

## INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

**Name:** Name suppressed

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## Review of NSW Heritage Legislation

Thank you for the opportunity to provide comment on the Review of NSW Heritage Legislation. My heritage background includes having worked in the Heritage Office in NSW and interstate; in both instances I was responsible for both the listings of places on the state heritage registers and assessing development applications for State listed places. I have taught building conservation and the preparation of Conservation Management Plans (CMPs) at two universities. I have managed heritage properties in a heritage precinct and, over the past several years, worked as a heritage consultant, providing advice and writing heritage impact statements for owners of heritage listed properties. In addition, I own a property in a conservation area. I am, therefore, broadly experienced in various aspects of heritage conservation and well versed in the operations of NSW Heritage Act 1977.

My submission addresses each of the Focus Questions, in which I discuss the issue and make a recommendation [in **bold**] on how the issue should be addressed. I should note that a number of these questions relate to issues outside the responsibility of the NSW Heritage Act. Also a number of these issues relate more to the operation of the heritage legislation, rather than the legislation itself.

In addressing these questions an underlying consideration is having a clear understanding of the levels of heritage management established by the heritage legislation. The primary focus of the NSW Heritage Act is the management of items of State heritage significance (some 1740 items), whereas local councils have the responsibility for managing some 40,000 items in NSW, assessed as being of Local significance and listed in the heritage schedules in the relevant Local Environmental Plan (LEP). On occasion some people are confused by this distinction in heritage management responsibilities.

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

- archaeology
- conservation of environmental heritage
- local government
- moveable heritage
- natural heritage
- planning
- property, planning or environmental law
- property economics
- rural interests
- Aboriginal heritage
- architecture
- building, development and property industries

- engineering
- New South Wales or Australian history
- cultural landscapes

For the Heritage Council of NSW (HC) to be able to provide the Minister with expert advice on heritage matters it is essential that the majority of members have a demonstrated knowledge and experience in heritage conservation.

The present HC currently consists of former politicians, public servants and business people, few of whom have any demonstrated knowledge and/or practical experience in heritage conservation, with the exception of one member who has a background in cultural landscapes.

While the indicative list of knowledge and skills [above] is broad, it tries to cover too many bases, rather than focus on the most likely areas of expertise, for which the Minister requires advice.

A number of the skills listed above, i.e. architecture, conservation of environmental heritage, local government, planning, have usually been sourced from the relevant government departments as ex-officio Council members (e.g. Government Architect, NPWS, Planning NSW, etc.). Others skills, such as archaeology, engineering, environmental law, moveable heritage, property economics and rural interests rarely arise as controversial public issues, in which case the HC can obtain outside expertise. Whereas building conservation and property development (e.g. MLC, North Sydney; Sirius Building, The Rocks and Willow Grove, Parramatta) continue to be a source of public conflict.

**Having at least one experienced conservation architect, a property developer with conservation experience and a representative of the National Trust (as community representative) is essential for sound HC deliberations and ministerial advice.**

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

For many years Aboriginal cultural heritage was considered to be an issue that focussed on sites in the rural landscape and, therefore, it made sense for these matters to be managed by NPWS. However, more people now have a more holistic perspective of what constitutes our heritage and the case for separating Aboriginal, built and landscape heritage has diminished.

**It would be preferable that Aboriginal cultural heritage is acknowledged and considered within the Heritage Act and managed by qualified Aboriginal officers within Heritage NSW.**

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

The objectives of the Heritage Act - to identify, manage, interpret and celebrate (promote) our State's heritage - are all still very relevant.

**The NSW Heritage Act is a generally a robust piece of legislation; most of the issues of concern relate to the operation of the Act, not the Act itself.**

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

The Heritage Act is more than adequate to meet the community's expectation of protecting the State's heritage. However, much of the disquiet amongst owners of items listed on the SHR is prompted by how the statutory processes of the Heritage Act are being implemented by Heritage NSW.

