



**LEGISLATIVE ASSEMBLY**  
**FOR THE AUSTRALIAN CAPITAL TERRITORY**

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STANDING COMMITTEE ON ENVIRONMENT, CLIMATE CHANGE AND BIODIVERSITY  
Dr Marisa Paterson MLA (Chair), Ms Jo Clay MLA (Deputy Chair), Mr Ed Cocks MLA

## Submission Cover Sheet

Inquiry into ACT's heritage arrangements

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Australia ICOMOS Secretariat  
Faculty of Arts & Education  
Deakin University  
221 Burwood Highway  
Burwood VIC 3125

w: [www.icomos.org/australia](http://www.icomos.org/australia)

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Standing Committee on Environment, Climate Change and Biodiversity  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

By email: [LCommitteeECCB@parliament.act.gov.au](mailto:LCommitteeECCB@parliament.act.gov.au)

Dear Dr Paterson

### **Inquiry into ACT's heritage arrangements**

Thank you for the opportunity to provide comments for consideration in this Inquiry. I provide this submission on behalf of Australia ICOMOS.

ICOMOS – the International Council for Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an official Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 750 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia, which provides us with an exceptional opportunity to see best-practice nationally and internationally.

Australia ICOMOS has a particular interest in the broader development of policies and processes that have the potential to either enhance or prejudice a best-practice approach to the conservation and management of Australia's cultural heritage places. The Inquiry into the ACT's heritage arrangements provides a welcome opportunity to improve the effectiveness of heritage management in the Territory.

The current lengthy response times associated with ACT Heritage Council (the Council) decisions indicates that there is a need to urgently review heritage arrangements in the ACT. This includes a need to review the existing legislation as well as the governance arrangements between the Council and ACT Heritage. Heritage in the ACT also needs to be adequately resourced and measures to improve efficiency should be considered to resolve risks to heritage and restore trust in governance and decision making structures. It is important that the review also respond to current best practice with respect to recognising First Nations heritage protection.

Comments on heritage arrangements in the ACT are attached and provided under the Terms of Reference of the Committee. We trust that our submission will assist the Standing Committee in its review of heritage arrangements in the Territory and thank you again for your consideration of the views of Australia ICOMOS on these important issues.

Yours sincerely

Professor Tracy Ireland M.ICOMOS FSA  
President

Australia ICOMOS Inc (ACT),

**a) The effectiveness and adequacy of operations under the *Heritage Act 2004* including First Nations heritage, and approvals provided under the Act;**

*General*

A review of the effectiveness and adequacy of the *Heritage Act 2004* is considered appropriate given that it is now 19 years old, though we note there was a review undertaken in 2010. It is Australia ICOMOS' view that the following aspects of the existing Act require consideration:

- The types of decisions that are reviewable decisions under the Act should be examined and expanded. Reviewable decisions are currently limited to registrations, heritage directions, publication of restricted information and discovery orders. This means that other decisions, such as those related to Statements of Heritage Effects (SHE - a form of heritage impact assessment) applications, are not reviewable and the opportunity for applicants to practically appeal decisions is limited. An opportunity to appeal decisions is important and could also be provided by adopting an approvals process that reflects that used in Victoria where applicants can make an application to the Heritage Council to appeal a permit decision made by the Executive Director of Heritage Victoria (refer to section b for further information).
- Whilst works proposals that are submitted as a Development Application (DA) are generally publicly advertised, proposals that do not require a DA and are submitted directly to ACT Heritage do not need to be advertised. This means that there is no opportunity for the public to comment on these applications.
- The Act does not require heritage approvals for works located adjacent to a registered heritage place. This is inconsistent with good heritage practice and is a requirement in other jurisdictions, such as New South Wales.
- There is limited use of statutory timeframes. Whilst there are statutory timeframes associated with several processes (such as the provision of Council Advice on referred Development Applications), there are no statutory timeframes for works proposals that are submitted directly to ACT Heritage for formal advice, or for applications for approval of a SHE. This leads to considerable uncertainty and allows for lengthy delays which impacts negatively on the perception of heritage in the ACT. Other jurisdictions, such as Victoria, have statutory timeframes for making decisions on permit applications.

