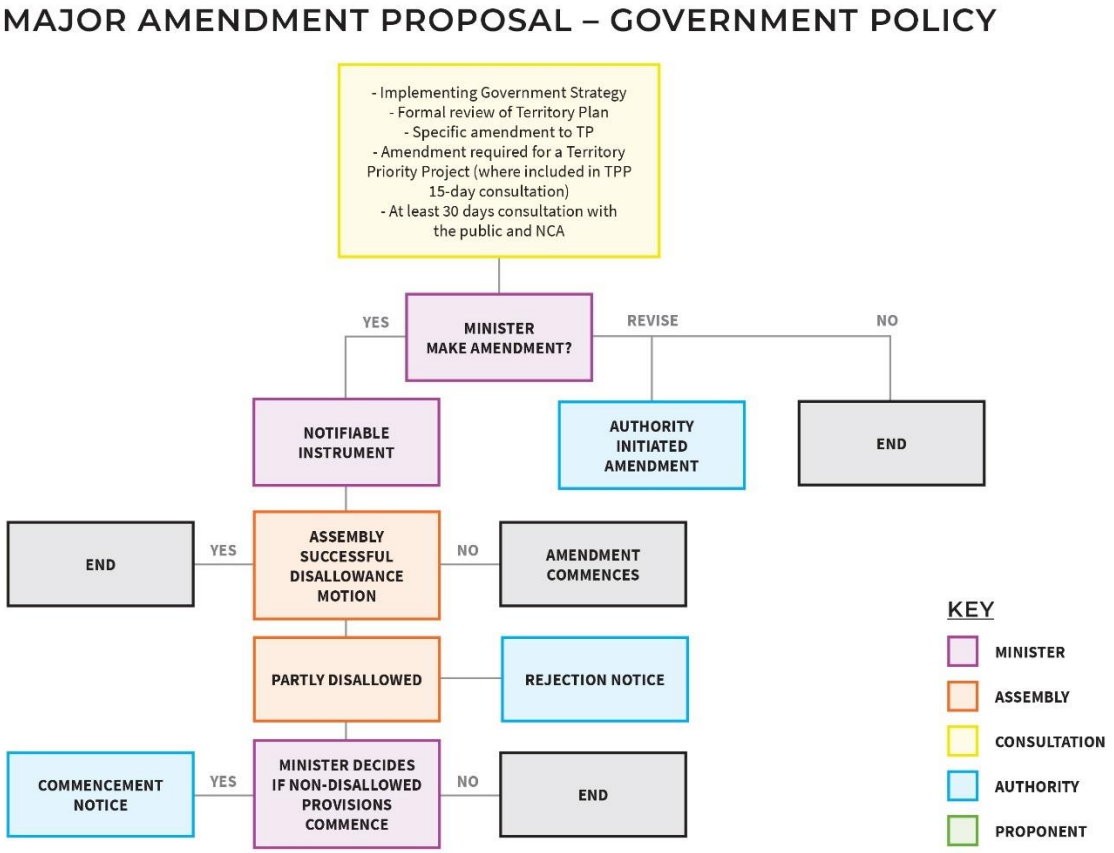
As a principle, where the government consults on a proposed policy or strategy, and as part of the consultation any proposed amendment to the Territory Plan is clearly identified and articulated, public consultation need not separately occur at the Territory Plan amendment stage.

Following the approval of the Government strategy, policy or plan the Minister may make an amendment to the Territory Plan without undertaking additional public consultation on the amendment provided that the proposed amendment was clearly articulated within the policy document and sufficient public consultation has occurred in relation to that policy document. This efficient amendment process will also be available in relation to Territory Priority Projects, as explained in relation to chapter 8.

Amendments giving effect to formal Government policy would not be referred to the Legislative Assembly committee for inquiry, reflecting that the amendment gives effect to formal and adopted Government policy. The Legislative Assembly would, however, retain its power to review and disallow a Territory Plan amendment prepared under this process.

The process for government policy amendments to the Territory Plan is set out in Figure 8.

FIGURE 8: EFFICIENT PROCESS FOR GOVERNMENT POLICY AMENDMENTS



Other Processes

The Planning Bill proposes the removal of the *strategic environmental assessment* process. This process has not been used, except for the current review of the Territory Plan as part of the Project. The process is not considered to be an effective process for assessing potential environmental implications of planning policy changes, and that assessment of broad environmental impacts is appropriately dealt with through various existing processes applying at different scales of the planning system, including:

- consideration of environmental and sustainability principles and outcomes through strategic and spatial planning processes, including recognition in the object of the Act and principles of good planning
- the environmental impact assessment process for development proposals
- the strategic assessment process under Part 10 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

Further, the removal of this process will be offset by increased consideration of environmental and sustainability outcomes in an outcomes-focussed planning system. Strategic and spatial planning will be informed by principles of good planning requiring consideration of natural environment and sustainability outcomes, ecological sustainability, and wellbeing and liveability.

CHAPTER 6 - SIGNIFICANT DEVELOPMENT

The Planning Bill introduces the concept of *significant development*. Significant development is a sub-category of assessable development.

Significant developments are those developments identified in Chapter 6 of the Bill. The Chapter brings together the provisions for types of development which are subject to additional documentation, process and assessment requirements: environmental impact assessments, developments requiring design review, and proposals for estate planning. Those processes are outlined in more detail below.

The development assessment and approvals chapter provides for additional documentation to be lodged with a development application for significant development; for example, for a significant development where an environmental impact statement is required, a completed environmental impact statement must be submitted with a development application, and where referral of a proposal to the design review panel is required, a development application must be accompanied by the design review panel's advice and the proponent's response to that advice.

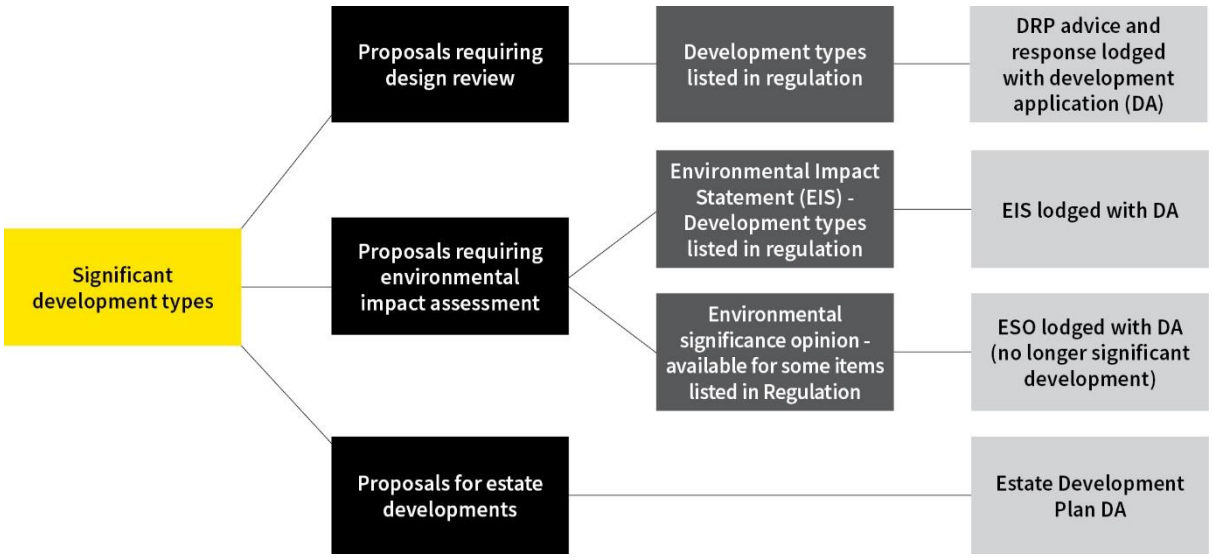
Development applications for significant development will also be required to be publicly notified for an additional 10 working days, reflecting the greater complexity and documentation provided with these applications.