**It is essential that the Heritage NSW officers responsible for assessing applications and permits have sufficient practical knowledge and expertise in architecture and building conservation and also have enough nous to make sound judgements that differentiate between what might be desirable and what is essential.**

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

This is a broad question that covers all heritage in NSW, whether it be the 40,000 Local heritage items listed in the Local Environmental Plans (LEPs) across the State, or the 1,740 items of State significance listed on the SHR. There are already provisions for Local Councils to provide assistance [rate rebates, etc.] for local heritage items and the Heritage Act provides assistance [conservation grants, etc.] for SHR listed items.

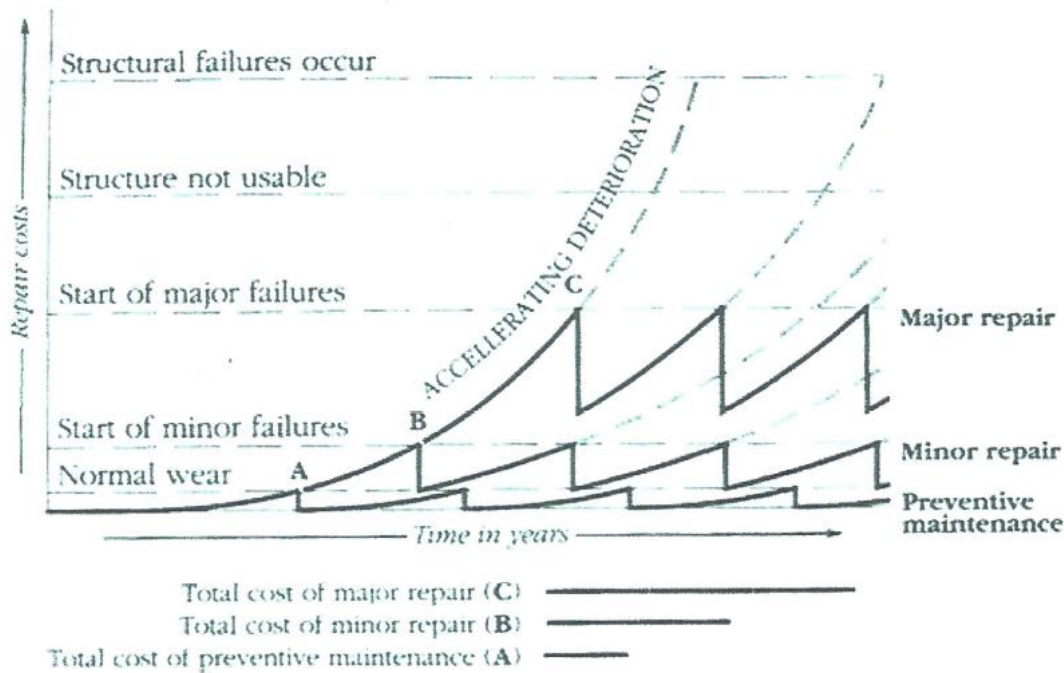
Recognising there will always be requests for additional conservation funds the UK government established the National Lottery Heritage Fund. Similarly, Lottery West (WA) allocated a portion of its annual profits specifically for building conservation projects.

**The State government could establish a Lottery Heritage Fund, or alternatively earmark some of the vast poker machine profits from Clubs NSW specifically for heritage conservation.**

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

The notion that owning a heritage property is a financial burden has to be challenged. In many instances this is not the case. For example, it is evident that the private owners who bought SHR listed houses in Millers Point have been in no need of any mitigation of their conservation costs.

All property owners [heritage listed or not] should be encouraged to maintain their property in sound condition. The necessity for restoration is frequently the result of deferred maintenance and as the following graph demonstrates the lack of routine maintenance is expensive.



PREVENTIVE MAINTENANCE (bottom line) not only costs markedly less in aggregate than repairing buildings failures, it reduces human wear and tear. A buildings whose systems are always breaking or threatening to break is depressing to the occupants, and that brings on another dimension of expense. This diagram is adapted from *Preventive Maintenance of Buildings* (New York, Van Nostrand Reinhold, 1991), p. 3.

The HC has provided NSW government agencies with the Heritage Asset Management Guidelines, which the agencies should be compelled to implement.

