

CONSULTATION DRAFT PLANNING BILL 2020

CONSULTATION DRAFT PLANNING (EXEMPT DEVELOPMENT)
REGULATION 2022

CONSULTATION PLANNING (GENERAL) REGULATION 2022

SUBMISSION FROM THE ACT HERITAGE COUNCIL

JUNE 2022

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**APPENDIX 1: DETAILED EVALUATION OF THE DRAFT CONSULTATION DOCUMENTS FOR
THE ACT PLANNING SYSTEM REVIEW AND REFORM PROJECT**

1. INTRODUCTION

The ACT Heritage Council (hereafter referred to as the Council) made a submission to the five Planning System Review Papers in July 2021 as part of the government review of the ACT Planning and Development Act 2007. The submission included several recommendations relating to each of the review papers dealing with the Planning System, Strategic Planning, Development Controls, Development Assessment and System Operation in the context of the protection, conservation and enhancement of ACT's cultural heritage including Aboriginal places and objects.

This current submission by the Council responds to the following consultation draft documents, again with the primary intent of ensuring appropriate recognition, protection and enhancement of ACT's cultural heritage within the context of the proposed planning and development system:

- Draft Planning Bill
- Draft Planning (Exempt Development) Regulation 2022
- Draft Planning (General) Regulation 2022

The Facts Sheets also available to the public have been sourced to assist in our response. For the purpose of continuity the Council has revisited its list of recommendations for each of the review papers and responded in detail in Appendix 1. A traffic light assessment has been applied in the table as follows:

- Green – the draft documents adequately address the Council recommendation
- Orange – the draft documents partially address the Council recommendation and further amendments are sought
- Red – the draft documents do not adequately address the Council recommendation and significant amendments are sought

This submission only addresses those matters shown as orange or red.

2. SYSTEM STRUCTURE

Recommendation: A Heritage Strategy be prepared for the ACT and integrated into the new planning system.

Response: The draft Bill states that the planning strategy for the ACT '*may include other government strategies and policies.*' The Bill acknowledges in S.7 (3) that important matters in achieving the object of the Act include:

- (a) *the knowledge, culture and tradition of the traditional custodians of the land, the Ngunnawal people;*
- (c) *the ACT's biodiversity and landscape setting, including the integration of natural, built, cultural and heritage elements;*
- (d) *high-quality, people-focussed and design-led built outcomes that respond and contribute to the distinctive characteristics of the local area, and sense of place;*

The natural and cultural heritage of the ACT, including Aboriginal places and objects, is integral to the history, sense of place and character of the Territory. These environmental elements are embedded in the landscapes, streetscapes and civic and community spaces that contribute to the distinctive characteristics of the ACT and are highly valued by its people. The planning system should recognise and protect these elements. Just as there are other strategies applicable to the ACT e.g. Housing Strategy, an ACT Heritage Strategy is a worthy candidate for recognition and integration

into the planning system thus providing an overarching strategic framework dealing with natural and cultural heritage places and objects. Because development introduces change to the environment and that change will impact on and influence an appreciation of the heritage attributes of the Territory, an ACT Heritage Strategy is needed.

Recommendation: The principles of good planning include cultural heritage conservation principles.

Response: S.9 (1) (h) of Part 2.2. Planning principles includes natural environment conservation principles as part of '*good planning*.' However cultural heritage conservation principles which apply also Aboriginal, historic and built heritage are also part of '*good planning*' and yet they have been omitted. This is a serious oversight that needs to be corrected.

It is noted that high quality design principles are set out in S.9 (2) of the draft Bill. Sub clause (a) should include the following:

'(iv) generate a public benefit for current and future generations.'

There is a strong link between 'quality design' and 'public benefit' and this needs to be recognised in the principles. Also the term 'public benefit' will require definition in the dictionary section of the new legislation.

Recommendation: There should be consistency of terminology between legislation, such as the Planning Act and the Heritage Act. The draft Bill refers to 'heritage areas' but they are not defined in the draft dictionary.

Response: The Heritage Act 2004 uses the term '*place*' and '*object*', definitions of which are presented in the Dictionary of the new Bill for Aboriginal Place and Object by cross referencing to the Heritage Act definitions.

However the term '*heritage area*' in the draft Bill should be changed to '*heritage place or object*' for consistency of terminology across legislative instruments.

Recommendation: If amendments to the Heritage Act are required as a result of the new Planning Act then these changes need to be identified and resourced.

Response: There is no indication in the draft consultation documents that changes to the Planning Act may or will trigger a need for amendments to the ACT Heritage Act and if more resources will be needed and provided to the Council and its Secretariat to perform those changes.

Recommendation: The effect of the Council's advice on proposed variations to the Territory Plan be clearly defined in planning legislation in ways similar to the effect of such entity advice on referred DAs. Written reasons be provided by the planning authority if the Council advice is not followed.

Response: it is proposed to establish a new planning authority, the Territory Planning Authority and to prepare a transitional draft territory plan. S.48 (2) (v) requires the new authority to consult with the Council on the draft plan but not adopt the advice of the Council. Rather it '*considers*' that advice and prepares a consultation report which goes to the Executive. For the purposes of accountability and transparency the new territory planning authority should be required to provide its consultation report with reasons for or against adopting advice from say the Council and any proposed changes to the new plan – all of which should be in the public domain and available to the Council.