Because significant development involves the consideration of additional matters, the development assessment and approvals chapter outlines additional circumstances in which a development application for a significant development cannot be approved. These circumstances largely mirror the provisions in the 2007 Act setting out when an impact track proposal cannot be approved.

The Planning Bill provides that the authority has an extra 10 working days for deciding applications for significant development. This reflects the additional documentation, and additional considerations, that must be taken into account when deciding an application for a significant development.

The types of significant development, where the detailed items are listed, and the required documents to be submitted are outlined in Figure 9.

FIGURE 9: SIGNIFICANT DEVELOPMENT TYPES AND PROCESSES



DESIGN REVIEW

The Design Review Panel (DRP) process is proposed to be retained in the Planning Bill. The DRP process commenced in the ACT in an interim capacity in 2017 and through formal statutory processes in 2019 (National Capital Design Review Panel).

Design review is recognised across Australia and internationally as an effective way to raise the design quality of the built environment. It offers the opportunity for peer review of development proposals by independent design professionals with the aim of achieving the best possible outcome for development proposals and public spaces.

The DRP processes remain fit for purpose and are performing as intended. They require development proposals for significant development types to undergo design review before a development application can be lodged. The design review process is integrated into the development assessment process, with provisions allowing the authority to consider the advice of the DRP during the assessment of a development application.

It is proposed to keep the threshold for significant developments requiring design review at the current thresholds, being a proposal for a building with 5 or more storeys, or to increase the floorspace of a shop by more than 2,000m^2 (in particular zones).

ENVIRONMENTAL IMPACT ASSESSMENT

Environmental impact assessment is required wherever a development proposal may have significant adverse environmental impacts. Categories of development which require environmental impact assessment will be listed in the Planning Regulation and are generally consistent with schedule 4 of the 2007 Act. Minor additions are proposed to include major expansions to listed development

types. The 2007 Act provides for three mechanisms for the assessment of likely environmental impacts of a development: environmental significance opinions (ESO), environmental impact statements (EIS) and environmental impact statement exemptions (EIS exemptions).

The Planning Bill retains the ESO process. ESOs are statements provided by a relevant agency, on request of a proponent, where the agency is of the opinion that a development proposal (which hits a relevant trigger in schedule 4) does not have a significant adverse environmental impact. Where the option for such an opinion is available, and one is provided, no further environmental impact assessment is required of the environmental impact to which the opinion relates. This process is an efficient way of confirming that developments with potential significant adverse impacts will not result in such impacts. It also has the consequence of deeming the development proposal not to be a significant development, reverting to the standard assessment process.

The Planning Bill also retains the EIS process, with some minor improvements to processes. EISs are required to describe the development proposed, its expected environmental impact (ascertained through required investigations and other studies), proposed mitigation strategies and the approaches available to manage the remaining environmental impacts. The Territory Planning Authority prepares a scoping document, in consultation with relevant entities, which outlines the precise matters a statement must address.

Those matters include where the Territory assesses an EIS in accordance with a bilateral agreement under the Environment Protection Biodiversity Conservation Act 1999 (Cth). The environmental impact statement process involves public notification and opportunity for representations on a draft EIS, consideration by the Authority and the Minister, and opportunity for independent inquiry.

This process is an information-gathering exercise, so that when the proposed development is submitted to the Authority for assessment, the Authority can decide whether or not to approve the development proposed in light of all relevant information in relation to the likely environmental impact of the proposal.

Finally, the Planning Bill removes the concept of an EIS exemption. The EIS exemption process is, in effect, an EIS based on existing studies. It is not a lesser environmental impact assessment process and has the same features of entity referral, public consultation and assessment by the Authority and Minister. The Planning Bill omits the ability to apply for an exemption to the requirement to provide an EIS. Instead, the Bill retains the substance of this EIS exemption process by providing that recent studies may be relied on in the preparation of an EIS.

In this way, the Bill requires that expected environmental impacts be considered through a consistent process, always starting with the preparation of a scoping document by the Authority. This will deliver benefits through greater certainty to applicants as to the matters required to be addressed and also to interested community members, through a more transparent process. The extended expiry provisions applying to approvals issued under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) will also be retained. For example, this will allow EIS expiry dates to align with strategic assessment approval timeframes.

ESTATE PLANNING

The Planning Bill reflects the continued need for planning to address the estate level.

For example, estate planning is relevant where a subdivision is proposed. Estate planning will consider layout, street network, public realm and pedestrian networks, access to public transport and services as appropriate to support the eventual development on subdivided or consolidated blocks.

The strategic planning for a district and other identified areas will influence the estate planning as a way to realise the broader strategic vision.

Under the 2007 Act, concept plans are prepared only for future urban areas. The Planning Bill provides for an expanded role for further planning also to apply in urban infill areas. Estate planning must be consistent with any applicable provisions of the Territory Plan and further plans that may be applied to an area.

In this way the role of estate planning is clarified in the reformed planning system, making sure that estates are appropriately planned and supported by infrastructure and services and support and deliver on the overall vision and desired outcomes for an area.

The nature of estate planning, and the significance of translating strategic directions into the subdivision of an estate, means that additional documentation and extra time may be required to consider these development applications.

PRE-DA COMMUNITY CONSULTATION

Pre-DA consultation is proposed for removal because, on balance, it is not considered to add value to the development process beyond the early notification of a proposal and identification of issues of contention, which often remain issues of contention during the DA assessment.

The costs to the proponent, time delays in bringing product to market, and furthering the adversarial relationship between the community and proponents are considered to be much greater burdens than the limited benefit of early identification of issues and the potential of achieving a 'social licence' for development, which often does not occur as varying views are often held by community members.

While pre-DA consultation is proposed to be removed, there will be significant improvements to the transparency of processes throughout the Planning Bill. These include application documents for Territory Plan amendments and DA processes being proactively published on the planning website, and improvements to strategic and spatial planning processes, through district strategies, to provide greater clarity about how areas may change and evolve in the future.

CHAPTER 7 - DEVELOPMENT ASSESSMENT AND APPROVALS

All planning systems have a primary function of enabling the assessment of development proposals and granting development approvals in appropriate cases. The Territory Plan is implemented through the development assessment and approvals process.

A proposal contained in a development application is assessed against the requirements of the Act and Territory Plan. When an application is approved, a development approval confers on the applicant a right to develop in accordance with the approval given (for the life of the approval). Accordingly, this process is central to the effective operation of the planning system.

Development assessment under the 2007 Act is largely focussed on code-compliance. The rules and criteria set out in codes provide the bulk of development controls, reflecting the prescriptive and regulatory nature of the planning system.

The shift to an outcomes-focussed planning system requires the revision of development assessment processes to ensure the assessment process and decision-making criteria appropriately allow for consideration of potential development outcomes and promote the achievement of good planning outcomes.

The following policy changes have been made in order to increase the efficiency and effectiveness of the development assessment and approval system.

EFFICIENT AND TRANSPARENT ASSESSMENT PATHWAY

The 2007 Act introduced assessment tracks: three different pathways to assessment, applicable to proposals having regard to the impact of the proposal. The rationale for the assessment tracks was to create a simplified and consistent development assessment system that matched the impact of a development proposal with an appropriate level of process and assessment.

The operation of the assessment track system has, however, proven to be inflexible. In terms of use, the vast majority of development applications are assessed in the merit track, ranging from minor applications (e.g. a carport located within a side-setback of a residential block) to significant and complex development proposals (e.g. a large mixed-use commercial redevelopment).

