



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Submission Number: 021

Date Authorised for Publication: 18 April 2023

Standing Committee on Environment, Climate Change and Biodiversity
Inquiry into the ACT's Heritage Arrangements

Submission by Dr Laura Dawes
March 2023

Introduction

Thank you to the Standing Committee on Environment, Climate Change and Biodiversity for instigating the "Inquiry into ACT's heritage arrangements." I welcome this opportunity to provide a submission. I note the terms of reference (TOR) of the inquiry (https://www.parliament.act.gov.au/data/assets/pdf_file/0003/2118621/ToR-Inquiry-into-the-ACTs-heritage-arrangements.pdf) and will be commenting with respect to:

- (a) the effectiveness and adequacy of the operations under the Heritage Act 2004 including First Nations heritage, and approvals provided under the Act;
- (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;
- (c) the adequacy of resourcing for the ACT Heritage Unit;
- (e) how the ACT's heritage arrangements might be improved to guarantee the ACT Heritage Council achieves its statutory functions; and
- (f) any other related matters with respect to the ACT's heritage arrangements.

This submission is based on my experience as a former member of the Council, having the role of expert in the discipline of history. I was appointed by the then-Minister, Minister Gentleman, in 2020 for a three-year term due to finish in March 2023. I was appointed by Minister Vassarotti as Deputy Chair from 2021 to May 2022. I remained on the Council as an ordinary member until Minister Vassarotti dismissed the Council in December 2022. I am an expert in history, and have held positions in federal public service, academia, the media, and entertainment industries. In addition to my expertise, I have, as do most members of the former Council, extensive experience in team work and collaboration.

Based on my knowledge and experience, I consider that the current governance, administrative and delivery structures for ACT government heritage activities need revision. In my opinion, effectiveness and adequacy would be strengthened by the Heritage Council having real authority; the ACT Heritage Unit needs to be staffed, skilled and resourced appropriately to support and implement Council's directions and other heritage activities; and the governance arrangements between the Council and Unit should be predicated on inclusive collaboration and transparency. Additionally, the placement of the Unit within

EPSDD with heritage advice subsumed to ACTPLA decisions should be revised to guarantee the Council achieves its statutory functions. Relatedly, the Unit needs to forge more effective interaction with planning areas, and other government and non-government community and heritage bodies.

TOR (a) Effectiveness and adequacy of operations under the *Heritage Act 2004* - intention vs practice

The *Heritage Act (ACT) 2004* establishes the Heritage Council as an independent statutory body, comprised of subject area experts and community representatives. The intention of this structure is that decisions regarding heritage registration (which, in effect, restrict a property owner's rights over their property) are made in and for the public interest and not by executive government. It also provides a readily available pool of specialist expertise that government can draw on to inform activities and policy.

However, in practice, the majority of functions outlined in the Act are delegated to the Heritage Unit within EPSDD under the *Heritage (Heritage Council) Delegation 2017*. The remnant functions of the Council after moving the delegations to the Unit are firstly, to decide on whether nominations meet heritage registration criteria based on assessments prepared by the Unit, and, secondly, to provide advice on other heritage matters.

Most commonly, the Unit and the Chair deal unilaterally with each other. The delegations give the Chair authority in certain circumstances to represent Council, but in my opinion these delegations have been interpreted and applied too widely such that the Chair functions largely unconnected with the body of the Council. This is unfortunate, since the Act envisages broad input from a Council of 6 different disciplines and 3 public representatives.

Council members meet as a group for one morning, every six weeks, and must make requests to the Unit to action any decisions or activities. (Smaller sub-groups – taskforces – meet on an ad hoc, as-needed basis.) However, opportunities for the wider Council membership to give input had been substantially curtailed, such as when meetings are not scheduled or are cancelled, or when agenda topics requested by members are not included for discussion.

I recommend that this review seek to institute operational practices that engage with and respond to the wider body of the Council, as envisaged in the Act.

I note that, contrary to public characterisation of the Heritage Council in Parliament and in the media, the Council does not in fact have management powers or service delivery functions. It does not manage the Heritage Unit. Nor can it require the Unit to carry out activities. The Council is a largely advisory body. It is the Heritage Unit within EPSDD that manages heritage activities, including developing policy, and providing services, and determines whether Council input is sought on any matter and, with the Chair, decides whether meetings are held.

This administrative structure and these working practices do not give effect to the principle of community and expert input envisaged by the *Heritage Act*. They don’t make use of the specialist expertise gathered on the Council.