The existing criteria used for heritage listing in the ACT are based on the nationally recognised HERCON criteria. These are well-established and an appropriate set of criteria to determine heritage significance for the purpose of placing statutory controls on a place or object.

*First Nations/Aboriginal Heritage*

It is noted that First Nations cultural heritage has been the subject of several reviews in other states and that the Commonwealth Government has commenced a process that is building on significant national reviews and *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* (HCOANZ 2020). This is likely to have significant implications for state and territory First Nations heritage legislation and may require the states and territories to meet minimum standards in legislation relating to First Nations heritage protection. These standards may be similar to those recommended in *A Way Forward report* (JSCNA 2021).

The structure of Aboriginal heritage in the ACT and its operations are premised on outdated concepts. The legislation does not allow for broad Aboriginal cultural values to be considered, instead focusing on objects and sites. In relation to assessing significance, the current processes are largely driven by the concepts of scientific or archaeological significance being assessed, with no overt requirement for Aboriginal social and spiritual values to be assessed. Without specific mechanisms and requirements for broadly assessing Aboriginal cultural values, the practice of doing so is *ad hoc* and partial, and therefore inconsistent in its application. This does not provide the Aboriginal people of the ACT with confidence in either the assessment processes or in the ACT's protection measures.

Current mechanisms also do not empower the Aboriginal community in any decision-making processes relating to their heritage and its potential incremental destruction. While the Aboriginal community is included in ACT Heritage Council membership, the Representative Aboriginal Organisations (RAOs) representatives express concern that they do not have an active engagement with the ACT Heritage Council in the decision making process. The current arrangements for consultation with the local Aboriginal community are based on an outdated system of having four recognised RAOs as the main stakeholders for heritage and archaeology related consultation. This system is not reflective of the Aboriginal community in the ACT and should be revised.

The absence of any formal consultation processes and Aboriginal community empowerment in the process is at odds with other jurisdictions, current trends and the recognition of First Nations rights under the 2007 United Nations Declaration on the Rights of Indigenous Peoples. In Victoria for example, legislation and regulations have been set up to provide a consistent process and to empower the First Nations community to have a substantive decision-making role in the future management of heritage.

For First Nations cultural heritage, significance and values should be self-determined and the management of this heritage should be developed in a co-design process with traditional custodians who have the right to speak for Country. This is equally applicable for the ACT. The *State of the Environment report 2021* (Heritage chapter, McConnell *et al*) outlines a pressing need for a rights-based approach to Indigenous heritage management, which, together with a primary role in decision-making, must give Indigenous Australians expanded access to Country so they may continue to interact with and care for heritage sites in line with their customary obligations.

**b) The effectiveness of the structure, administration, and operation of the ACT Heritage Council, including the adequacy of governance arrangements between the ACT Heritage Council and ACT Heritage Unit (ACT Heritage);**

Greater clarity is required with regards to the respective roles of the Council and ACT Heritage. The Act defines the role of the Council, but does not refer to ACT Heritage or deal with the governance arrangements between the two bodies. The role of both ACT Heritage and the Council should be defined in a way that the public understands their respective roles and there is clarity regarding what matters are assessed by the Council or under delegation. Importantly, the Council should remain an independent statutory body.

The roles of the Council and ACT Heritage could be defined within the Heritage Act (as is the case in Victoria), with supplementary information provided via other means (such as documents published on the web by the ACT Heritage Council). In Victoria, the role of the Executive Director of Heritage Victoria is clearly articulated in the *Heritage Act 2017*. This role includes recommending to the Heritage Council the registration of a place or object onto the Register, determining permit applications and managing enforcement. Whilst for registrations the Victoria Heritage Council makes the final decisions, permits are generally determined by the Executive Director. Applicants, owners or other persons with a substantial interest in the place or object may make a written request for the Heritage Council to review the decision of the Executive Director and a public hearing can be held by the Council prior to making a final decision.