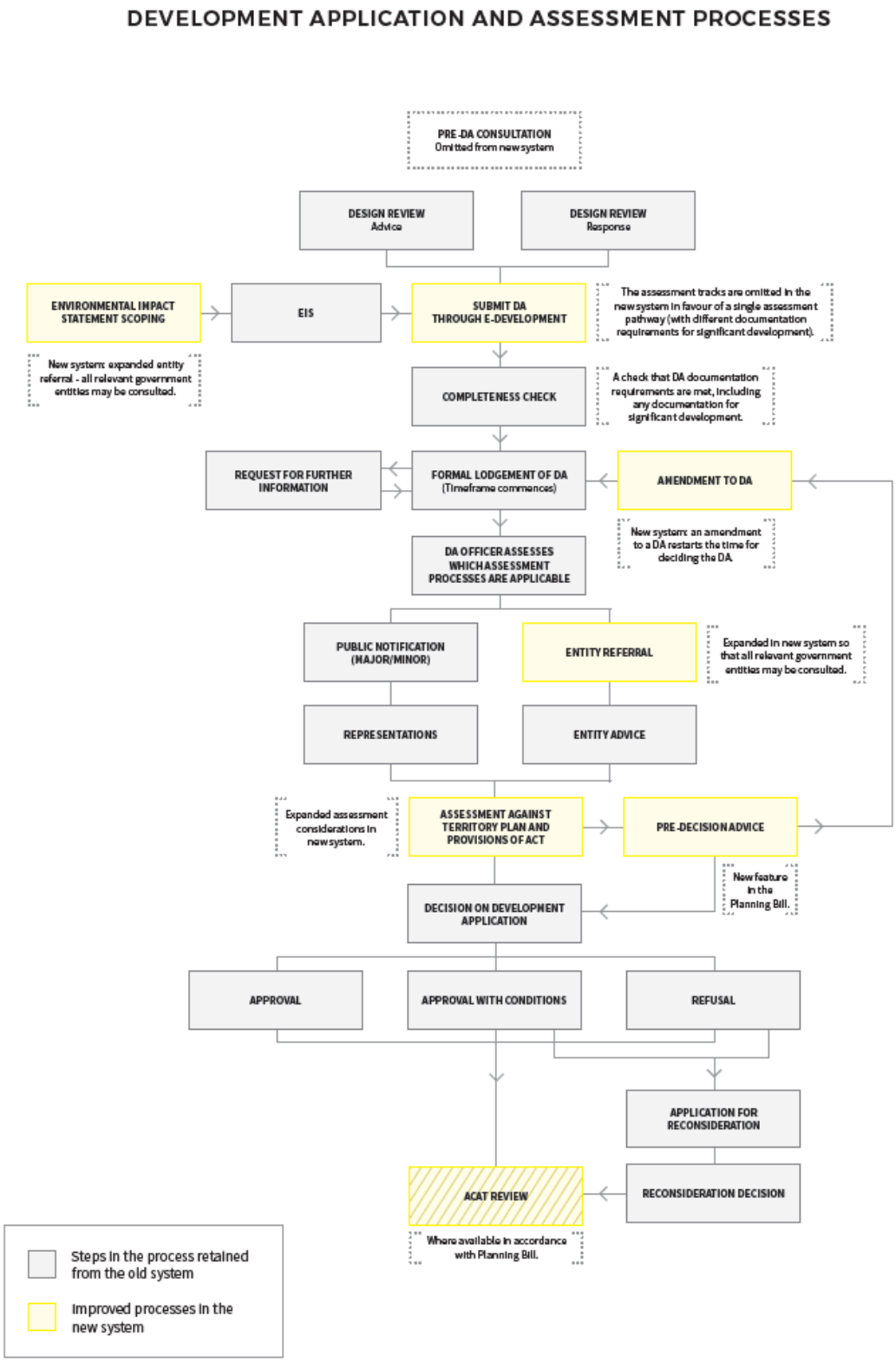
The assessment tracks thus do not respond to the scale and complexity of development in the way that was envisaged. In the context of these issues, the Directions Papers identified the need to introduce clearer assessment pathways that have regard to the scale and complexity of proposals.

FIGURE 10: SIMPLIFIED OUTLINE OF DEVELOPMENT ASSESSMENT PROCESS

The Planning Bill will simplify development assessment, with a single, efficient and transparent pathway. *Significant developments*, such as those that trigger an environmental impact statement or a referral to the National Capital Design Review Panel, must meet additional documentation and assessment requirements. The Act or the regulations may prescribe the circumstances in which the different types of significant development requirements apply, giving flexibility to the application of additional processes. The Planning Bill delivers clearer assessment requirements and provides refined documentation requirements that reflect the relative complexity of a proposal.

An extended timeframe will be provided for the assessment of development applications and public notification for significant developments, reflecting the additional time and work required to determine applications for complex developments. In this way, the procedural safeguards and decision-making integrity of the impact track will be retained, but the inflexibility of assessment tracks will be abolished. A more detailed diagram of the proposed development assessment process is provided in Figure 11.

FIGURE 11: PROPOSED DEVELOPMENT ASSESSMENT PROCESS



ENDORSEMENT NOTICE FOR UNDERTAKINGS MADE IN LAND SALES PROCESSES

The Planning Bill adds a new requirement that the Deed Manager (i.e. the Suburban Land Agency) must provide an endorsement notice for certain development proposals before a development application for the proposal can be lodged.

This requirement applies where a Project Delivery Deed is entered into as a condition of the sale of land. This is to make sure that undertakings included in a tender for the purchase of a lease are delivered in the design of the proposed development.

CONCURRENT PROCESSES

Concurrent processes were introduced into the 2007 Act by the Planning and Development (Efficiencies) Amendment Act 2016. Whilst the rationale for these processes was to revise inefficient sequential processes with concurrent consideration of related processes, the concurrent processes have been utilised rarely since their introduction.

Concurrent development applications in anticipation of Territory Plan variations involve a level of risk for the proponent (that the anticipated variation will not be approved). Nonetheless, this mechanism is considered to deliver efficiencies, so will be retained in the Planning Bill. It is not considered appropriate, however, for a concurrent development application to be lodged prior to the proposed Territory Plan amendment being drafted by the Authority and given to the Minister for approval.

Until that occurs, there is insufficient certainty about the form a proposed Territory Plan amendment may take, in order for the concurrent development application to be assessed. The Planning Bill therefore revises the time at which a concurrent development application may be made where a Territory Plan amendment is anticipated.

Concurrent development applications for prohibited development which may be lodged where they involve minor encroachments onto Territory land and the land custodian consents to the encroachment have been used rarely, but have been used successfully to enable minor encroachments (e.g. awnings overhanging public walkways; that is, encroaching into air rights).

The concurrent EIS processes have been utilised in respect of major infrastructure developments where the development was essential and the EIS process was focussed on managing and offsetting environmental impacts. The EIS processes that have been conducted as concurrent processes resulted in mitigation measures that required amendments to be made to DAs, meaning little efficiency was realised. Because a DA must be decided within 10 days of the EIS being completed, existing timeframes may not allow adequate consideration of the DA in the context of the final EIS.

In the context of these experiences with the existing concurrent processes, the Planning Bill will retain the ability to lodge a DA for:

a) prohibited development where an amendment to the Territory Plan has been drafted by the Authority and provided to the Minister for consideration
b) prohibited encroachments onto Territory land where the Territory consents to the encroachment.

Other concurrent processes, including for EISs, will be omitted from the Planning Bill. This approach retains the concurrent processes where efficiencies are most likely to be achieved, and omits those concurrent processes that have been used since their introduction, but have proven not to be effective or efficient.

The concurrent consultation processes contained in the 2007 Act will be omitted from the Planning Bill. The provisions supporting concurrent consultation are lengthy and complex, and similar notification will be achieved through the public notification that applies to each process separately, with updated administrative practices to make clear the two processes are connected.

ENTITY REFERRAL AND PUBLIC NOTIFICATION

The continued importance of entity referral and public notification is recognised in the Planning Bill.

Entity referral

Provision is made for a regulation or the Territory Plan to outline when a development application is required to be referred to stated entities.

The Territory Plan will continue to prescribe the bulk of entity referral requirements, tailored to the nature and impact of development applications.

The draft regulation retains referral to the Conservator of Flora and Fauna where the application relates to any part of a declared site within the meaning of the Tree Protection Act 2005 and, where an application relates to unleased or public land, the custodian of the land. The draft regulation also newly prescribes the Heritage Council where a development relates to a place registered or provisionally registered under the Heritage Act 2004, and where the Authority is aware that the proposed development may impact an Aboriginal object or Aboriginal place.