I recommend that this review consider revising heritage administration to give the Council clear authority and greater ability to have its directions actioned.

I understand that the Minister has received complaints regarding delays in processing development applications (DAs) relating to heritage properties. In her public statements, Minister Vassarotti characterised processing DAs as a “joint function” between Council and the Unit. This is not accurate: DA advice-giving is a delegated function carried out by the Unit. The Unit may seek Council input on difficult or complex applications. I calculate that the Unit seeks Council input in approximately 2% of all heritage-related applications they receive.

Given Council’s very minor role in processing DAs, delays are therefore not due to the Council. They are due to the government’s long-term under-resourcing of the Heritage Unit. Staffing levels have not kept pace with the development pressures on heritage properties. Council has raised staffing levels with the department and Ministers past and present. Further, Council members have sought to have advice and information included on the website to help applicants and reduce the time Unit staff spend on form-filling or content issues, without success.

The government and executive should refrain from characterising advice delays as *Council* advice delays or *Council* timeframes or *Council* response times. This has been widely reported in the media and gives the public an incorrect representation of how heritage functions in our territory. These and similar statements created a wrongful impression that is it the Council that manages or operates all heritage activities. It is an important principle of responsible government to correctly and accurately portray to the community who is responsible for decisions and actions.

TOR (b, c) Structure, administration, operation, governance, resourcing

During my time serving on the Heritage Council, I and some of my fellow appointees found that the Unit did not use common management and strategic practices that would have helped activities, such as having a policy or overall strategy, or adjusting ways of working by adopting new practices. The particular challenges of COVID intensified these stresses.

For example,

- Heritage activities lack a policy framework, including
 - an overall strategy
 - a communications/outreach/engagement policy and
 - guidelines for liaising with property owners.
- The Unit accrued a substantial backlog of heritage nominations pending assessment, but did not have a plan for how to clear this backlog. For example,

- Since the 2013 review, the Unit reduced the backlog of registration nominations from 83 items to 77. Some of these nominations were submitted over 20 years ago.
- The Unit completed less than 40% of registration priority assessments each year.
- Annual reports did not include performance targets or suitable reporting measures for this area of activity. (The only reporting measure currently related to nominations is whether, once a decision is made, the Unit notifies interested parties within the statutory timeframe.)
 - The number of nominations pending assessment, and the time taken to assess a nomination should be measures reported in the annual report. These would help the Unit seek adequate resourcing.
- Developing assessments of nominated places or items in-house is inefficient. This is an activity well-suited to engaging consultants, who can be specialists on the particular subject matter needed. Senior staff in EPSDD had indicated that “surge” funding (that is, short term funding for, say, consultancies) could be more readily available than funding for on-going staffing positions. However, the Unit continued to retain most assessment activities in-house.
- Assessments carried out by the Unit were overly complex, taking years of staff members’ time. While reports were impressively researched, they were excessively detailed and substantially beyond what Council needed to determine heritage significance in most cases.
- The Unit did not seek Council input at an early stage of the assessment so reports may not meet Council requirements and had to be revised. This was a source of frustration for both Council and Unit staff.
- The nomination backlog functions as a *de facto* heritage register (since nominated places or objects may be subject to the same DA process as registered properties). However, this may mean that the Unit is potentially restricting owners’ property rights without Council oversight, contrary to s60(1) of the *Heritage Act*.
- Failure to assess nominations within a reasonable time doesn’t meet obligations to the community. When a citizen nominates a place or object for heritage protection, they have a reasonable expectation that it should be considered in a timely manner.
- With greatly increased development pressures, the Unit was having to process many more Development Applications (DAs), but had not received a corresponding increase in staffing levels or adjusted processes. This was a source of stress and pressure for the Unit.
 - For example, the Unit did not provide advice on the website or through public engagement activities to help owners complete DAs or know what criteria or principles the Unit would use in developing advice. Staff therefore had to spend time on incorrectly filled out, insufficient or inappropriate applications. Owners got annoyed and frustrated.
- Although the Heritage Unit is located within EPSDD, this had not facilitated effective collaboration with other units within the department.
 - For example, the online heritage register doesn’t work with the platforms and applications used by the planning sections.

