

Submission  
No 139

## INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

**Name:** Name suppressed

**Date Received:** 25 June 2021

---

Partially  
Confidential

**8 July 2021**

**Standing Committee on Social Issues**

**Dear Committee Members**

**Subject: Submission on Review of NSW Heritage Legislation**

I support the aims of the review to deliver more effective, relevant, and best-practice ways of recognising, conserving, adaptive re-use and celebration of the important heritage of New South Wales.

I am a qualified archaeologist and as a cultural heritage management specialist with over thirty years' experience in heritage management at local, state and Commonwealth level, as well as internationally, I appreciate the opportunity to provide input into the review. In recent years I have been working as a Heritage Officer for local government and offer my comments from the perspective of managing local and state-listed heritage items from that perspective.

The following submission has been prepared with reference to the Review of NSW Heritage Legislation Discussion Paper (April 2021).

I look forward to contributing to later stages of the review including any Hearings, Draft White Papers and Draft Bills.

Should you require further information, please contact me

**Yours faithfully,**

**Submission from [redacted] on Review of NSW Heritage Legislation**

As a guiding principle in all considerations relating to the conservation of heritage the application of best practice, as described by the Burra Charter and the Australian Natural Heritage Charter, by government in the identification, conservation, promotion and management of heritage values is essential in promoting those values and the value of heritage conservation.

It is concerning that the review fails to address local heritage. In New South Wales, local environment plans cover 40,000 primary sites and thousands more of lesser importance.

However, many local councils lack the incentives, resources and expertise to adequately conserve heritage places. The review should be expanded to cover local heritage as that is the mechanism for conserving the vast majority of places of heritage significance across New South Wales.

### **Focus Question 1: What should be the composition, skills and qualities of the Heritage Council of NSW?**

I am concerned that members from disciplines or organisations relevant to heritage conservation do not form the majority on the Heritage Council. Either the number of non-experts should be reduced or the members with expertise relevant to heritage conservation should be increased. It is not appropriate to the independence of heritage assessment decisions by Council to have industry members as voting members.

Assessment of heritage significance should be based purely on heritage values and separated from the decision-making processes to manage those values.

The Council must be a representative body of informed members with appropriate skills. There must be a majority of members who are knowledgeable about or skilled in the conservation of the cultural environment. This will require the skills of historians, conservation architects, archaeologists and planners.

I also note that it is important that members have relevant heritage experience, rather than merely coming from the disciplines mentioned.

The specialist heritage bodies which should be represented on the Council include the National Trust of Australia (NSW), the Australian Archaeological Association, the Australian Society of Historical Archaeologists, and Australia ICOMOS (International Council on Monuments and Sites).

The Australasian Institute for Maritime Archaeology should be a statutory consultee for the Council where its expertise is relevant, i.e. in relation to any decisions involving items of Maritime Archaeology.

### **◆ Focus Question 2: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act?**

Active participation by Aboriginal people in the identification, conservation and management of Aboriginal heritage is essential to the wellbeing of Aboriginal people and the achievement of good conservation outcomes.

The passage of standalone Aboriginal heritage legislation in NSW should be the first priority. Contemporary legislation to protect and conserve Indigenous Heritage must remain a priority over amending heritage legislation.

Any acknowledgement and consideration of Aboriginal Cultural Heritage within the Heritage Act should include the provision of a rights-based approach to Indigenous cultural heritage protection (a requirement under the *United Nations Declaration on the Rights of Indigenous Peoples*).

This Review, while a good start, cannot take the place of a more comprehensive and independent expert joint review of national and State and Territory Indigenous heritage legislation, and areas of overlap with the *Native Title Act 1993* (NT Act). We recommend that such a review be a recommendation of this Inquiry. The review should be led by the Commonwealth. It should establish principles for effective and workable Commonwealth, State and Territory legislation; emphasise a rights-based approach which gives clear powers to make decisions to relevant Indigenous groups; and include thorough and widespread consultation and discussion with Indigenous people across Australia.