The Planning Bill retains the requirement to refer proposed developments that are likely to have a significant adverse impact on a protected matter to the Conservator of Flora and Fauna.

The Planning Bill also provides discretion for the Authority to refer a development application to other areas of government whose advice may be relevant when the Authority is considering a development application. Such advice may be taken into account in deciding a DA but is not regarded as formal 'entity advice'.

In addition, where a development application is amended or further information is provided in support of the application, the existing re-notification provisions are retained and expanded to ensure that, where an application was not originally referred to an entity, but because of the amendment or further information the Authority considers that the entity may be able to provide relevant advice, the Authority may refer the application.

This expanded referral power ensures that the Authority can obtain all relevant information when deciding development applications.

The effect of entity advice is also refined in the Planning Bill. Where an entity provides advice to the Authority, but fails to do so in accordance within the required timeframe, the advice may be taken into account in deciding the development application. Where the advice is provided by a prescribed entity within the provided time, the Authority generally must not depart from that advice in deciding the development application.

However, an application may be approved contrary to entity advice (other than advice from the Conservator of Flora and Fauna in relation to a registered tree or declared site) where, having considered the land zoning, applicable desired outcomes under the Territory Plan, and where an EIS is required, any reasonable alternative design options, the decision-maker considers that departing from the entity advice is required in order to achieve a good planning outcome.

The Bill also makes limited provision for the Chief Planner, personally, to depart from Conservator advice on registered trees, declared sites and protected matters. In all cases, the Chief Planner must be satisfied that departing from the relevant advice would significantly improve the planning outcome to be delivered or result in significant public benefit.

In addition, where advice relates to a protected matter, that advice may only be departed from where the departure is consistent with the Offsets Policy (which provides for the offsetting of significant environmental impacts through the protection of areas where the same environmental values are found).

Public Notification

Public notification of development applications is a central feature of the ACT's planning framework. The Planning Bill retains the requirement for public notification of a development application, unless a regulation provides that one or both forms of notification is not required in a particular case.

Public notification takes the form of 'major public notification' and 'notice to adjoining premises'. The content of these notification requirements is the same as presently required under the 2007 Act, with specific provision included for giving notice by email where the Authority has an email address for a person. This change reflects the community's increased use and reliance on email, and the fact that email is now a more efficient way of disseminating information than mail.

The Planning Bill provides discretion to the Authority, when giving notice to adjoining premises, to give additional notice if the Authority considers the place may be affected by a development proposal in a way similar to an adjoining place.

The Planning Bill also allows the Authority to make guidelines about additional notice to be given to nearby premises, for different development types. This power recognises the important role public notification, and representations, play in the development assessment process.

The Planning Bill sets out a general rule that, where a development application is amended or further information is provided, further public notification is required. That further notification may be waived by the Authority if, having regard to the representations received in response to the initial

notification, the nature of any proposed amendment and the cumulative impact of any proposed amendments, the Authority is satisfied that the proposed amendments (if any) will do no more than minimally increase the adverse and environmental impact of the development. This ensures there will be adequate consultation in relation to the substance of any development application.

Development applications for significant development will also be required to be publicly notified for an additional 10 working days, reflecting the greater complexity and documentation provided with these applications.

DEVELOPMENT ASSESSMENT – PRE-DECISION ADVICE

The Planning Bill introduces an important new stage into the development assessment process: *pre-decision advice*. This stage allows the Authority to provide advice to an applicant for development approval prior to making a formal decision in relation to the application.

The shift to an outcomes-focussed planning system means the Authority's role is expanded; it must consider whether development proposals are achieving good planning outcomes. This new process has been introduced to facilitate the Authority's expanded role. The Authority may provide advice on changes that, in the opinion of the Authority, are required to be made to a development application in order for it meet the requirements of the Territory Plan in order to achieve a good planning outcome.

Consistent with the goals of increasing transparency and accessibility of information, the Planning Bill requires the Authority to publish on its website any pre-decision advice it gives.

If formal pre-decision advice is given, an applicant for development approval may seek to address the Authority's advice (which may result in an amendment to the DA) or may indicate that they will not respond to the Authority's advice, in which case the Authority will proceed to make a decision on the DA. Any formal pre-decision advice must be taken into account by the Authority in deciding a development application.

DECISION-MAKING CONSIDERATIONS

The Planning Bill gives effect to the shift to an outcomes-focussed planning system. In order to achieve an outcomes focus in development assessment, the Authority must be enabled to consider all relevant matters when deciding a development application. The Planning Bill outlines matters the Authority must take into account, and when it must not issue approval.

Many of these considerations reflect the considerations applicable under the 2007 Act. While the assessment tracks will not be a feature of the new Planning Act, the decision-making criteria relevant to the impact track will be retained.

New considerations facilitate the assessment of proposed developments' performance and merit, having regard to the scale, complexity and design of development proposals, and their context. The new considerations direct attention to the performance and suitability of a development proposal in

the site and site surrounds, including its interaction with existing developments and as yet unconstructed development proposals.

New considerations include:

- any pre-decision advice
- where the site adjoins another zone, whether the proposal achieves an appropriate transition between zones
- the suitability of the proposed development in the context of the site and site surrounds, including permissible uses
- the interaction of any proposed development with any other adjoining or adjacent development proposals for which a development application has been lodged, or development approval has been given.

The Directions Papers identified a proposed direction, DA4, to provide a process for managing strategic developments, including urban intensification. The requirement for the Authority to consider other development proposals, even where they have not been approved or built, provides a mechanism for the Authority to consider the overall impact of proposals, their type, scale and interaction. This is particularly important to areas with significant infill proposed.

Directions Papers direction DA2 calls for the clarification of the hierarchy of decision-making criteria. While this clarification will predominantly be achieved through the new Territory Plan, the inclusion of these new decision-making criteria help to make clear the matters a decision-maker considering a DA will take into account, and the bases upon which a DA may be refused.

Direction DC6 outlines that the Planning Authority should be provided with the ability to exercise discretion in favour of high-quality development outcomes. The outcomes focus of the Territory Plan will support improved development outcomes and allow for approval of design solutions where they meet the performance outcomes of the Territory Plan.

Additional decision-making criteria that have been incorporated into the Planning Bill to help describe several matters that are relevant to whether or not a proposal is achieving a good development outcome.

The fundamental requirement that a development proposal must be consistent with the Territory Plan remains a key feature of the development assessment process.

Lease and development conditions

The 2007 Act continues the operation of *lease and development conditions*: these are conditions, that were imposed for many years until 2011, and regulated the way in which estates or blocks of land could be developed. Lease and development conditions typically regulated elements of development such as plot ratio, building height and envelope, setbacks, building design and materials and finishes.

These provisions are not conditions of Crown Leases, but are operative through transitional provisions in the 2007 Act. Such detailed provisions act as a quasi Territory Plan, imposing different or additional requirements to the development controls contained in the Territory Plan. In addition, the Territory Plan continues the effect of lease and development conditions, but does not require compliance with them, so their continued role and relevance has caused uncertainty.

The reformed planning system aims to be more accessible and easier to use. The existence of lease and development conditions is inconsistent with this easier to use vision. For that reason, the Planning Bill will not provide for the continued operation of lease and development conditions.

The subsisting lease and development conditions, and the policies they seek to achieve, will be reviewed as part of the broader Territory Plan review continuing in 2022, so that where appropriate, the substance of lease and development conditions can be retained directly through the Territory Plan.

TIMEFRAMES

The Planning Bill adopts a simple and certain approach to timeframes for development assessment processes. This approach replaces the lengthy and detailed provisions in the 2007 Act for working out the time within which a development application must be decided.

