

Inquiry into ACT's heritage arrangements

Dissenting Report by Ed Cocks MLA

Reason for Dissent

While a number of recommendations of the main committee report have merit, taken as a whole it provides little substantive direction for the Government to correct course, and it does not fully contend with a number of the underlying strategic issues and tensions in the ACT's Heritage system.

Furthermore, the main report is based on the notion that tinkering around the edges will be sufficient to repair an outdated system which became deeply dysfunctional, resulting in unprecedented steps against those working in the system.

There is a risk that, without strong direction and a willingness to take clear decisions, the Government will continue largely as it has since 2016. It is not tenable that the last 7 years of strategic indecision and neglect be allowed to stretch to a decade or more.

There is also a risk, particularly in the context of the current planning reforms, and the impending review of the heritage system undertaken by the same Directorate, that the main report could be seen as endorsing unfettered development over heritage considerations. As one person put it:

"I have seen in my long career in heritage dozens of reviews of heritage, and they are almost always viewed with great concern by the heritage community, because governments are often more about unravelling heritage in some way or easing the path for other activities rather than a kind of full-throated, genuine embrace of heritage issues"

Despite the weight given to what could be termed the "development at all costs" perspective in the main report, the preponderance of evidence and opinion presented to the inquiry suggests that an effective heritage system ought to be focussed, first and foremost on the preservation of heritage and its inherent value. This cannot be achieved by injecting an increasing number of competing, non-heritage considerations into the system.

I therefore consider it important to dissent from the main report and present an alternative perspective on the problems in the Heritage system, and how they could be addressed.

Ed Cocks MLA

Summary

Throughout the conduct of this Inquiry, it has become clear that the ACT Heritage system is not, and has for some time not been, operating as it ought. There are clear failings and weaknesses at both the strategic and operational levels, and as a system it seems to be neither adequately protecting the Territory's heritage, nor enabling reasonable development of and improvements to properties where heritage is a consideration.

There are also clear deficiencies in respect of Aboriginal heritage, local heritage, and other more specialist heritage areas.

Furthermore, it seems clear that for a long time, there has been no shared understanding of the objectives, responsibilities, and standards for heritage management between those in the Council, those in the Directorate, and the Minister. The backlog of issues requiring resolution reached an unmanageable level before the Minister dismissed the previous council and subsequently appointed an interim council.

As the Committee heard throughout this inquiry, the ACT's heritage legislation, systems, and structures have been largely neglected, and it is impossible to understand the current state without understanding that 20 year record of neglect, which culminated in the Minister's unprecedented dismissal of the Heritage Council.

Prior to the Minister's action, the ACT Heritage system was last elevated to policy prominence in 2016 with the release of a discussion paper intended to inform development of an ACT Heritage Strategy. Before that, the last major development appears to have been the original establishment of the heritage act around 20 years ago.

In considering the future direction of the heritage arrangements in our Territory, it is also important to understand that heritage protections inevitably contend with conflicting interests, and in particular with unfettered development and densification. However, many modern approaches to heritage seem to balance and even integrate these interests, driving creative solutions and increasing the likelihood of heritage preservation.

This dissenting report makes recommendations intended to support the modernisation of the ACT's Heritage System based on a strategic approach to system level reform.

Key issues identified during the inquiry included:

Poor Strategy and Systems

- A lack of strategic direction and guidance which translated into an unwillingness to take hard decisions;
- A lack of clarity of purpose, and shared understanding of the functions of the Heritage Council, the Heritage Unit, and the heritage system in general.
- An outdated legislative framework that is no longer fit for purpose.

Operational issues and dysfunction

- Poor transparency and openness in the heritage system, which was described during the hearings as operating as a bureaucratic “black box”, with no clear accountabilities, and no clear standards for many decisions.
- Low predictability regarding decisions of the Council and the Unit, and little feedback on the reasons for particular decisions.
- Poor consultation and barriers to the involvement of stakeholders.
- The development of dysfunctional relationships both between individuals, and between
- A perceived culture of protection, whereby it appears likely that the Directorate valued protection of Ministers and the Government above the independent operation of the Council and the ACT’s heritage system.
- Structurally entrenched conflicts of interest within the heritage system, including through the subordination of the heritage function to the planning function and development priorities of the Government.
- Chronic under-resourcing of administrative staff and functions of the heritage system which are likely to have contributed to

Heritage Council Dismissal

The Committee launched this inquiry on 5 December 2022 following advice from, and subsequent announcement by the Minister on 29 November 2022 that all members of the ACT Heritage Council were to be dismissed.

It was not the intent the Committee to examine the Minister’s handling of issues within the ACT Heritage System. And it has, from the outset of this inquiry, been the Committee’s intention to take a productive, and forward-looking approach to improving the ACT Heritage system, and to contribute to a reform process that would prevent such deep dysfunction and poor relationships emerging in the future.