The Committee are further encouraged to consider the *Dhawaura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* and the *Best Practice Standards for Indigenous Cultural Heritage Management and Legislation* developed in 2020 by Australian ICOMOS. (See *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* | Department of Agriculture, Water and the Environment).

◆ **Focus Question 3: Are the objectives of the Heritage Act still relevant?**

I affirm the fundamental importance of the role of the Heritage Act, 1977 to identify, protect, promote and conserve cultural heritage places in NSW. The Heritage Act needs to recognise the significant contribution that cultural heritage places make to our identity, creating a sense of place and representing the State's story, its people and its shared connections.

I believe that the objectives of the Heritage Act are still relevant, but need to be expanded to more adequately cover social and racial justice, Indigenous heritage, intangible heritage and environmental sustainability.

It is important that any proposed amendments should result in demonstrably better heritage outcomes, rather than a weakening of heritage protection. While the Heritage Act and its regulations may benefit from small updates and amendments, its objectives and principles remain appropriate and relevant.

◆ **Focus Question 4: Does the Act adequately reflect the expectations of the contemporary NSW community?**

Active involvement by all sectors of the community in the processes of identification, conservation and use of heritage places is integral to good conservation outcomes, community appreciation and compliance.

The community continues to expect that it has a right to conserve its heritage and want strong protections. The community see heritage conservation as an integral part of environmental and land use planning. Within this context, heritage conservation should remain a head of consideration in all planning decisions. Local communities, in particular, have expressed a sense of connection to local heritage and sense of place, and are concerned about the social implications when that connection is lost.

◆ **Focus Question 5: How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?**

The Heritage Act does not prevent sympathetic re-use of heritage places. When applied well, it enhances strong economic development and delivers good heritage outcomes. Owners of heritage places should receive useful advice, effective financial incentives and adequate conservation grants to ensure well informed ownership of heritage places leads to desirable outcomes.

A key improvement across planning legislation would be moving to a “re-use first” principle for assets, as Scotland has done. This would require property owners to justify demolition against sustainability principles and encourage owners to investigate adaptive reuse of heritage properties.

I support the provision of owner incentives such as access to transferrable heritage floor space schemes.

**◆ Focus Question 6: How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?**

I support the provision of tax incentives, grants or other tax concessions for private conservation or philanthropic heritage investment. As an issue has been identified with navigating and accessing existing incentives this should be further investigated to develop strategies for making it easier to access these incentives and encouraging their use.

**◆ Focus Question 7: What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?**

I support the development of a State-based scheme of stewardship payments to heritage owners seeking to activate a heritage item for a community or business opportunity.

Consideration should also be given to the “Invest Victoria” model of giving free-of-charge specialist advice on development approval processes for projects which involve the activation and conservation of heritage items through commercial investment.

Investigation should also be undertaken into encouraging philanthropic investment in heritage items by making these investments eligible to receive tax concessions and rebates, including exemptions from capital gains and GST.

**◆ Focus Question 8: How could tailored heritage protections enhance heritage conservation?**

The process of identifying and listing cultural heritage places should be separate from the process of managing change at cultural heritage places. It should not introduce further categories of places.

There is no evidence that the tailored heritage protections or proposed heritage listing categories discussed in the Discussion Paper will enhance the conservation of heritage items. In fact, it is much more likely that local heritage, which makes up the bulk of heritage

items within the state, will suffer further from a perception that they are not as significant as higher category items with more tailored and stronger legislative protections.

**◆ Focus Question 9: How should heritage items that are residential properties be accommodated under a proposed category scheme?**

The key principle for the management of any heritage item is understanding its significance and managing the item in such a way as to conserve and enhance that significance. That principle needs to be reflected in any proposed category scheme or proposal to manage residential properties according to a different standard to other listed items.

**◆ Focus Question 10: Would greater community engagement deliver a more robust State Heritage Register?**

People-centered conservation is a way to place the community at the heart of heritage. Local heritage, in particular, can promote community empowerment, social and racial justice, and sustainability.

The review should consider:

- Greater funding to allow for engagement and consultation with Indigenous traditional owners and communities in relation to heritage values assessments.