The Planning Bill adopts the model of a *complete application*: time for deciding an application runs from the day on which the Authority is provided with all required information for deciding the development application. If, on closer inspection, further information is required, the clock for deciding the development application stops on the day the Authority requests further information and starts again when the requested information is provided to the Authority. If an application is amended, it is considered a new application for the purposes of decision timeframes.

Within that overarching approach, timeframes for deciding DAs in the Planning Bill reflect timeframes under the 2007 Act. Namely, development applications must be made within:

- if the DA is a concurrent development application – 10 working days after the concurrent process is completed,
- if no representations are made in relation to the DA – 30 working days, or
- if representations are made in relation to the DA – 45 working days, and
- if the development application is for a *significant development* – 10 working days is added to the applicable timeframe for decision.

The approach taken to timeframes within the Planning Bill provides an incentive for proponents to provide complete information to the Authority for assessment at the earliest possible time.

This approach also allows any further public notification or entity referrals to occur within the statutory timeframe.

RECONSIDERATION

The Planning Bill retains the availability of internal reconsideration where a development application is refused by the decision-maker. Minor amendments have been made to provide for the appropriateness of the internal review process:

- The Territory Planning Authority must have a decision-maker more senior to the original decision-maker make the decision upon reconsideration
- Reconsideration is not available where the Chief Planner made the original decision (reflecting that the Chief Planner is the most senior decision-maker).

APPROVALS – TAKING EFFECT AND ENDING

The Planning Bill provides for when development approvals take effect, and when they end. The provisions that set out when development approvals take effect are necessarily complicated, having regard to the various events that may need to happen before a development approval can take effect.

These events include the expiration of a period within which an affected entity might apply for ACAT review, the variation of a lease to allow the development subject of the approval, and the satisfaction of conditions that are expressed as being pre-conditions to the approval taking effect.

The substance of the provisions outlining when a development approval takes effect has not changed from the provisions in the 2007 Act, however the Planning Bill aims to express these concepts more simply.

The Planning Bill sets out a revised approach to the ending of development approvals. The existing provisions do not reflect the practical realities of other planning, construction and financing processes that travel alongside a development approval.

The Planning Bill takes a less prescriptive approach, providing a single timeframe within which the development (subject of the approval) must be started and finished. This gives an overarching timespan, and a proponent can undertake development within this timespan having regard to their individual needs and constraints.

The applicable period will be five years, unless extended by the Authority. The Authority will have power to extend the five-year period for up to a further two years, in limited circumstances. Importantly, the development must have started and must be substantially progressed and the development must remain approvable as at the date of extension.

Separate provision is made for the ending of development approvals relating to lease variations.

TRANSPARENCY

The Planning Bill establishes additional transparency measures.

The Directions Papers identified, in Direction SO4, the need to provide greater transparency of development assessment applications. It is also recognised that a shift to an outcomes-focussed planning system should be accompanied by additional transparency measures so it is clear what is being approved, and on what basis.

The Planning Bill introduces several new requirements for advice, decisions and information to be published on the Authority's website. Examples of what must be published under the Bill include:

- development applications
- requests for further information
- further information provided
- applications to amend a development application
- notice extending period of public notification
- decision to waive further entity referral or public notification requirements, with reasons
- any pre-decision advice
- notices of decision
- applications for reconsideration.

The Authority's website is proposed to become a central source of information on planning matters. The publication of these applications, decisions and notices on the website will mean that community and industry members can go to a single website to access all the information they need about planning in the Territory.

Implementation work on the website to increase usability and accessibility is planned.

CHAPTER 8 – TERRITORY PRIORITY PROJECTS AND MINISTERIAL POWERS FOR DEVELOPMENT

The Minister has, under the 2007 Act, either individually or with another Minister, several specific functions: making the Planning Strategy and district strategies; and making amendments to the Territory Plan.

However, the Minister, generally, does not have day-to-day functions relating to the administration of the Territory Plan or assessing development applications.

In a few very specific areas, the Planning Bill provides for the Minister to become involved in development and development application processes, particularly when they are significant for the Territory.

MINISTER'S POWER TO DECIDE DEVELOPMENT APPLICATIONS

Under the 2007 Act, the Minister has a 'call-in' power; the Minister is able to direct the Planning and Land Authority to refer a development application to the Minister for consideration and potential decision. Where the Minister decides a development application, there is extended ability to depart from entity advice, merits review is not available and judicial review of the Minister's decision is time limited.

Under the Planning Bill this power has been omitted. A new power—the Territory Priority project declaration power—will have many of the same substantive and procedural consequences, with declared projects to be decided by the Chief Planner rather than the Minister.

The one kind of development application the Minister will decide under the Planning Bill is applications seeking the removal of the concessional status of a lease. Further detail on the proposed process for those decisions appear in the leasing chapter.

TERRITORY PRIORITY PROJECTS

The Planning Bill proposes the Minister be given a new power: to declare a proposal to be a *Territory priority project*. This will provide for certain significant projects to proceed through a new pathway.

It is proposed that the Minister's power would be available only where all of the following criteria are met:

1. The proposal will provide critical infrastructure or facilities
2. The proposal is likely to provide a significant benefit to the people of the Territory
3. The project is time-critical
4. There has been sufficient public consultation on the proposal.

The Minister must publish a consultation notice setting out the Minister's proposal to declare a stated project, and must consider any representations made in response to the notice when deciding whether or not to declare a project as a Territory Priority Project.

In addition, where a proposal is giving effect to a formal Government policy or otherwise requires an amendment to the Territory Plan or the declaration of a development proposal could identify a Territory Plan amendment required for the development proposal to proceed, in which case the efficient Territory Plan amendment process discussed above would apply (public consultation on the proposed Territory Plan amendment would occur through the Minister's consultation notice).

The power is intended to apply to such projects of the scale and significance that have been the subject of specific legislation in recent years (e.g. light rail and the Symonston mental health facility) as well as to government projects that have been approved at DA stage by the Minister (e.g. the Canberra Hospital expansion, the ACT second electricity supply and the proposal for Kenny school), and major private proposals where they will deliver significant public benefit (e.g. critical public housing, private hospitals, schools etc). Proposals may be multi-stage or multi-site projects, but in all cases must be adequately described in the Minister's consultation notice.

Declarations are proposed to be notifiable instruments, providing transparency and giving the Legislative Assembly oversight of the use of the power while providing certainty to the progress and timeliness of projects.

The power is proposed to provide the government and community with certainty that specified projects will not be subject to the delays, costs and uncertainties that are associated with third-party merit review and Supreme Court appeals. The proposed power recognises that important government projects undertaken to deliver public infrastructure and facilities, and limited private projects of public benefit, may justify a level of prioritisation in terms of time and a slight departure from the usual balance of competing considerations. However, compliance with the Territory Plan should be required in all cases.

