

Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 27 August 2019.

Planning Act Amendment Bill 2020

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the bill

This Bill amends the *Planning Act 1999* (the Act) and legislation related to that Act.

The purpose of this Bill is to support Government's planning system reform commitments by amending the Act to enhance transparency around decision making.

In summary, the Bill:

- revises the purpose and objectives of the Act,
 - establishes a strategic planning framework to guide decision making to strengthen the alignment between the Act and the Northern Territory Planning Scheme;
 - revises a range of administrative and decision making processes to improve efficiency;
 - reforms the Development Consent Authority to increase transparency and to ensure members have the skills and training to make sound decisions and
 - provides a range of modern regulatory tools including enforcement notices, offences and penalties to ensure that the requirements of the Northern Territory Planning Scheme approvals are complied with and able to be enforced.

The Bill establishes the legislative policy objectives of:

- enhancing transparency and accountability around decision making
- valuing and encouraging community participation in the planning system
- strengthening the role of the Northern Territory Planning Scheme to deliver planning outcomes and support the growth of the Territory whilst protecting the environment

Overall these policy objectives are considered legitimate objectives as they facilitate economic development and considerations of human rights including facilitating community participation in the future growth of their communities.

Offences and penalties in the Bill have been prepared to comply with Part IIAA of the Criminal Code.

Human rights implications

This Bill engages the following rights:

- the rights of appeal or review and whether those rights provide for an effective remedy, as contained in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)
- the rights to the protection of one's privacy, as contained in Article 17 of the ICCPR
- the rights to minimum guarantees in criminal proceedings, specifically the right to be free from self-incrimination, as contained in Article 14(3)(g) of the ICCPR
- the right to the presumption of innocence, as contained in Article 14(2) of the ICCPR

Rights of appeal and review

Article 2(3) of the ICCPR requires that a person whose rights or freedoms are violated should have access to an effective remedy, even if the violation was committed by persons acting in an official capacity. In providing the right to an effective remedy, a person must have access to a competent judicial, administrative or legislative decision making authority who can hear an appeal and review the purported violation. Furthermore, the person must have confidence that the authority will enforce any remedies if they are granted.

Clause 73 of the Bill provides the right for an affected person to have certain decisions made under the Act to be reviewed by the Northern Territory Civil and Administrative Tribunal (NTCAT).

As the Bill is providing rights to persons to seek an effective remedy for decisions made under the Bill, it is considered that the rights of appeal and review are positively affected by the Bill. As such, it is considered that the Bill is compatible with Article 2(3) of the ICCPR.

Privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence.

A number of provisions in this Bill relate to matters addressed in Article 17 of the ICCPR, including the powers for authorised officers to enter and search premises and to search persons.

The limitations that the Bill will place on the rights of privacy will enable delivery of a modern regulatory system that provides an array of proactive and reactive tools to facilitate compliance and enforcement activities.

While in some instances information obtained may be personal, existing domestic laws such as the *Information Act 2002* prevent personal information from being made publicly available and ensure its safe and secure management. In addition, Clause 57 adds a new section 81ZA to the Act, which creates an offence for unauthorised disclosure of confidential information by members or staff of the Planning Commission which may be personal information, and Clause 72 adds a new section 107 which creates an offence for unauthorised disclosure of confidential information by members of the Development Consent Authority.

It is considered that although components of the Bill could impact on privacy rights, the limitations imposed are not arbitrary, and are necessary to facilitate the effective administration of the Act to achieve the legitimate policy objectives of the legislation.

Clause 49 provides a broad range of powers that permit authorised officers to enter and search any land or premises, undertake investigations, collect information and evidence, obtain personal information and documents, and perform other activities considered necessary to fulfil the duties of an authorised officer being to monitor compliance with the Act, and investigate suspected contraventions of the Act.

The power in the Bill that is provided to an authorised officer to intrude on a person's privacy does not extend to residential premises unless consent is provided by the occupier, or a Local Court Judge considers there are reasonable grounds to enter onto residential premises and has issued a search warrant.