There is also the perception that there is a focus within ACT Heritage on processes, and it is not clear if critical thinking on a case-by-case basis is undertaken. This may be reinforced by the objectives of the existing Act which include a clause related to the Development Application process but lack statements regarding desired outcomes. This focus on statutory processes means that existing Heritage Register entries (including relevant Specific Requirements and Features Intrinsic lists) are elevated above other matters, even when they are dated, contain omissions or are inaccurate. Despite the Act containing provisions for the Council to correct or change a registration detail, the perception is that it is too difficult to make amendments to existing Register entries.

**c) The adequacy of resourcing for the ACT Heritage Unit;**

The lengthy delays in all matters related to ACT Heritage are the cause of much discontent and appear to be having considerable impact on the perception of heritage in the ACT. It is clear that there has been a substantial increase in the workload of ACT Heritage and that the volume of work is beyond their current resources. Resourcing should be sufficient to support the identification, assessment and management of the Territory's diverse heritage (such as landscapes, Aboriginal heritage, built heritage, archaeology and objects).

The lengthy timeframes associated with obtaining approvals for works at a listed heritage place (by formal advice or via the SHE process) is a disincentive for owners/managers and appears to contribute to works being undertaken either prior to, or without, obtaining the appropriate approvals. The perceived lack of enforcement around compliance further exacerbates this.

There are also extensive delays involved with the approval of Conservation Management Plans (CMPs) and the formal assessment of places and objects nominated for inclusion on the ACT Heritage Register. Where owners and managers of heritage places take a proactive approach by preparing CMPs prior to the design and documentation of upgrade works (in accordance with good practice), the substantial timeframes

associated with review of these documents (often multiple years) means that these documents are rarely approved before development proposals are prepared. This creates greater uncertainty for all involved and can have substantial financial implications.

In addition to ensuring that ACT Heritage is adequately resourced in terms of both the number of staff and range of expertise (to cover the range of heritage values, places and objects, including First Nations staff), it would be sensible to investigate measures to improve efficiency and reduce workload. This might include:

- Improvements to communication protocols, particularly when interacting with applicants and the public. Currently there is no formal system for acknowledging that an application has been received when submissions are made directly to the ACT Heritage Council for advice (this occurs via email). Applicants generally (although not always) receive an automated response advising of delayed assessments and minimum but lengthy response times. Unlike other jurisdictions, such as Victoria, a formal application number is not provided and advice regarding the progress or status of an application is difficult to obtain as there appears to be no designated assessment officer.
- Consideration of provisions for exempt works that apply to all heritage places so that advice/approval does not need to be obtained for particular maintenance or temporary works where these meet particular criteria. The current Act does not include provisions for exempt works. A review of the success (or otherwise) of exempt works in other states, including those recently introduced in NSW (Schedule of Standard Exemptions, November 2020) and Victoria (General permit exemptions, December 2022), could be used to inform the development of appropriate exemptions for the ACT. Specific exemptions for listed places or objects could also be developed during the registration process and included in the Heritage Register Entry.
- Updates to existing guidelines and development of new guidelines in accordance with contemporary heritage practice to provide greater certainty and clarity regarding the management, conservation and upgrade of heritage places. It is noted that many of the existing Guidelines are now quite old and are not necessarily consistent with contemporary practice. There are also contemporary issues that could be addressed via the introduction of new guidelines (for example to address thermal performance and other sustainability issues). Promotion and publication of contemporary guidelines would serve to raise awareness of good heritage practice and provide ACT Heritage with the tools to efficiently make appropriate decisions.
- Development and implementation of a thematic framework and thematic history for the ACT in consultation with the ACT community. The lack of this resource typically means that additional research is required during the registration of a heritage place/object to inform an understanding of its significance to the Territory. A robust thematic framework and history would assist with understanding the relative significance of a heritage place/object as well as identify gaps with existing listings (such as cultural landscapes). It could inform a strategic program of heritage assessments rather than the current system which appears to be *ad hoc* and relies on individual nominations. The framework should also be grounded by an understanding of Canberra's national significance as set out in the National Capital Plan.
- Consideration of additional outsourcing or consultation to assist to clear the backlog of nominations to the ACT Heritage Register. In the past it has been practice to outsource a number of assessments via the Heritage Advisory Service to progress nominations. In other jurisdictions, such as Victoria, the Council can consult with others and seek advice where required, including the commissioning of studies. Commissioning of larger heritage/typological studies (rather than assessing places individually as they are nominated) could be undertaken to efficiently establish the relative significance of places and objects and identify those that should be included on the Register.
- Proactive engagement with development matters, early in the process to guide appropriate outcomes. This would serve to limit proposals being withdrawn/substantially reworked, saving considerable resources for both the Council and owners/managers of heritage places (including other ACT Government agencies). Proactive and timely engagement would also serve to promote heritage in the ACT.