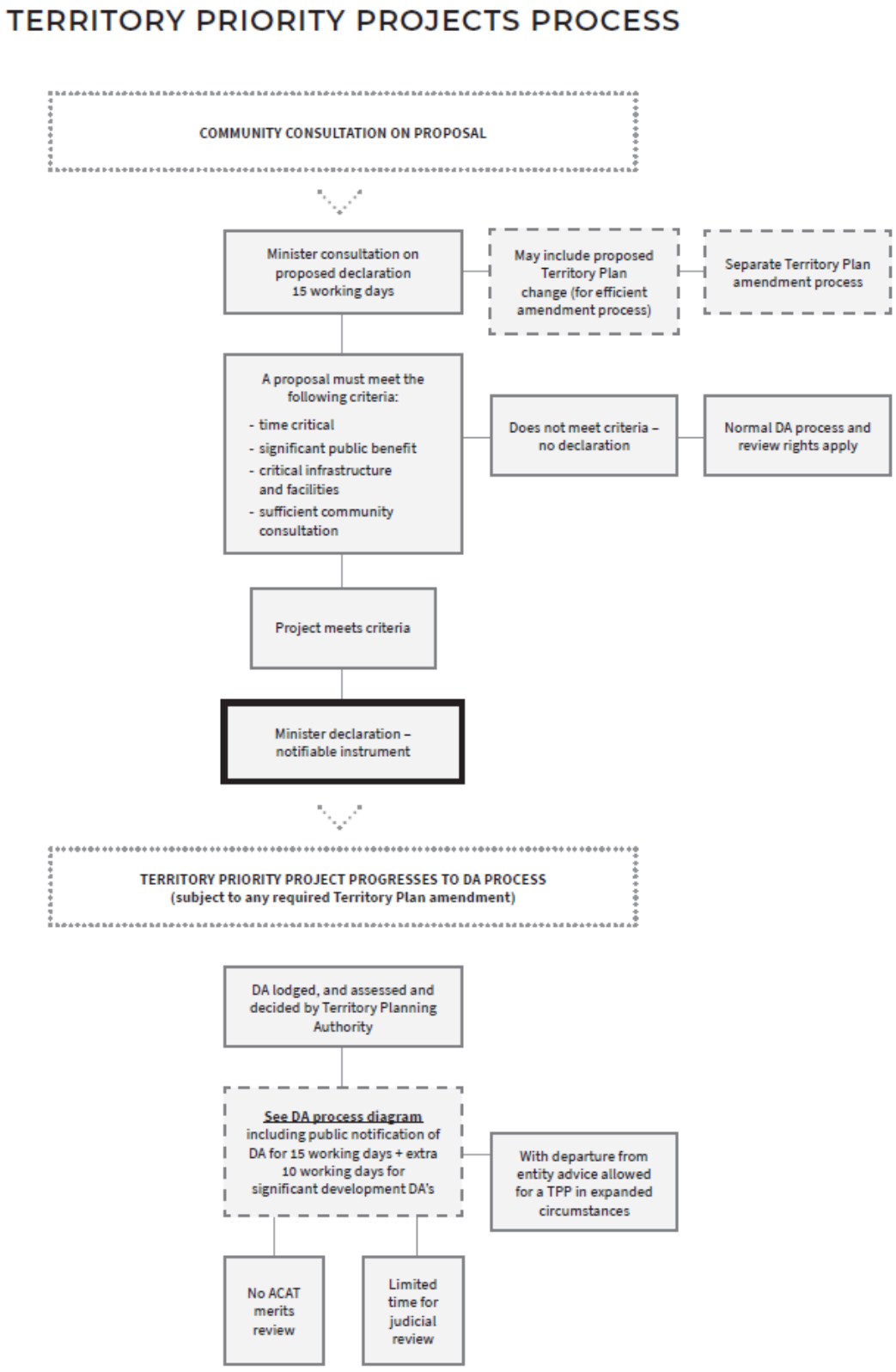
Once declared, a development proposal must be decided personally by the Chief Planner. Territory Priority Projects are proposed to be treated similarly to the way the 2007 Act treats a project related to light rail—merits review would not be available, there would be limited time to seek judicial review, and when deciding whether to approve or refuse a development application for the proposal, the Chief Planner could depart from the Conservator's advice in relation to registered trees, declared sites and protected matters in limited circumstances (in no circumstances may advice from the Commonwealth under the EPBC Act be departed from).

The ability to depart from the Conservator's advice on these high-value matters has been safeguarded by strict limitations on when advice may be departed from, and a requirement that the Chief Planner personally must decide development applications for Territory Priority Projects.

Aside from those modifications, the Chief Planner would be responsible for assessing any development application for a Territory Priority Project in accordance with the Territory Plan. This means a development application is subject to the same planning requirements as any other development proposal, and is assessed in accordance with the general assessment processes including public notification and entity referral.

The proposed process for Territory Priority Projects is outlined in Figure 12.

FIGURE 12: PROPOSED PROCESS FOR TERRITORY PRIORITY PROJECTS



CHAPTER 9 – OFFSETS

Chapter 6A of the 2007 Act sets out the requirements for offsets. Offsets are usually land that is used to help manage the adverse impact of development on threatened species and habitats by providing compensation; often by setting aside additional land as a nature reserve (which then requires ongoing management).

The Australian and ACT governments have entered into bilateral agreements to deliver streamlined assessment for environmental approvals and offsets, with provisions of the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) embedded in the 2007 Act to maintain high environmental standards and simplify approval processes.

The Australian Government is reviewing the EPBC Act, with the final report released in January 2021. It is currently considering its response to the review and any legislative changes which may result. The ACT Government is also reviewing potential legislative changes to environmental approvals and offsets because of this work.

Depending on the approach the Australian Government takes, amendments may be required to the ACT's planning legislation in the future, however this is unlikely to align with the timing of the new Planning Bill.

As such, it is proposed to retain the offsets provisions from the 2007 Act in the Planning Bill. These provisions will be reviewed in accordance with any changes made to the EPBC Act which impact these provisions, any ACT specific issues with the administration of offsets, and the processes for managing offset areas.

CHAPTER 10 – LEASES AND LICENCES

The leasing system plays two important roles in the Territory: it is central to the system of title by registration, where proof of ownership is provided through registration of Crown Leases (or other interests). Leases are also used as a way of regulating the use of land, predominantly through lease purpose clauses.

As noted above, the removal of the leasehold system of land regulation was considered to be outside of the scope of this project. While the Project focussed on the shift to an outcomes-focussed planning system and the emphasis on strategic and spatial planning, the opportunity has nonetheless been taken to review several elements of the leasing system.

Modest legal policy changes have been made, while the bulk of policy positions underpinning the leasing and licensing chapter remain unchanged.

REMOVING CONCESSIONAL STATUS OF LEASES

Concessional leases have been issued in the Territory since 1930. Concessional leases were originally issued as a matter of discretion to bodies carried on not for profit and then, as legislation progressed, the power to issue concessional leases was required to be exercised in accordance with detailed legislative criteria. Since shortly after self-government, the power to issue concessional leases has been vested in the Territory Executive.

Under the 2007 Act, the lessee of a concessional lease can apply to the Authority to vary the lease and remove its concessional status. However, the Authority must refuse a development application to vary a concessional lease if the Minister decides that considering the application is not in the public interest.

The Minister is called to decide if it is in the public interest for the Authority to consider whether to vary a concessional lease to remove its concessional status. In making that judgment, the Minister is required to take into account various matters, such as whether the proposed change would cause disadvantage to the community having regard to other potential assessable uses of the land, whether the Territory should buy back or acquire the land, whether the Territory should continue to monitor the use of the land, and so forth.

The current legislative provisions are problematic. It appears that the provisions were intended to operate so that the Minister could make a judgment about whether the variation is in the public interest. As the provisions stand, however, the Minister decides whether it is in the public interest for the Authority to consider the application.

Once the Minister makes a determination that considering the application is in the public interest, the Authority can assess the application. It is unclear, however, what considerations the Authority could take account in deciding whether to approve or refuse the application insofar as it relates to removing the concessional status of the lease.

Noting that the Territory Executive issues Crown Leases, and the intention that the Minister for Planning determines whether it is in the public interest to remove the concessional status of a lease, it is not considered appropriate for the Planning Authority to make a separate decision in relation to removing the concessional status of the lease.

For that reason, the Planning Bill proposes to reshape the relevant processes so that, where a development application relates to a proposal to remove the concessional status of a concessional lease, the development application is referred to the Minister for consideration and decision in accordance with specific criteria relevant to assessing the public interest. Those criteria will build upon the criteria in the 2007 Act, and the Minister will not be empowered to approve the removal of the concessional status of a lease without the Executive's approval.

LAND USE FOR OTHER THAN LEASED PURPOSE WHERE THERE IS PUBLIC BENEFIT

The *use of lease purpose clauses* to regulate land use in the Territory means that the use of land is regulated with a degree of inflexibility. There are circumstances where land needs to be used for purposes other than the purpose for which it is leased.

Recent examples include the need for land to support the public health response to the COVID-19 health emergency and supporting the insurance assessment of thousands of cars following a significant hailstorm affecting the ACT. The exemptions from requiring development approval presently authorise the Territory to carry out development, because of an emergency, to protect public health or safety, or property.