Authorised officers require appropriate access to land and property to enable effective administration of the Bill by conducting investigation, compliance and monitoring activities. Whilst there are certain limitations being placed on the rights in Article 17 of the ICCPR, these limitations are considered permissible and do not compromise the Bill's compatibility with human rights.

Presumption of innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Strict liability when applied to an offence or an element of an offence, can be considered a limitation of the presumption of innocence because the offence, or an element of the offence can be proven, without the prosecution being required to prove fault. When strict liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, not the fault elements, in order for the defendant to be found guilty.

A defence of an honest and reasonable mistake of fact is available to the defendant (see section 43AX of the Criminal Code). This has the effect of reversing the burden of proof as to the defendant's understanding of a fact that is an ingredient in the offence.

The Bill contains a number of clauses that either make offences strict liability, or contain at least one element to which strict liability applies. All of these strict liability offences are considered to be reasonable, necessary and appropriate to achieve the objectives of the Bill and supports a contemporary planning system for the Territory that contains effective deterrents to committing an offence.

Clause 10 of the Bill provides for amendment of section 16 of the Act, relating to unauthorised removal of a sign notifying a proposed planning scheme amendment prior to the end of the period of exhibition. Strict liability applies to the erection of the sign in accordance with section 16, and the removal occurring prior to the end of the period of exhibition, meaning that the prosecution only has to prove that the defendant intentionally removed the sign.

The maximum penalty that may be imposed under section 16 is 100 penalty units.

It would be next to impossible for the prosecution to prove beyond reasonable doubt that a defendant knew that the sign they were removing had been erected in accordance with section 16 and that the exhibition period for the proposed change was still current. It is reasonable in the circumstances to remove this evidential requirement while allowing the defendant to raise a reasonable mistake of fact defence.

Clause 20 of the Bill provides for amendment of section 30J of the Act, relating to unauthorised removal of a sign notifying a concurrent application prior to the end of the period of exhibition. Strict liability applies to the erection of the sign and the removal

occurring prior to the end of the period of exhibition, meaning that the prosecution only has to prove that the defendant intentionally removed the sign.

The maximum penalty that may be imposed under section 30J is 100 penalty units.

It would be next to impossible for the prosecution to prove beyond reasonable doubt that a defendant knew that the sign they were removing had been erected in accordance with section 30J and that the exhibition period for the concurrent application was still current. It is reasonable in the circumstances to remove this evidential requirement while allowing the defendant to raise a reasonable mistake of fact defence.

Clause 41 of the Bill provides for amendment of section 66 of the Act, creating an offence if a person continues to use or develop land after notification by the Minister of the intention to either revoke or modify the permit allowing that use or development.

Strict liability applies to elements of this offence, meaning that the prosecution only has to prove that the defendant intentionally continued to use or develop the land after they were served with a notice revoking or modifying their right to use or develop the land in that manner.

The application of strict liability to the defendant's state of knowledge about the service of the notice and that their continued use or development of the land was a use or development only permitted under the original permit, is not a significant limitation on the presumption of innocence. It is a defence to a prosecution under section 66(6) if the defendant proves that they took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in preventing the offence.

The maximum penalty that may be imposed at amended subsections 66(6A) and 66(7A) is 200 penalty units.

The application of strict liability to ingredients of the section 66(6) offence, and the provision of a reasonable steps defence, will not have a significant impact on the presumption of innocence.

Clause 49 of the Bill provides for the replacement of Part 7 of the Act, relating to enforcement of offences. A new section 75C provides for the offence of clearing of native vegetation except in accordance with a planning scheme, interim development control order or a permit.

The prosecution has to prove that the defendant intentionally engaged in conduct, that conduct resulted in land clearing and the defendant was reckless as to that result, and that

the land clearing was not in accordance with a permit or interim development control order, or a planning scheme that applies to the land.

Strict liability applies to a person's state of knowledge about whether their clearance of native vegetation was contrary to the terms of a permit or interim development control order, or a planning scheme that applies to the land.