#### **d) The operation of heritage legislation in other Australian jurisdictions**

A review of heritage legislation in other jurisdictions to identify successful aspects of their respective heritage acts is supported. It is noted that a Request for Quotation (RFQ) for an ACT Heritage Jurisdictional Review is pending a decision by the ACT's Environment, Planning and Sustainable Development Directorate (EPSDD). As highlighted throughout this submission, issues worthy of consideration in a review of heritage arrangements in the ACT include:

- First Nations/Aboriginal cultural heritage protection Acts, including recent reviews of these.

- The objectives of other heritage Acts, which include statements about desired outcomes.
- The roles of other heritage councils as well as the roles of the organisations, such as Heritage Victoria, that support the functions of the councils.
- Processes for appealing decisions.
- Statutory timeframes.
- Provisions for exempt works.
- Communication protocols with external parties.
- Guidelines, heritage strategies, thematic frameworks and other advisory documents which supplement heritage legislation.

One aspect of other jurisdictions that is of concern are ministerial call-in powers for 'state significant' developments. These powers give a strong perception of political interference in heritage matters and appear to undermine the standard and expert processes for heritage approvals.

It is noted that other jurisdictions have places of both state significance as well as those that are protected at a local level (for example in NSW through inclusion in the Local Environmental Plan and in Victoria through the application of a Heritage Overlay). Places included on the ACT Heritage Register have been assessed as having significance at the Territory level. Places assessed as having local level significance are not eligible for inclusion on the Register which provides statutory protection.

The ACT is also unusual in Australia regarding First Nations heritage protection legislation as it, along with that in the Northern Territory, are the only two pieces of heritage legislation that deal with all types of cultural heritage in the one Act. In the ACT, the Act is drafted in a way which is more consistent with the protection of other types of heritage, such as historic heritage. This approach should be reviewed, considering likely Commonwealth requirements to meet minimum standards for Aboriginal heritage protections (refer to section a). It may be that an additional piece of legislation, such as the *Northern Territory Sacred Sites Act 1989*, is required to meet Aboriginal aspirations. The language used in relevant legislation should also be updated in line with contemporary terminology, like 'Traditional Owners/Custodians'.

#### **e) How the ACT's heritage arrangements might be improved to guarantee the ACT Heritage Council achieves its statutory functions**

The statutory functions of the Council as set out in the Act include several positive roles that could serve to better promote heritage in the ACT. These functions include encouraging the registration of heritage places and objects, encouraging public interest and understanding of issues relevant to conservation, as well as public education. Whilst these functions suggest that there should be a proactive role for the Council, there is a perception that the focus is on already listed places, with a perceived lack of action on other roles. Consideration could be given to the following to assist the Council achieve its statutory functions:

- In addition to ensuring ACT Heritage is adequately resourced, the Council should also be adequately funded. A greater number of meetings and allowance for additional time for Council members may be required in order for the Council to fulfil its statutory functions.
- As noted previously, the respective roles of the Council and ACT Heritage could be refined or amended to improve efficiency and transparency. This might reflect the format used in other jurisdictions.
- Provision of appropriate heritage expertise within other ACT Government agencies (such as ACT Property Group and Parks and Conservation Service) that are responsible for the management of multiple listed heritage places. It is understood that these agencies generally have no expert staff dedicated to heritage management. Providing appropriate expertise within these agencies would take some pressure off both the Council and ACT Heritage as well as allow for a broader focus than the management of only existing listed heritage places and objects.
- Develop an ACT Heritage Strategy which documents strategic priorities for both Council and heritage recognition and protection in the ACT. The lack of a heritage strategy suggests that there is no overarching appreciation and direction in the protection of the Territory's heritage. This potentially allows for the incremental destruction of Canberra's cultural heritage, including Aboriginal heritage. Further, there is no strategy to gauge or assess the 'state of the environment' that includes heritage, or the cumulative impacts on heritage and the implications of this for future generations.