- Heritage Unit participation was not sought outright on planning activities affecting heritage places, such as the City Plan renewal.
- When the planning section received development applications for buildings or places that have potential heritage significance, they did not necessarily seek the Unit’s input. Not all heritage-worthy places are already nominated or on the register. Developing a more proactive and collaborative relationship between the sections would help reduce risks to ACT’s heritage.
- Further, the different priorities of heritage versus planning considerations are not clearly delineated in this structure.
- When heritage input to planning or development matters has merely advisory status, the Council does not automatically have the right to appeal or defend its determinations in an ACAT hearing.
 - For the Council to have proper independence and hence power to determine and not just advise on DAs will require amendment to legislation (the *Planning* and *Heritage Acts*). Legislation should establish separate heritage and planning jurisdictions and decision-making.
- Operating processes and procedures were out of date
 - The “MOU” between the Unit and Council (a procedures document setting out roles and responsibilities) expired in 2018. Council members sought a new MOU without success. Agreement on roles and operating processes is vitally necessary to ensure that the Unit and the Council work smoothly together.
 - There were opportunities to use more efficient ways of working, such as using group editing platforms or providing advice and information to the community via the website.
 - In preparing annual assessment priorities, the Unit did not review the nomination documents as these had been filed and staff would have to recall the files from storage. However, the nomination is the starting point for Council to have legal authority to consider registration and, further, nomination documentation can contain important information as to the threats to a property or opportunities that may inform priorities. Not regularly reviewing or having recourse to the nomination documents created legal and operational risks.
- The Unit has for many years stored Indigenous cultural artefacts at the EPSDD offices and this should be remedied.
 - It is standard practice that cultural artefacts be cared for in museum-standard, environmentally controlled storage and handled by staff with the appropriate training, pending the outcome of discussions on long-term keeping or return to country with the Representative Aboriginal Organisations (RAOs).

Clearly, it was not possible to address all of these things all at once, but I and other members felt it was possible and desirable for the Unit and Council to take steps to put heritage arrangements on a firmer and more efficient footing.

Past Councils also recognised the operational concerns. They are long-standing. I understand that some matters were raised in the 2013 review, and were communicated to Minister Gentleman and to Minister Vassarotti in correspondence and meetings.

The immediate past Council members over some years sought to progress discussion between the Unit and the Council on these matters using the procedures and processes available to us, such as by seeking meetings, proposing agenda topics, preparing discussion papers, and proposing having a planning day.

I encourage this review to consider these past examples and recommendations when considering actions that will improve the effectiveness of the structure, administration, and operation of the ACT Heritage Council, the governance arrangements between the ACT Heritage Council and ACT Heritage Unit and the adequacy of resourcing for the ACT Heritage Unit.

TOR (e) Improving ACT heritage arrangements

Beyond my other recommendations as to the terms of reference a, b, and c above, I would like to comment further on how the ACT’s heritage arrangements could be improved to guarantee the Council achieves its statutory functions (TOR e). In particular, I think it is worth addressing the impact of the allegations of unprofessional behaviour and dismissal of the Council on heritage activities in the ACT. My recommendations as to how governance arrangements might be improved in the future include that this review consider how to build collaboration, trust and public transparency in heritage activities.

I note that it was in the context of the Council members’ attempts to seek discussion on the operational matters addressed in the previous section and after the additional stresses of COVID that allegations were made by Unit staff of unprofessional behaviour by Council members. I was first made aware of these allegations in the report by a consultant (Nous) engaged by the Unit titled “Review of the ACT Heritage Council – Report for Internal Use”, delivered in November 2022. Minister Vassarotti released the executive summary of the Nous report later that month. This made the allegations public but this summary did not disclose the context.

To my knowledge, the allegations were not investigated as per usual workplace health and safety processes, which are intended to protect all parties from unwarranted harm. The allegations, however, appear from the public announcements to have motivated in part the decision to dismiss the entire Council.

Members of the Council raised concerns that such action may unfairly damage members’ reputations, the standing of heritage protections in the Territory, the potential to attract suitably qualified experts in the future, and the principle of expert and community input.

Minister Vassarotti addressed the ACT Assembly and the media regarding the review and the contemplated action of dismissing Council. Council members, though the subject of these statements, were bound by the duties of being public servants and thus barred from publicly rebutting or clarifying. Instead, Council members wrote to this Standing Committee

seeking help, but the Committee did not dissuade the Minister from dismissing them. Changes in the Heritage Unit following the delivery of the *Nous* report were not correspondingly made public. FOI requests have been allowed for the release of EPSDD and Ministerial materials, but not Council members’ responses.