The Planning Bill will allow the Authority to authorise, for a short-term period, the use of land for additional purposes where there is a significant public benefit and time criticality. The Authority may only authorise an extended use where the Authority is satisfied that giving the authorisation is necessary, considering the urgent nature of the proposed use of the land and whether other processes of the Act are available to facilitate the proposed use in the circumstances.

CHAPTER 11 – MANAGEMENT OF PUBLIC LAND

Chapter 10 of the 2007 Act sets out the requirements for the management of public land. Public land may be reserved for certain purposes such as a nature reserve, urban open space or a sport and recreation reserve, and must be maintained in accordance with a public land management plan and the management objectives set out in the Act.

Some types of public land listed in the 2007 Act, namely a wilderness area, national park, nature reserve and special purpose reserve, are managed under the Nature Conservation Act 2014, which is out of scope of the Project.

The Standing Committee on Planning, Transport and City Services has recently conducted two inquiries into public land management plans. In addition, a significant number of public submissions were received on recent management plans: 99 submissions on the Canberra Nature Park and 41 submissions on Canberra's urban lakes and ponds. The conduct of Assembly inquiries, and public engagement with the inquiries and plan-making processes, indicates the continued Assembly and community interest in in ensuring these areas are properly maintained.

The provisions of the 2007 Act are fit for purpose in enabling appropriate oversight and reviews. The Planning Bill retains the provisions of the management of public land chapter.

CHAPTER 12 – DEVELOPMENT OFFENCES AND CONTROLLED ACTIVITIES

The 2007 Act contains a series of offences, predominantly in relation to development. The substance of these offence provisions is proposed to remain unchanged. However, the offence provisions relating to development will be moved out of the development assessment provisions and placed into a consolidated development offences and controlled activities chapter. The move will make these offences clearly identifiable and will result in the provisions being located close to the compliance and enforcement powers in the Planning Bill.

The compliance powers available to the Planning and Land Authority under the 2007 Act are generally fit for purpose and comprehensive. The Planning Bill will largely retain these provisions and processes, but an effort has been made to simplify processes and express them in a way that is easier to understand.

The Planning Bill will omit the concept of applications for a controlled activity order. Presently, a person may apply to the Authority for a controlled activity order to be made where the person thinks another person is conducting a *controlled activity*. Unlike with the complaints process, the Authority has no discretion to dismiss the application on the basis it is frivolous or vexatious, and cannot consider whether, having regard to Access Canberra's risk-based regulatory model, compliance action is appropriate.

The Planning Bill will introduce discretion into the controlled activity order process. A person will be able to lodge a complaint in accordance with the existing complaints process. The Authority will then have discretion whether or not to consider making a controlled activity order.

Discretion is considered necessary noting that compliance and enforcement activities are resource intensive, and those limited resources should be expended in a manner consistent with the risk-based compliance policy that has been endorsed by Government. This formalises the important risk-assessment undertaken by Access Canberra in undertaking compliance functions on behalf of the Planning Authority.

CHAPTER 13 – ENFORCEMENT

Chapter 12 of the 2007 Act sets out the provisions enabling enforcement to be undertaken.

The enforcement chapter of the 2007 Act provides for the appointment of inspectors and their powers of entry; the Authority's power to require information; seizure, forfeiture and return of seized items, search warrants and monitoring warrants; and rectification works orders.

The provisions of the 2007 Act are fit for purpose in supporting compliance and enforcement action. The Planning Bill retains the provisions of the enforcement chapter.

CHAPTER 14 – ACCESS TO INFORMATION

To further the transparency principle guiding the processes of the Planning Bill, it is proposed to create a chapter which consolidates all provisions relating to accessing information on the planning system. The main element of this chapter is the public register, which will be retained as an essential feature, with additional information and accessibility as detailed below.

EXEMPTION DECLARATIONS ON PUBLIC REGISTER

Following feedback from members of the community through the Project consultation activities, exemption declaration documentation will be added to the public register as an increased transparency measure.

This will mean that plans submitted to the Authority, and the Authority's decisions, will be publicly available. These documents will be able to be provided to the public without the need for a request for documents under the Freedom of Information Act 2016.

Further information on the scope and operation of exemption declarations is provided later in this paper.

PUBLIC REGISTER AVAILABLE ONLINE

The Planning Bill will retain provisions requiring certain development application information and documents on the public register to be publicly available on the planning website. This includes details of development applications and the key documents and plans submitted for approval through the development assessment process.

These provisions were passed by the Legislative Assembly in the Planning Legislation Amendment Act 2020 and have a delayed commencement to August 2022. These provisions are important elements of the transparency features of the Planning Bill.

ACAT MEDIATED OUTCOMES

Related to the transparency principle, the Standing Committee on Planning and Urban Renewal (a committee of the 9th Legislative Assembly) inquired into, and reported on, Engagement with Development Application Processes in the ACT. In its Inquiry Report, the Committee relevantly recommended:

> *51. The Committee recommends that the Directorate work with the ACT Civil and Administrative Tribunal on ways to increase the accessibility of ACT Civil and Administrative Tribunal decisions, orders and associated documents related to Development Application appeals, for example linking them to the relevant Development Application on the Directorate's website.*

The ACT Government agreed in principle to recommendation 51 and committed to exploring with the ACT Civil and Administrative Tribunal ways to improve linkages between Tribunal decisions on planning matters (and associated documents) and the Authority's website.

One particular transparency issue is the Tribunal mediation process, where the outcomes reached during mediation are not publicly available. Neighbours and interested parties are often critical that an amended approval is achieved 'behind closed doors' through the Tribunal's confidential mediation process.

Discussions with the Tribunal are continuing to develop ways of increasing the accessibility of Tribunal decisions, orders and other documents, whilst maintaining and respecting the central role of confidentiality in the Tribunal's mediation processes.

It is proposed that wherever a development approval is given as a result of a Tribunal mediation process, the approval may be published on the Authority's website (as distinct from any other outcome of mediation).

CHAPTER 15 – REVIEW OF DECISIONS

The Planning Bill provides opportunities to seek merits review of decisions made under the proposed Act. The merits review is to be undertaken by the ACT Civil and Administrative Tribunal (ACAT).

The Territory's planning laws need to make provision for procedures for just and timely review, without unnecessary formality, of appropriate classes of decisions on planning, design and development of land.

The 2007 Act presently makes such provision and identifies decisions that are reviewable by the Tribunal, and those that are exempt from third-party review. Those provisions apply in conjunction with relevant provisions of the ACT Civil and Administrative Tribunal Act 2008.

The Planning Bill retains the fundamental approach to providing for review and identifying reviewable decisions and the persons who may seek review, but simplifies the statutory framework.

A key approach of the Planning Bill is to identify categories of decision that are exempt from review in the primary legislation itself, rather than by regulation made under the Act. The shift to specifying the exemptions from reviewable decisions in the Planning Bill promotes transparency and certainty: having reviewable decisions and exemptions contained in two schedules which appear together in the Act is easier to understand and a simpler approach.

The categories of reviewable decision that are exempt from review have also been simplified and realigned having regard to the new outcomes focus of the planning system. Developments in the city centre, a town centre, industrial zone or Kingston foreshore continue to be exempt. Developments in other non-residential zones will be exempt where a set of criteria are met.

Amongst those criteria are:

- the development must be at least 50m from a block within a residential zone
- if the development involves any construction of or alteration to a building or other structure on the land, any new or altered building or structure on the land meets the performance outcome for any applicable height and plot ratio provisions by meeting the quantitative measure.

The effect of these criteria is that where fundamental development controls relating to height and plot ratio are met, and a development is not close to a residential block, a decision on a development application may be exempt from review. This approach reflects that where key acceptable measures within the Territory Plan are met, the proposal is delivering an intended development outcome.

For those proposals that do not meet the key acceptable measures, approvals are more likely to be based on a qualitative assessment of the proposal's compliance with performance outcomes, and review is available (except where the development is exempt under another item of the schedule; for example, where the development is within the city centre).