1

**◆ Focus Question 11: Would streamlining enhance the listing process?**

Items should be listed on the basis of their assessed heritage significance. The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance, known as the Burra Charter, establishes the best practice principles and processes for understanding and assessing a place's significance. Listing should be based on the Statement of Significance developed for each item under consideration in accord with the Burra Charter.

Assessment of heritage significance should be based purely on heritage values and separated from the decision-making processes to manage those values.

I object to any suggestion that the Minister should be involved in making decisions about adding items to the State Heritage Register based on considerations other than heritage significance. The decision to list should be based on the heritage significance of the item, not on perceived difficulties with management after listing or qualitative decisions about "reasonable and economic use". Listing, as far as is possible, needs to be de-politicised and quarantined from self-interested considerations.

The following suggestions should be considered in the review:

- Heritage nominations should be assessed to a short, statutorily enforced and transparent timetable.

- Extensions should be possible but limited to reasonable periods with clear reasons articulated. Limited Departmental resources should not be used as a reason for delay in determining a nomination.
- Places under assessment should be provided with interim protection until a listing decision has been made on them.
- Emergency nomination decision timeframes (short) should be included in the Act.
- Statements of Reasons for all negative, statutory decisions should be available on request or on a public website as a matter of course, in a timely manner.

**◆ Focus Question 12: How could we improve the current approval permit system?**

Due to the risk of damage to the heritage significance of listed properties, the triggers for a heritage permit must continue to include:

- Building extensions, constructions, interior works, demolition or relocation of buildings and structures;
- Changes of colour schemes and signage;
- Subdivision and construction of new buildings and garden structures such as fences or decks, pathways and driveways, and change of materials;
- Works to registered trees and gardens which are not regular maintenance work;

An application for consent must be required to undertake any works or activities at archaeological sites listed on the Heritage Register.

I object to the suggestion that the Minister should be involved in making decisions on the regulatory thresholds for standard exemptions, fast-track applications and standard applications for permits. The involvement of the Minister does not add any specialist expertise to the permitting process but does open it up to increased politicisation and lobbying by self-interested individuals and groups.

**◆ Focus Question 13: Are the current determination criteria for heritage permits still appropriate?**

The key principle for any determination is that the proposed works are compatible with and complement the heritage significance of the item. Any proposed “stream-lining” or rationalisation of determination criteria which is not consistent with this principle cannot be regarded as best-practice.

**◆ Focus Question 14: How could we improve heritage consideration within land use planning systems?**

Cultural heritage is at immense risk from State Significant Developments, which effectively turn off and override the provisions of the Heritage Act, 1977.

1. Heritage recognition and conservation should be fully integrated into the planning and environmental management systems, simple to operate and understand, open, transparent and accountable.
2. Pre-lodgement consultation - should be applied at all scales of development. This allows the community to better understand and have input into large-scale planning and land-use decisions, as well as localised developments that have the potential to impact directly on them and their local heritage.
3. Merit appeal rights should be reinstated for state significant proposals. Communities should have an automatic standing in Court processes. Court costs need to be waived for community groups.
4. There should be less emphasis on timeframes and more on outcomes, including design. Data should be collected to measure performance against the implementation of strategic plans and EPIs, including housing numbers, affordability, employment, infrastructure delivery, community services, together with qualitative measure such as community satisfaction and design quality.
5. Any decisions that might significantly affect heritage values should explicitly and transparently/demonstrably take into consideration 'feasible and prudent alternatives' to the damaging actions in an effort to force consideration of less-damaging options and so potentially avoid or minimise the impacts of actions.

**◆ Focus Question 15: Are there opportunities to enhance consideration of heritage at the strategic level?**

Given that the NSW government owns at least 54% of the places listed on the State Heritage Register, government agencies have a significant responsibility to provide leadership in effectively identifying the state's heritage places and managing their change in a sympathetic manner.

Heritage conservation needs to be reimagined to renew its mission as a centrepiece of aspirations towards social, environmental, economic and cultural sustainability. The development of a state Heritage Strategy which recognises the economic and sustainability values of heritage would promote the consideration of heritage conservation at all planning levels.