In my opinion, dismissing all Council members removed input from people with insight into and experience of the operational issues and the expertise to address them. The Council should, instead, have received support from the Minister and the Standing Committee in its efforts to address the operational issues and improve heritage practices.

I believe that there is a risk that future Councils will be reluctant to raise matters of concern, given this example of the serious personal and professional harms that may result.

I recommend that, to guarantee future Councils are able to achieve their statutory functions, this review seek to establish heritage arrangements that are collaborative and which ensure trust and public transparency.

TOR (f) Other matters with respect to the ACT’s heritage arrangements

I note that the Heritage Festival is greatly appreciated by the ACT community and has grown over the years. Unit staff achieve this good outcome despite a small budget, and are to be congratulated on this addition to the Canberra calendar.

Similarly, the Heritage Grants program provides useful funds to individuals and community organisations for heritage activities and building conservation. This is an excellent program, which could be expanded with greater funding. These elements of heritage activities work well and should continue to be supported.

The ACT has a deep and diverse heritage, with particular strengths in natural, Indigenous, and mid-century/modernist heritage, and in relation to Canberra’s international distinction as a planned capital city. These should be recognised and prioritised in the heritage strategy.

Conclusion – Summary of Recommendations

In summary, I would suggest the following to enhance the ACT’s heritage arrangements:

- Develop a heritage strategy that has statutory standing.
- Formally set out statements of roles and responsibilities for the Council and Unit, which should reflect the intention of the *Heritage Act* to gather input from a council of experts and community members.
- Refresh business processes and make them more efficient, through updating the MOU and agreeing what Council requires in reports and assessments.
- Adopt an annual planning and review cycle with updated reporting measures and performance targets (including reporting on nomination backlog and time taken to make assessments). Planning should include holding an annual planning day.

- Generate a surrounding policy environment, including a communication and outreach strategy, and guidelines on liaising with property owners.
- Increase Unit staffing (with a suitable mix of skills) and funding. The Unit should be sufficiently staffed to be able to enforce heritage protections or appear at ACAT hearings, action Council decisions, and deliver DA input and registration assessments within agreed timeframes.
- Compose Council taskforces based on the mix of skill sets required for the taskforce’s work and assign a taskforce member to be convenor. The taskforce convenors should be members other than the Chair of the Council.
- Places or items nominated on the basis of Aboriginal cultural significance should be assessed by the Aboriginal Taskforce, not by the general Register Taskforce.
- Upgrade the website (including a search function for the register database, structuring the data to be usable by other government entities, and providing improved information about heritage processes and activities, especially DA requirements).
- Delineate government planning and heritage functions, especially in regard to development applications (DAs). It is inappropriate that heritage input is merely advice that can be overridden by ACTPLA. The *Planning Bill* and *Heritage Act* should be amended to reflect this delineation. The Heritage Unit should be separate from EPSDD. The Council should appear independently as a party in ACAT hearings regarding heritage places/objects.
- Improve coordination between planning and heritage directorates, including proactively identifying places with potential heritage significance and especially those facing development pressure.
- Improve coordination between other heritage-related government bodies, such as ACT Historic Places, ACT Heritage Library, National Capital Authority. ACT heritage functions could be gathered within a single directorate.
- Coordinate and collaborate with non-government heritage organisations, such as the Canberra and District Historical Society, National Trust and community associations.
- Formalise and structure processes for securing Council oversight regarding DA advice on nominated but not registered properties. Council should assess whether these properties have likely heritage significance and, if so found, develop an interim list of protected heritage features.
- Seek the required resources to assess all backlogged nominations within 5 years.
- Secure respectful and culturally appropriate care for Aboriginal cultural artefacts while return-to-country/keeping places are organised. (AIATSIS, CMAG, and the National Museum have the skills and facilities to assist with museum-standard storage and handling.)
- Seek to have a note on heritage registration included on the Torrens register of land titles so that purchasers are aware of heritage registration. Institute processes (such as public engagement activities) to inform owners of heritage considerations for their property and answer questions.
- Restructure the Council to include a representative from each of the four Representative Aboriginal Organisations (RAOs) instead of a single “Aboriginal Community” representative.
- Regular involvement by the Minister for increased accountability and oversight.

- Under the principle of responsible government, the Unit and government Ministers should take care to correctly and transparently portray to the community who is responsible for decision-making and service delivery. The public misperception of the role and scope of the Council and that of the Unit should be corrected.
- Commit to meaningfully and inclusively engaging and collaborating with the Council.