**Where there is a clearly demonstrated financial hardship Treasury could provide incentives, whether it be land tax rebates or stamp duty exemption for a SHR listed property on the proviso the owner legally commits to conserving the place.**

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

The Heritage Act already has a number of provisions to encourage the activation and conservation of heritage items. The majority [60%] of heritage items listed on the SHR are owned by Government agencies and all government agencies are required to have a Heritage Assets Management Strategy [HAMS].

**A good incentive would be for the Government to budget for the implementation of each government agency's HAMS, so that the conservation of government owned heritage items becomes part of their core business, not an afterthought.** (see comments on Focus Question 6, above)

Conservation programs such as Endangered Houses Fund run by Sydney Living Museums/Historic Houses Trust [GSDA 1 House, Castlecrag], should be widely publicised as an example of what can be achieved when profit isn't the sole driver for undertaking heritage conservation. But note that Heritage NSW currently has neither the resources nor the expertise to run such a scheme. It would best be left to another agency to implement, but keep in mind that government agencies already have too many redundant/unwanted/discarded heritage items, so there is no advantage in any proposal for the State to accept any more from the private sector. On the other hand there might be more take up by the private sector of government owned redundant/unwanted/discarded heritage items if Treasury was willing to trade a lower financial expectation in return for a specified commitment to beneficial conservation works, e.g. the construction of the YHA hostel on the Big Dig site in The Rocks.

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

The fundamental purpose of "heritage protection" is to ensure the cultural significance of a heritage item is retained. The principal means to achieve this objective is through the preparation of a Conservation Management Plan [CMP]. The CMP sets out the documentary and physical evidence related to the item to establish its cultural significance. Taking into account a number of contextual factors [physical condition, spatial layout, statutory requirements, owner requirements, etc] conservation policies are written to guide future decisions affecting the conservation of the item, with the prime purpose being to retain the identified cultural significance.

The CMP was intended to be tool [guide], a means to an end, but over the years through the actions of the heritage bureaucracy it has almost become an end in itself. The Anderson Stuart Medical School CMP (1992), written by James Semple Kerr who devised the CMP format, was sixty [60] pages, of which twenty nine pages (48%) dealt with Conservation Policies. The recently revised Anderson Stuart Medical School CMP [2019], submitted to the HC for endorsement has swelled to some 200 pages, of which only 45 pages [25%] cover Conservation Policies. (Much of the other material is a dense history of the place, which adds little to the already acknowledged significance of the place.) It is likely Semple Kerr's original CMP, which was widely regarded as a professional exemplar, would no longer be accepted by Heritage NSW officers as a suitable document.

Writing a CMP now has almost become the equivalent of writing a doctoral thesis. The time and effort of the heritage consultant and the cost to the property owner of preparing such a document has become exorbitant. For example, the recent *review and update* of an existing CMP, prepared by a highly reputable heritage consultancy, cost some \$50,000. The cost for additional material required by Heritage NSW after its review of the draft CMP was a further \$20,000. This additional work would certainly make the endorsed CMP worthy of publication, but it also made very little difference to the policies guiding the conservation of the place. A good proportion of this large consultancy fee would have been better spent on actual conservation works.

**Having decided to no longer endorse CMPs, the HC/Heritage NSW needs to provide guidance on exactly what level of documentation is acceptable to guide and support decisions affecting the conservation of a heritage item and the retention of its cultural significance.**

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

A heritage item is either of State or Local heritage significance – this categorisation is used primarily to determine which level of government - State (1790 listed items) or Local (40,000 listed items) - has responsibility for managing its conservation.

If the heritage item is of State significance then its conservation management comes under the jurisdiction of the Heritage Act. The retention and conservation of a heritage item listed on the SHR is governed by a clear understanding of its cultural significance, as set out in the SHR listing.

**An item is either of State significance or it is not. The notion that there could be categories within the SHR would only lead to bureaucratic complications. If the issue is that some items on the SHR warrant less attention from the HC, then the Minister could readily expand the scope of the Standard Exemptions or require Heritage NSW prepare Site Specific Exemptions for those items in question.**

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

The HC has periodically sought community input on the question of what types of heritage items were under represented on the SHR. Similarly, local councils and local heritage groups have been invited to nominate heritage items identified in their LEP Heritage Inventories for consideration for listing on the SHR.