Whereas 17 items were listed as exempt from review under the Planning and Development Regulation 2008, schedule 7 of the Planning Bill contains eight items and a significant simplification of the items, so it is easier for users of the planning laws to identify whether a decision is reviewable or not. The changes are expected to give rise to a modest change to the number of decisions that are reviewable by the ACAT (although, some decisions that are reviewable under the existing legislation will not be reviewable under the Planning Bill).

If an application is made to the ACAT for review of a decision made under the Planning Bill, the ACAT has the same powers to assess the merits of the matter and make a decision as the original decision maker (i.e. the Authority). The term often used to describe this principle is that the ACAT 'stands in the shoes' of the original decision maker.

In this respect, the Planning Bill departs from the approach of the 2007 Act, which placed a limitation on the ACAT's review jurisdiction in relation to several matters. Section 121(2) of the 2007 Act provides that, where a decision to approve a development application has been made, and that decision is reviewable under the reviewable decisions chapter, the right of review is only in relation to the decision, or part of the decision, to the extent that:

a) the development proposal is subject to a rule and does not comply with the rule or
b) no rule applies to the development proposal.

The operation of s 121(2) has caused significant uncertainty throughout the life of the 2007 Act. Several different approaches to the interpretation and effect of that provision have been suggested by the Authority and other parties to planning litigation. There are numerous Tribunal decisions in which different approaches have been taken (see, for example, *Sladic v ACT Planning and Land Authority* [2018] ACAT 38 and *Noah's Ark Resource Centre Inc v ACT Planning and Land Authority* [2017] ACAT 44 and [2018] ACAT 95).

The Planning Bill facilitates a shift to an outcomes-focussed planning system. The focus of decision-making under the Planning Bill is the achievement of good planning outcomes, not compliance with quantitative and prescriptive rules. The outcomes focus will be delivered primarily through desired outcomes and performance outcomes of the Territory Plan. In this context, s 121(2) of the 2007 Act is not a workable or productive limitation on the ACAT's jurisdiction in the reformed planning system.

CHAPTER 16 – MISCELLANEOUS

No policy changes are proposed to the provisions contained in the Miscellaneous chapter of the 2007 Act. Some of the provisions in this chapter will be relocated to new chapters of the Planning Bill, such as the Access to Information chapter.

The Miscellaneous chapter contains provisions that are important to the effective functioning of the planning system: providing for the making of regulations, the setting of fees, and evidentiary provisions.

The provisions for the custodianship map will be relocated to this chapter, reflecting their broader purpose identifying land custodians for public land, as well as unleased Territory land.

CHAPTER 17 – TRANSITIONAL PROVISIONS

Planning legislation in the Territory must deal with many legacy issues, such as the granting of leases and development approvals under previous legislation. It must also enable a transition from one statutory scheme to the next.

Transitional provisions are being drafted to support the effective transition from the current system to the reformed planning system. The first version of the 2007 Act contained many transitional provisions which provides a useful starting point for understanding what is required to transition the system.

THE NEW PLANNING REGULATION – POLICY

Under the new legislative framework, it is proposed to have two regulations: a general regulation and an exempt development regulation.

The general regulation will contain detailed provisions and thresholds for the application of processes under the Bill, process requirements and administrative detail to support the provisions of the Act. The exempt development regulation will provide a standalone regulation providing for exempt development.

This approach has been taken to make it easier to locate and navigate the provisions for exempt development, as these are provisions which are regularly accessed by the building and development industry. There is some complexity in the structure and layout of the Planning and Development Act 2007 and Planning and Development Regulation 2008 that will be addressed through this new, easy to navigate, approach.

PLANNING (GENERAL) REGULATION

The Planning (General) Regulation will continue to contain the administrative and process provisions to support the operation of the Act. Changes to provisions in the General Regulation support the policy positions outlined earlier in this paper.

PLANNING (EXEMPT DEVELOPMENT) REGULATION

SIMPLIFICATION OF SOME EXEMPTIONS

Exempt development is an important concept for the effective operation of the planning system; it allows low-risk development to occur without development approval.

The General Exemption Criteria will remain and provide important limitations on exempt works and ensure that other regulatory schemes are considered before works can be considered exempt from requiring development approval and can commence.

Given the regular use of exemptions by the development and building industries, the approach through the reform process has been to prioritise certainty over change, so that changes only occur where necessary. There have been minor changes to drafting of some provisions to improve clarity.

NEW EXEMPTIONS FOR MURALS AND MINOR UTILITY WORKS

A new exemption has been added to allow some murals (street art) to be painted on to buildings without the need for development approval. This reflects a desire to support street art, which adds to the vibrancy and attractiveness of the city.

Often, the development application process places an undue regulatory burden on a building owner or community group looking to put a mural on their building. The authority has received several requests from community groups to be able to paint murals without the need to go through the development application process.

The new exemption contains important limitations to protect against offensive or unsightly murals, and potential driver distraction. These include that the mural:

- is not within a residential zone
- is undertaken with the consent of the lessee or land custodian
- does not contain material that discriminates against or vilifies any person or group, is offensive or sexually explicit
- does not contain advertising material
- is not illuminated or animated
- does not use reflective paint and
- is not more than two storeys in height.

A new exemption has also been added for minor utility works. This would allow minor works necessary for utilities to provide essential services to the community, such as fences around their facilities, lighting, modifications to existing infrastructure and excavation for exempt work.

The new exemption contains important limitations to protect against impacts to nearby residents and the public, including, where relevant, height and plan area limits, a limit on distance to residential blocks, and compliance with other regulatory schemes.

EXEMPTION DECLARATIONS

Single dwellings may be exempt from requiring development approval under the current planning system where they meet the requirements of the Single Dwelling Housing Development Code (and other required criteria). This is a very important category of exempt development as it allows compliant single dwellings to be built without development approval.

An exemption declaration is a type of minor approval that can be issued by the Authority that allows a single dwelling, which would be exempt otherwise than for one or more minor encroachments, to continue to be dealt with as exempt development.

Under the current legislation, the Authority is given power to declare a dwelling to be exempt notwithstanding the minor departure from the rules of the Single Dwelling Code. In all cases, the departures from stated rules must be consistent with the applicable criteria under the Single

Dwelling Code, and the Authority must be satisfied the departures are minor and will not cause an adverse effect to neighbours.

This minor approval process allows many developments to avoid the lengthy and expensive development application process in circumstances where the minor departure is unlikely to have an adverse impact on anyone but the owner of that house.

Exemption declarations have caused concern amongst some community members because there is seen to be a lack of transparency around the issuing of exemption declarations, and sometimes neighbours tell us they are impacted by an encroachment.

These concerns have been considered and weighed against the important role exempt development, and exemption declarations, play in keeping low-impact developments outside of the development assessment process.

The draft Planning (Exempt Development) Regulation aims to increase transparency where exemption declarations are issued. At present, neighbours are required to be given information about a proposed development where an exemption declaration is issued, and it appears that requirement is not complied with in all cases.

The Authority's power to issue a declaration will be limited so that a declaration can only be made where the Authority is satisfied the requirement to provide information to neighbours has been met. The information requirement itself will be bolstered, requiring site plans, elevation plans and, where an encroachment into the solar building envelope is proposed, shadow diagrams, to be provided to neighbours.

In addition, the draft Planning (Exempt Development) Regulation provides that encroachments into the solar building envelope may only be the subject of an exemption declaration where the encroachment does not cause shadowing to any habitable room or principal private open space of another block. This will protect neighbours and make clear that exemption declarations that relate to encroachments into the solar building envelope are only available in very limited circumstances.

The draft Regulation also introduces a time limit on the operation of exemption declarations. Exemption declarations will be effective for 36 months, or such longer period as is specified in writing by the Authority.

The provisions under which exemption declarations are made will be renamed to be descriptive of their operation to s*ingle dwellings where declaration authorises minor non-compliance*.