A heritage strategy should be developed in consultation with the community including the Aboriginal communities of the ACT, and should outline actions to achieve the strategic priorities. It is noted that a heritage strategy discussion paper was prepared in 2016, though a Heritage Strategy has never been published.

Whilst a review of the above is supported, the Council should remain the primary mechanism to advise the Minister on all heritage matters in the ACT.

**f) Any other related matters with respect to the ACT's heritage arrangements**

*Relationship between the Commonwealth and the Territory*

The dual planning system in the ACT is complex, and despite the intent for both systems to work together, the requirements of each vary. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth), requires that a Commonwealth agency manage all heritage values associated with a place, even when it is not included on any statutory heritage lists. These requirements do not apply once Commonwealth land has been sold to private owners and subsequently the need to undertake appropriate due diligence no longer applies. As such, the dual system exposes loopholes and vulnerabilities, as heritage protection is not triggered, for example when the place transfers in ownership or management.

ACT Heritage legislation should have a strong, functional interface with The National Capital Plan (the Plan) and subsequent Territory Plan, because the Plan is grounded by a holistic understanding of Canberra's national significance. For example, the Plan establishes (among other points):

- The pre-eminence of the role of Canberra and the Territory as the centre of National Capital functions, and as the symbol of Australian national life and values.
- Conservation and enhancement of the landscape features which give the National Capital its character and setting, and which contribute to the integration of natural and urban environments.

There is also a significant 'disconnect' in process and expectations for consultation between the ACT and Commonwealth with regards to First Nations heritage. Consultation for Commonwealth projects relies on the *Ask First Guidelines* which is more expansive and inclusive than the ACT 'RAOs' system. This means that the requirements to consult with the RAOs may apply to one area but not necessarily to adjacent areas.

Better integration of information for heritage places that are the responsibility of the Commonwealth and the Territory should be considered. This might be achieved via a centralised database or mapping tool that allows owners and managers of heritage places to locate relevant information from a single source.

*ACT Heritage Database*

The existing ACT Heritage website should also be overhauled, including the page which lists the Register Entries for listed heritage places and objects. The existing online register is hard to navigate, is usually limited to the statutory Heritage Register Entry (CMPs and background documents have only begun to be included recently) and does not link to other relevant sources such as ACTmapi. A dynamic database is required which provides appropriate search functions to ensure that relevant listings can be readily accessed. The databases of other jurisdictions allow for a place search to be undertaken using a variety of fields that include location, name and keyword as well as attributes that facilitate comparative analysis such as designer, style, date etc.

*ACT Wellbeing Framework*

An area of opportunity and leadership for the ACT Government is through the ACT Wellbeing Framework. Whilst it is understood that the Wellbeing Framework is being utilised to inform Government priorities, policies and investment decisions, the role of heritage and its impact on wellbeing is not adequately embedded in the Framework. We urge the development of indicators and the collection of data relevant to these indicators to adequately measure the role that cultural heritage plays in the wellbeing of the ACT community. Further, longitudinal data to measure the performance of government in meeting its own obligations under the Framework should also be collected. Resourcing should be given for a project that brings together Traditional Owners, community organisations, researchers, and government agencies such as the Council, ACT Heritage and Historic Places ACT to establish metrics that can be used to measure the impact of heritage conservation and engagement and demonstrate that interaction with cultural heritage practices, places or the historic environment can be a positive factor in supporting individual and community wellbeing.

### *Gaps in listings*

As noted elsewhere in this submission, proactive identification of gaps in existing listings is required. This may result in the promotion and protection of cultural landscapes and intangible cultural heritage. Cultural landscapes are an important type of heritage, particularly in relation to First Nations heritage, as this is one of few place types that affords protection for broader Aboriginal values, adequately recognising connection to place and that First Nations heritage is living heritage. A focused, awareness raising program for both professionals and the public would foster consideration of intangible cultural heritage being identified when assessments are being undertaken.