In the past decade the Australian Institute of Architects (NSW Chapter) and the National Trust of Australia (NSW) have submitted comprehensive documentation on numerous twentieth century buildings, which their heritage experts considered worthy of listing on the SHR. Few of these nominations have been presented to the HC for its consideration and a recommendation to the Minister. This example highlights a problem with the Heritage NSW bureaucracy, not a problem with the Heritage Act.

**The challenge for anyone nominating an item for listing on the SHR has been the daunting amount of supporting documentation required by Heritage NSW.** [see Focus Question 11, below] .

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

The SHR listing is quite straightforward. The Heritage Act sets out the criteria for determining the cultural significance of a heritage item and the threshold for listing on the SHR, the HC makes a recommendation to the Minister and the Minister makes a determination to list on the SHR, or not.

There are several reasons why an SHR listing can take a long time;

Example 1] One factor is the amount of documentation required by Heritage NSW officers before submitting a nomination to the HC for its consideration. Increasingly, the distinction [established in *The Burra Charter: the Australia ICOMOS Charter for Places of Cultural Significance* (2013)] between the identification of cultural heritage significance of an item [required for an SHR listing] and the conservation management regime, e.g. a CMP [required to guide the ongoing retention of that

cultural significance] have been blurred. Heritage NSW seems to want all this information [significance and management] prior to processing it for HC consideration. Consequently, the process can unnecessarily be very time consuming, as well as very costly, for the property owner.

**The listing of a place on the SHR would be more timely if the required listing documentation and process focused solely on a consideration of the cultural significance of the place (in accordance with the HC cultural significance criteria ) and does it meet the threshold for a Local (LEP) or State (SHR) heritage listing.**

Example 2] There have been times when an HC recommendation to list an item on the SHR has languished in a ministerial in-tray for months awaiting a determination.

**This problem could be overcome by including in the Heritage Act a set timeframe for a ministerial decision, and also a requirement that the Minister, if not accepting an HC recommendation to list an item on the SHR, provide in writing the reasons to the HC, for the public record.**

A more pressing issue than 'streamlining the listing process' is the reluctance of the HC and Minister to list some of our major heritage items, including the Art Gallery of NSW and Taronga Zoo, thereby excluding the HC from any statutory involvement in the development of these important heritage items.

**Major government owned heritage items, such as the Art Gallery of NSW and Taronga Zoo, should be listed immediately on the SHR.**

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

Recent changes to the approvals permit system, that were promoted as streamlining the system, have in practice made the process more cumbersome, in particular changes to the Standard s.57[2] Exemptions and the HC decision to no longer endorse CMPs.

The rationale for these changes to the Standard s.57[2] was to "*streamline approval requirements, reduce assessment processing times, and allow landholders/owners and managers to more easily carry out works that support the management of their heritage items.*" However implementation hasn't been smooth.

Example 1: The standard exemption most commonly used by owners of a heritage item was *Exemption 2 – Repairs*, which in the rescinded exemption permitted general repairs of any heritage fabric with the proviso the repairs did not damage significant fabric, whereas the new *Standard s.57[2] Exemption 2 – Repairs to non-significant fabric* severely restricts the application of this exemption to *non-significant fabric*. Theoretically all fabric in a heritage building/item has some level of significance: in most CMPs fabric is usually ranked as being Exceptional, High, Moderate, Little or Intrusive. So for starters, the terminology *non-significant fabric* does not correlate with the common CMP terminology, hence there is likely to be confusion in the application of the exemption and, consequently, Heritage NSW will be inundated with additional s.60 applications.



**It would be better if Standard s.57[2] Exemption 2 – Repairs applied to, at least, fabric of *Little and Intrusive significance* or, better still, was extended to include fabric of *Moderate significance*.**

Example 2: Many local council staff [planners and heritage advisors], being unfamiliar with the new self-assessment process for Standard Exemptions, are wary of accepting a written “self assessed” exemption submitted by a reputable heritage consultant and, instead, are insisting on written confirmation of the exemption from Heritage NSW,. Unfortunately Heritage NSW officers have been advised to not provide such confirmation, thereby requiring the property owner to have to lodge a s.60 Application and, thus, defeating the purported streamlined process. Catch 22 !!