However, the Minister’s statements and advice to this Committee were central to the decision to undertake this inquiry, and it is important to understand the extent of the Minister’s engagement with the Committee prior to the inquiry’s announcement.

Despite the Minister’s initial statement to the Assembly that she was “*consulting with the Assembly’s Standing Committee on Environment, Climate Change and Biodiversity about her potential decision in response to the review*”, the Minister’s engagement was limited to briefing the Committee on her intended approach. At no time was there any indication to the Committee that the Minister was considering any course of action other than the dismissal of the Heritage Council. The dismissal of the Heritage Council was entirely the Minister’s decision, and it had been made prior to discussions with the Committee.

Such extreme action was unprecedented, and with the Minister announcing she had lost confidence in the Council, the Committee was concerned about the possibility of deeper issues in the ACT's heritage system.

It is also notable that the Minister has declined to provide the Committee with the full unredacted report that led to the Council's dismissal. In the absence of that information, it has been significantly more difficult for the Committee to understand the Minister's decision, and to formulate helpful recommendations to support the effective operation of the Heritage system, and prevent the emergence of similar dysfunction into the future.

Indeed, the decision to withhold the report from public release, from the Committee, and from the interim Chair of the Council mirrors one of the most commonly discussed concerns with the ACT's heritage system during this inquiry. Specifically that:

"decision-making appears to occur in some sort of a black box, so that the general public and other concerned organisations have no idea how that decision has been arrived at." (Ms Forrest)

It also echoes concerns that the Directorate's relationship with the Heritage Council seems to be driven by concerns about the potential to embarrass or upset the Government.

"...Part of that touches on things like undeclared tensions, for example, in the relationship between council and the branch over an activist council wanting to do something which might upset the government."

It is the view of this MLA, that an independent statutory body such as the Heritage Council should be empowered to fulfil its role without fear that it will be shut down for potentially upsetting the Government.

It also remains my considered view that the Minister's persistence in withholding the full report which triggered both the unprecedented dismissal of the entire Council and a large scale internal review and reform process for the ACT's Heritage arrangements risks undermining the opportunity to fix the system. The Minister should reconsider this decision and release the report in full, with minimal redactions only where absolutely necessary to protect the privacy of the individuals impacted.

DISSENTING RECOMMENDATION 1:

THAT THE MINISTER RELEASE THE 2022 REPORT ON THE REVIEW OF THE ACT HERITAGE COUNCIL WITH REDACTIONS ONLY WHERE ABSOLUTELY NECESSARY TO PROTECT INDIVIDUALS' PRIVACY.

Strategic Directions and Legislative Framework

The heritage system operates in a complex environment with stakeholders across multiple Government, private sector, and third sector organisations. It has close interactions with the planning and development system, and there is often potential for conflicting interests to arise with other policy areas and perspectives; such as accessibility, safety, and sustainability.

However, an effective heritage system should, first and foremost, be designed around protecting heritage. It should not be subservient to development, and should not be corrupted by integration of competing interests.

It is notable that the main committee report provided significant weight to the views of the Greater Canberra submission, which essentially argued for unfettered development at the expense of heritage. This submission argued for the wholesale eradication of heritage areas in favour of what Greater Canberra considers a better use of the land. This perspective was not supported by other submissions, and was a polar opposite view compared with that expressed by the great majority of witnesses and submissions.

Similarly, the main report has taken the view that specific expertise regarding sustainability should be integrated within the heritage system. This perspective is largely based on the experience of a limited number of submissions that described experiences of delays, indecision, and what they felt were unreasonable decisions regarding straightforward property improvements such as the installation of solar panels.

These are legitimate problems within the heritage system. However, the corruption of the system by further introducing competing interests and tensions is unlikely to appropriately address these issues. It is likely that the development of clear guidelines and standards for straightforward improvements to a property would be sufficient to achieve the desired outcome, while maintaining a clear demarcation between heritage and other policy issues.

Many witnesses expressed concerns, during hearings, that heritage was being placed in a subservient position to development, and that the Government's planning legislation increased that risk. Some witnesses pointed out that this risk was further exacerbated by the inclusion of the Government's official in charge of the Government's development and infill agenda as a member of the Council. Notwithstanding the potential value of understanding the government's development objectives, witnesses observed that there seems to be a conflict of interest inherent in the two roles.

Ultimately, however, the tension between heritage and other policy areas is a question of strategic positioning and strategic direction for the ACT Government. It is essential that everyone involved in the heritage system has a clear understanding of the objectives and operation of the heritage system in the ACT. That is best expressed through a formal strategy, which should be delivered before any subsequent change to the ACT's legislative framework for heritage.

DISSENTING RECOMMENDATION 2:

THAT THE GOVERNMENT DEVELOP A HERITAGE STRATEGY FOR THE ACT, BY JULY 2024, SPECIFYING:

- The strategic objectives of heritage management in the ACT;
- The structures required to support those objectives;
- Clear, defined processes for consideration of matters by the Heritage Council, including preparation of material by officials.
- The timeframe for implementation of the strategy.