**◆ Focus Question 16: How could heritage compliance and enforcement be improved?**

There are a number of issues which need to be addressed including:

- a lack of monitoring and reporting on the condition of State-listed heritage places,
- no long-term management strategies for State-owned heritage places



- no management strategies in place for the conservation of cultural heritage values of government managed natural landscapes;

In addition, it is suggested that practical steps could include:

1. Strategic Plans must specify environmentally sensitive lands and Heritage areas with development limitations being enforceable.
2. The introduction of civil penalties into the EP&A Act similar to the systems used in the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and the model Work Health & Safety Act 2011. It is agreed that this would enhance the regulator's capacity to hold offenders accountable for community and environmental harm, including harm to heritage items.
3. The introduction of the power to issue penalty notices if there is a non-compliance with heritage requirements for listed items and the introduction of investigative powers to enable Heritage NSW to gather sufficient evidence to prove an offence under the Act. It should be noted that this will only be effective if Heritage NSW is adequately resourced to undertake a proactive compliance role, which is currently not the case.
4. The introduction of regulations and penalty notices to deal with situations of demolition by neglect at the local level. Local listed heritage items currently have no protection against this illicit form of destruction.

In my experience the key problem with achieving effective compliance and enforcement for State-listed heritage items revolve around a lack of adequate resourcing for this area of operation, and the centralisation of officers responsible for this area in Sydney. There is also an observable reluctance by Heritage NSW to enforce minimum maintenance standards for listed heritage items owned by other state government agencies. Given that the majority of state-listed heritage items are owned by the NSW government there is a serious issue around the independence and perceived independence of management decisions relating to these items.

The Committee are further encouraged to consider the recent reforms of the Victorian Planning and Environment Amendment Bill 2021 which will provide local and state government with increased powers to penalise property owners for unlawful demolition, and allowing properties to fall into disrepair. The amendments proposed under the new Bill will prohibit development on sites for up to 10 years if the owners are charged with unlawful demolition, and will enable existing permits to be revoked and allow for new permits to be issued for specific purposes – such as building a park or reconstruction or repair of a heritage building. The Bill also aims to disincentivize the practice of allowing protected buildings to fall into disrepair, known as “demolition by neglect”.

#### ◆ Focus Question 17: How could understanding of state heritage be enhanced?

An education and learning strategy is essential to promote greater understanding and support for the identification, conservation and management of heritage places.

A promotional program that showcases best-practice cultural heritage protection and management, and the benefits that appreciation and protection of heritage can bring to communities. This should include the development of a public education campaign which ensures that the community understands the heritage system and promotes the value of this heritage to the public.

The review should consider:

- Increased funding for heritage education, outreach and promotion of best practice heritage outcomes and innovative approaches. Particular emphasis is to be placed on engagement with and inclusion of Indigenous communities in any such programmes.
- Resourcing for raising awareness, recognition, listing and management of cultural landscapes and also (place-based) intangible cultural heritage.

**◆ Focus Question 18: How could we improve heritage tourism or help activate heritage places for tourism?**

I support the establishment of a State-based grant program to assist with the cost of adaptive reuse and heritage activation to encourage the development of tourism ventures around heritage items and landscapes.

This initiative could be further supported by an annual award program for effective adaptive reuse and activation of privately-owned heritage buildings.

**◆ Focus Question 19: How could public heritage buildings be activated to meet the needs of communities?**

Government agencies should be exemplary owners and managers of cultural heritage assets and need to resource their respective heritage maintenance and management role, and take responsibility for the cultural heritage of state significant places.

I support the establishment of a State-based revolving conservation fund that could help communities to acquire, restore and operate items for profit, as well as indirect economic and social benefits. The Victorian Working Heritage scheme has been identified as a potential model for a financially self-sustaining heritage re-use scheme that has potential application to government-owned heritage.

The long-term lease arrangements for the North Head Quarantine Station, at Manly, are another example of achieving long-term heritage conservation outcomes for publicly owned heritage items while ensuring that they stay in public ownership. This model is commended to the Committee as part of their review, and in particular for application to other significant State heritage listed sites owned by state agencies, such as the Morisset Hospital site.