**Heritage NSW should immediately provide training and guidance to council planners, heritage advisors and heritage consultants on how the Standard s.57[2] self-assessment process works, if it want the self-assessment process to be widely accepted.**

Example 3: A number of heritage items have been listed on the SHR with applicable Site Specific s.57[2] Exemptions. In numerous instances these specific exemptions reference conservation policies in an HC endorsed CMP, but with the HC no longer endorsing CMPs these site specific exemptions have been negated and, therefore, the heritage item owner is now obliged to lodge a s.60 application to Heritage NSW.

**The Heritage Council needs to be more accepting of modest CMPs, and reconsider the endorsement of CMPs especially for major institutions and complex heritage sites, rather than all SHR items.**

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

The key determination of heritage approvals should still remain “the retention of the cultural significance of the heritage item”, but this requires both the applicant and the assessor to have a shared understanding of the cultural significance of the heritage item. It seems, increasingly, the assessors consider all fabric as being of equal significance. Hence, in one insistence, the refusal to permit the upgrade of a non-descript 1970s bathroom in a Miller’s Point terrace house on the basis that it was significant fabric [presumably reflecting the PWD involvement in improving amenities in public housing]. This approach can be excellent when wanting to interpret the many layers of occupational history, as in the case of Rouse Hill Estate [a museum property], but quite unjustifiable when upgrading the amenity of a terrace house to contemporary standards.

**This issue has more to do with the implementation of the Heritage Act and the effective determination of applications by Heritage NSW officers, than it does with the Heritage Act itself. It is essential that the Heritage NSW officers responsible for assessing applications and permits have sufficient practical knowledge and expertise in architecture and building conservation and also have enough nous to make sound judgements that differentiate between what might be desirable and what is essential.**

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

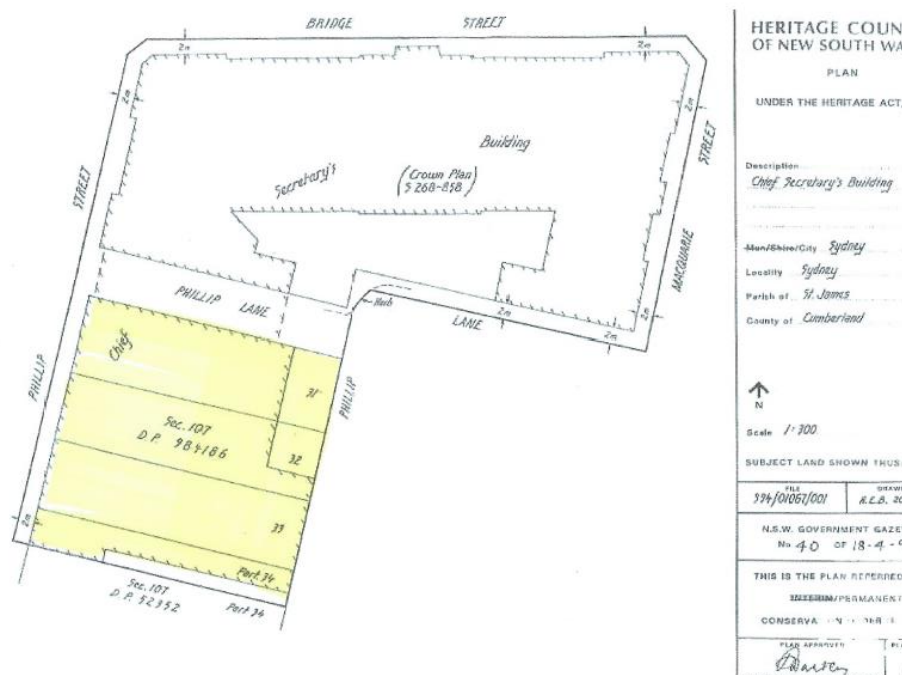
The issue here, typically with local heritage items rather than State heritage items, is the degree to which the Local Environment Plan does not accurately align with the Local Heritage Inventory. Conflict immediately arises when the development potential indicated by permissible height limits and FSR in the LEP offer more financial gain for the property owner than retention/conservation of a heritage item. Some councils, such as the City of Sydney, offer the transfer/sale of heritage floor space to overcome this problem. For items listed on the SHR the Heritage Act has provision for a Heritage Agreement, but this seems to have been rarely used.