In respect to the heritage legislative framework, the committee heard extensive evidence regarding areas which are no longer fit for purpose, and it was clearly put to the Committee that, notwithstanding some views to the contrary, the legislation is now so far out of date, and requires so many changes and improvements, that it would make sense to repeal the current legislation and replace it with a new, modern and fit for purpose Heritage Act.

This case became increasingly compelling as the range of issues requiring legislative change was explored.

It is my considered view that the best chance to establish a new and effective heritage system in the ACT is through this repeal and replace approach. This would enable clarity regarding decision making and powers, as well as supporting a more open, and engaged heritage system.

DISSENTING RECOMMENDATION 3:

THAT THE ACT GOVERNMENT REPEAL AND REPLACE THE HERITAGE ACT WITH A MODERN, FIT FOR PURPOSE ACT AND REGULATIONS, INFORMED BY CONSIDERATION OF EXAMPLES AND LESSONS FROM OTHER STATES, WHICH INCLUDES:

- A requirement for the Minister to develop, publish, and regularly review an ACT Heritage Strategy, developed with advice and input from the Council.
- Recognition of the intrinsic relationship and tension between heritage and development.
- Establishment of a fully independent, professional Heritage Council, supported by a dedicated secretariat.
- Confirmation of the Heritage Council as the decision making body for Heritage Matters, with the Minister maintaining the power to overrule decisions in exceptional circumstances.
- Recognition of the existing heritage council “taskforce” on Aboriginal heritage as dedicated Sub Committee. The role of the sub-committee would be to provide advice to the Heritage Council on matters related to Aboriginal heritage, and the chair of the Sub-Committee would also be a member of the Council, responsible for advocating the views of the Sub-Committee.
- an appropriate mechanism for the establishment of clear timeframes and standards for the assessment of heritage applications
- Integration with other ACT legislation, including legislation related to planning, development, and building.

Operations and public trust

Throughout the inquiry, stakeholders, including community groups, heritage advocacy groups, and development interests, reported feeling unheard, and there was a strong sense that once an application was submitted, it existed in a bureaucratic “black box” with little understanding of how a decision would be made and poor consistency between applications.

In testimony regarding the tensions with the development system, concerns were also raised about the culture of the bureaucracy, and a perception that under current arrangements, the Heritage Unit is effectively required to support the heritage unit while it exists under a governance structure which reports to the chief planner.

“One of the things that has come to mind in reflecting on the recent past is the difficulty the branch may have in dealing with two masters: the council on the one hand, and EPSDD, the government and the minister on the other hand.”

Evidence also reflected on the extended timeframes to receive responses from the heritage unit, and the inability to contact heritage staff, and a sense that the heritage system operates without influence from external experts.

Each of these concerns appears to have been exacerbated by divergent understanding of roles, powers and reporting lines between the Heritage Council, and the Unit, chronic under-resourcing of the heritage function, and a lack of independence for Heritage Council functions.

Delays in the Heritage System have a flow-on impact, with costs to society, businesses, particularly with respect to the impact on planning, development, and construction. It is also important to recognise that these impacts can act contrary to heritage objectives themselves, including by reducing certainty and increasing the expense of maintenance and improvement activities.

It seems likely that appropriately resourcing the administrative functions of the heritage system, and releasing them from within EPSDD, would improve the effectiveness and cost effectiveness of the system. This would be further supported by increasing engagement with the system.

DISSENTING RECOMMENDATION 4:

THAT THE GOVERNMENT ESTABLISH AN INDEPENDENT OFFICE FOR HERITAGE WITH ADEQUATE RESOURCING TO:

- Support the secretariat needs of the Council and its sub-committees and taskforces.
- Undertake all administrative functions required for the effective operation of the heritage system.

DISSENTING RECOMMENDATION 5:

THAT THE GOVERNMENT STRENGTHEN THE HERITAGE SYSTEM BY PROVIDING OPPORTUNITIES FOR CONVERSATION AROUND APPLICATIONS, INCLUDING INVOLVEMENT OF COMMUNITIES, INTERESTED INDIVIDUALS, EXPERTS AND OTHER STAKEHOLDERS IN CONSIDERATION OF SPECIFIC APPLICATIONS.

It is also notable that the costs of maintaining and living with or operating on a heritage property are largely born by the leaseholder in the ACT. This effectively operates as a penalty which discourages individuals and businesses from purchasing these leases. There is an opportunity to reduce this burden and encourage appropriate treatment of and care for these properties through conditional rates relief.

DISSENTING RECOMMENDATION 6:

THAT THE GOVERNMENT PROVIDE CONDITIONAL RATES RELIEF TO OWNERS OF HERITAGE LISTED RESIDENTIAL PROPERTIES, IN RECOGNITION OF THE SIGNIFICANTLY INCREASED RESPONSIBILITIES AND COSTS THAT ACCRUE FOR THESE BUILDINGS.