This places a positive burden on anyone wishing to do something that might result in the clearance of native vegetation, to first inquire as to whether they can legally do so.

The maximum penalty that may be imposed under new section 75C is 500 penalty units with a default penalty of 4 penalty units should the person continue clearing native vegetation after being notified that their clearing is illegal.

The application of strict liability to a person's knowledge of any land clearing restrictions is not a significant limitation on the presumption of innocence.

A new section 75D provides for the offence of contravening the requirements of an enforcement notice issued by the consent authority. Strict liability applies the person's knowledge or understanding of the fact that they were served with an enforcement notice, meaning that the prosecution only has to prove the fact that the enforcement notice was issued to a person, and that the person intentionally contravened a requirement of that notice.

The maximum penalty that may be imposed under new section 75D is 500 penalty units with a default penalty of 4 penalty units.

The application of strict liability to service of the notice is not a significant limitation on the presumption of innocence.

A new section 76D provides for the offence of obstructing an authorised officer acting in official capacity. Strict liability applies to the authorised officer status of the person being obstructed.

The maximum penalty that may be imposed under new section 76D is 200 penalty units or imprisonment for 2 years.

Given that the prosecution still has to prove that the person obstructing the authorised officer knew that that officer was acting in an official capacity, the application of strict liability to their status as an authorised officer is not a significant limitation on the presumption of innocence.

A new section 80F of the Act enables a court to find an executive officer of a body corporate personally liable if the body corporate has committed an offence under the Act.

The prosecution has to prove that:

- the body corporate committed an offence by contravening a declared provision of the Act, and the officer was reckless about whether the contravention would happen;
- the officer was in a position to influence the conduct of the body corporate in relation to its contravention; and
- the officer recklessly failed to take reasonable steps to prevent the contravention by the body corporate.

Reaching beyond the corporate veil in this way sends a message on behalf of the community that the offences are not merely regulatory sanctions, with some financial risk to businesses that choose to deliberately flout the rules, but that executive officers of corporations that choose to engage in these offences may be personally held liable for their conduct.

The maximum penalty that may be imposed on an executive officer under new section 80F is the maximum penalty that applies for the breach of the relevant declared provision by the body corporate.

The provision of strict liability to the ingredient that the officer was in a position to influence the conduct of the body corporate in relation to its offending imposes no significant limitation on the presumption of innocence.

Clause 57 of the Bill provides for the replacement of section 81ZA of the Act, relating to the unauthorised disclosure of confidential information by a member of the Northern Territory Planning Commission or someone working for the Commission. Under the new section 81ZA, a person commits an offence by intentionally disclosing confidential information obtained as a Commission member, or as a person engaged by the Commission, or as a staff member provided to the Commission. Strict liability applies to the person's status as a Commission member, a person engaged by the Commission, or a staff member provided to the Commission, and to their gaining information in the course of performing a function or exercising a power while acting in that capacity.

The prosecution has to prove that:

- the person was a member of the Commission, a person engaged by the commission, or a staff member provided to the Commission;
- they obtained information while acting in that capacity;
- that information was confidential and they were reckless as to that circumstance;
- they intentionally engaged in conduct;

- That conduct resulted in the disclosure of the information, and that disclosure was not:
 - connected with the administration of the *Planning Act 1999*; or
 - to a person who is not otherwise entitled to the information,and they were reckless as to that result and circumstance.

The maximum penalty that may be imposed under new section 81ZA is 50 penalty units or imprisonment for 2 years.

The application of strict liability to the first two elements of the new subsection 81ZA(1) offence is not a significant limitation on the presumption of innocence.

Clause 66 of the Bill replaces section 98 of the Act, relating to the non-disclosure of interest by a member of the Development Consent Authority. The replacement section creates 2 offences: one for members taking part in the deliberation of decisions of the Development Consent Authority when they have an interest in the matter under consideration, and the other for taking part in the deliberation of decision relating to a relationship or interest where they fail to disclose their interest or relationship.