**Ensure that land use zoning in LEPs and their associated DCPs are fully cognisant of the items listed on the LEP Heritage Schedule.**

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

One of the biggest failures in strategic planning is the provision in the State Significant Development (SSD) that effectively “turns off” the requirements of the Heritage Act. Similarly, with an Unsolicited Proposal (USP), where decisions can be made about building envelopes and heights without specific reference to the HC and Heritage NSW to ascertain what impact the proposal might have directly on a heritage item or indirectly on an adjacent heritage item, prior to the proposal moving to an SSD.

For example the government is at present considering an SSD for 50 Phillip Street, Sydney, a proposal which plans to incorporate a large part of the Chief Secretary’s Building (south of Phillips Lane). PDNSW undertook “robust due diligence investigations to support the assessment of the Proponent’s Detailed Proposal and to ensure the proposal provides value for money for the Government”, but did this process also require the HC to determine the proposal would result in sound heritage conservation for one of the most significant government buildings in Sydney?



When I initially read about this development proposal in the press I was quite unaware that it involved a new building jutting over the Chief Secretary's Building. The published architectural montage simply showed the top half of the 47 storey tower and avoided illustrating the impact of the proposed building on Macquarie Street and the nationally listed historic Governors Domain and Civic Precinct. By the time the public become fully aware of the implications of this proposed development it will be too late. The proposed redevelopment of the Central Station-Redfern Precinct is another example where Strategic Planning has ignored heritage conservation issues and the public are none the wiser.

**Heritage considerations must be taken into account in all Strategic Planning. USPs and SSDs must not be allowed to sideline the Heritage Act and the statutory advice of the HC.**

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

The Heritage Act has suitable provisions to deal with compliance issues and Heritage NSW now has a compliance officer. However, it has been many years since anyone was prosecuted under the Heritage Act [e.g. Great Northern Hotel, Newcastle (2000)]

Of all the items listed on the SHR 60% are in public ownership, 33% are owned by private organisations and 6% owned by private individuals. If there is currently any non-compliance with the Heritage Act is as likely to be with a government agency as it is with a private owner, but it is not possible for one government agency (Heritage NSW) to take legal action against another. Besides, the common catchcry was always "the Government [and all its agencies] should lead by example".

Note: One thing that might well prompt non-compliance might be the bureaucratic difficulties in gaining HC approval for minor works. (see Focus Question 12, above)

**Focus Question 17:** How could [the] understanding of state heritage be enhanced?

The Heritage Act recognises that the Heritage Council and Heritage NSW have a responsibility to promote and celebrate our State's heritage.

**There are a range of activities Heritage NSW can undertake in this respect, i.e. greater promotion the State Heritage Inventory, its publications and awards, however this doesn't require any amendment of the Heritage Act, it simply requires adequate financial resources.**

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

This is a question would best be addressed by Destination NSW. The Heritage Act recognises that the Heritage Council and Heritage NSW have a responsibility to promote and celebrate our State's heritage, however the most pressing role currently remains ensuring the conservation of our heritage.

**The promotion of cultural tourism is best handled through the resources of the tourism industry, in particular Destination NSW, with background information sourced from Heritage NSW.**

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

This is a very broad question, which the Heritage Act cannot answer. It almost implies – how can government off-load its unwanted heritage buildings. Local communities, i.e. the local art association, historical society, writers’ group, etc., typically do not have the resources to properly maintain and conserve a heritage building. The fate of the heritage buildings within Callan Park provides sufficient evidence of this fact. Any community groups occupying a public heritage building should also be provided with the resources to maintain and conserve that building or, better still, the government agency that owns the heritage building should be required to carry out routine maintenance.

**This question that has to be addressed through a “whole of government” policy, with a commitment by Treasury to properly fund government agencies to maintain their heritage buildings. As previously stated – restoration is deferred maintenance, but much more expensive.**