Strict liability applies in both offences to the circumstance that the person is a member of the Development Consent Authority, and in the case of the non-disclosure offence, the fact that the decision is in relation to an interest or relationship referred to in subsection 97(1) of the Act.

An offence is not committed if the Chair has determined under subsection 97(5) that the defendant may be present and participate in proceedings.

The maximum penalty that may be imposed under subsections 98(1) and (2) is 50 penalty units.

The application of strict liability to the fact that the person was a member of the Development Consent Authority, and the subject matter of the deliberation of consideration which they took part in, is not a significant limitation on the presumption of innocence.

Clause 72 of the Bill provides for the replacement of section 106 of the Act, relating to disrupting a meeting of the Development Consent Authority. Under subsection 106(3), a person commits an offence if they intentionally fail to leave a meeting or create a disturbance in or near a place the Authority is meeting, after having been directed to leave the meeting by the Chair of the Development Consent Authority.

Strict liability applies to the circumstance of the person being directed by the Chair to leave the meeting.

The maximum penalty that may be imposed under section 106 is 50 penalty units or imprisonment for 6 months.

The application of strict liability to the circumstance that the person was directed by the Chair to leave the meeting is not a significant limitation on the presumption of innocence.

Clause 72 of the Bill also provides for the replacement of section 107 of the Act, relating to the unauthorised disclosure of confidential information by a member of the Development Consent Authority. This provision mirrors the provision in section 81ZA inserted by clause 57 of the Bill for unauthorised disclosures by members and staff of the Commission.

Under new section 107, a member of the Development Consent Authority commits an offence if they intentionally and recklessly disclose information obtained by them as an Authority member.

The maximum penalty that may be imposed under new section 107 is 50 penalty units or imprisonment for 6 months.

Strict liability applies to the person being a member of the Authority and to the person gaining confidential information in that capacity.

The application of strict liability to these elements of the offence is not a significant limitation on the presumption of innocence.

Clause 76 of the Bill provides for replacement of section 119 of the Act, which creates an offence for the holder of a development permit to continue to develop land under a development permit after an application for review of the permit has been made to the Northern Territory Civil Administrative Tribunal.

Strict liability applies to the circumstances that the person holds a development permit, and that an application has been made for the review in relation to the issue of the permit. Any review application in relation to the issue of a permit would be initiated by the permit holder. Third parties have the right to seek a review of a decision of the consent authority to consent to a development permit. A permit cannot be issued until those review rights are exhausted, which means a third party will not be seeking a review after the issue of a permit.

It is a defence to a prosecution under this section if the defendant proves that he/she took reasonable steps and exercised due diligence to prevent the offence. The legal burden of proof rests with the defendant in relation to the steps taken and diligence exercised in

preventing the offence. This covers the scenario where the permit holder initiates a review of the permit terms, but a contractor continues to carry on with the development works.

If the permit holder is charged, they have a defence if they can establish that they took reasonable steps to prevent the contractor from continuing to develop the land.

If the contractor or a subcontractor is charged, and was not advised that a review application had been made, they can raise a reasonable mistake of fact defence.

The maximum penalty that may be imposed at new section 119 is 500 penalty units with a default penalty of 2 penalty units for continuing offences.

The permit holder will know that they have a permit and that they have sought to seek a review of the terms of the permit. The application of strict liability to these circumstances is not a significant limitation on the presumption of innocence.

Overall the strict liability offences in this Bill are those which are straight-forward and for which it is reasonable to expect that a person is aware of their duties and obligations.

It is therefore considered that although there are limitations being placed on Article 14(2) of the ICCPR in relation to the presumption of innocence, the limitations are permissible and do not compromise the Bill's compatibility with human rights.

Conclusion

This Bill does place some limitations on certain human rights. Overall however, the Bill is considered compatible with human rights as the limitations imposed are reasonable, necessary and proportionate, and facilitate the overarching legitimate objectives of the Act.