3. STRATEGIC PLANNING

Recommendation: A hierarchy of spatial plans is to be introduced with strategic statements accompanying these plans.

Response: Whilst the draft Bill anticipates a planning strategy for the entire Territory supported by district level strategies (S.34 to S.38), it also states that other government strategies are to be included, where appropriate. The planning strategy and the district strategies alongside spatial policies and goals are to guide and manage change and achieve the object and good planning principles identified in the draft Bill. As mentioned already a Heritage Strategy for the ACT should be prepared and referred to in these new strategic plans, where relevant, so as to ensure that part of managing change considers the natural and cultural heritage values of the Territory and its districts as well as within any estate management plan.

In addition entity advice from the Heritage Council should be sought on district strategies, as every district in the ACT contains heritage values which should be a consideration in the development of strategies (and in many instances, strategies should acknowledge heritage places to be conserved). District strategies also afford the opportunity for a more strategic and consistent approach within the ACT. It will be important for the Heritage Council to be involved in the preparation of district strategies including proper consideration of heritage values within each district.

Recommendation: Planning strategies and policies will address a range of considerations. These should include both the natural and cultural heritage values.

Response: As mentioned already S.9 of the draft Bill identifies *the Principles of Good Planning* but omits cultural heritage conservation principles which deal with the Aboriginal, historic and built environment. The connection between the Object of the Act and the Principles of Good Planning need to include the cultural heritage conservation, in the same way that natural heritage conservation is explicitly identified. The links between the levels of strategic planning, policies and plans derived from these documents as the planning system moves from Territory Plan to District Plans, Estate Management Plans etc need to ensure that the natural and cultural heritage places and values present in this spatial framework are protected and enhanced.

Recommendation: The community, including the Council, be consulted on masterplans.

Response: The draft bill refers to Estate Development Plans in Part 4.2 S.39 and S.40. These Sections set out the matters to be addressed in the making of such plans and what is to be included. There is no mention of these plans required to identify places or objects of heritage significance or of Aboriginal cultural significance. This needs to be addressed to ensure that estate management plans sensitively manage places and objects subject to Heritage Act provisions.

Again the link between strategy, policies and plans is weak without considering cultural heritage considerations.

4. DEVELOPMENT CONTROLS

Recommendation: Clarify the role and purpose of each zone and code with the opportunity to include objectives relating to the protection and conservation of the cultural heritage characteristics of the area, where relevant.

Response: As yet there are no details about the content of the Transitional – draft Territory Plan in the consultation documents. The Council is suggesting one option that being a heritage overlay provision in the plan.

Recommendation: The Council recommends strengthening the alignment between development controls and strategic directions in the Territory Plan assuming that such directions and policies aim to identify, protect, and conserve the cultural heritage places and objects within the Territory, district or local area including Aboriginal places and objects.

Response: S.181 of the draft Bill sets out the considerations when deciding development applications. The first consideration – ‘*any applicable desired outcomes in the territory plan*’ – of which a desired outcome should be, where relevant, the protection and conservation of cultural heritage places and objects. Also the draft Bill makes no reference to a consideration being any relevant strategy or policy and yet this is how strategic and policy content for a site or area/district is linked directly to the development application system of planning. This is a fundamental omission in the S.181 that needs to be addressed.

Recommendation: Expand precinct codes to address existing and desired future character of an area of which a defining character will be its heritage features/values.

Response: Again S.181 Considerations when deciding development applications needs to strengthen the consideration of desired character for an area. There is no indication at this stage that the term ‘*desired outcome*’ will also address the ‘*desired character*’ in a code or policy context. Further clarification is warranted. There is a need for desired outcomes and characters to maintain cultural heritage values – Garden City Precinct examples, where conserving spatial planning characteristics and unified residential dwelling characteristics is fundamental to the heritage significance of each place.

Another consideration to be listed should be any relevant code as it is codes that stipulate matters such as height, scale, massing, bulk, materiality etc when dealing with development and desired outcomes and desired character. The preparation of development codes needs to include a comprehensive community engagement program prior to their adoption as it is often issues such as the height, scale and form of new development that are controversial within the community and require community input and comment. Furthermore heritage conservation matters should inform such policies and codes.

S.182 – Conditional approvals sets out under (2) examples of conditions including

(a) the development, or a stated stage of the development, must be carried out to the satisfaction of a stated entity; and (l) for an approval in relation to a place registered, or nominated for provisional registration, under the Heritage Act 2004—the applicant must enter into a heritage agreement under that Act for the conservation of the heritage significance of the place.

Such conditions imply that S.181 should include greater consideration of the cultural heritage significance of the area or site, as set out in the Council’s entity advice on the application.

Recommendation: in developing new controls related to the management of areas identified for change the Territory Plan should include tools such as heritage overlays for individual or area based heritage places. Property owners and prospective purchasers are then aware of the status of a site as it relates to natural or cultural heritage significance. An alternative to this approach is requiring

the applicant to include in the DA information whether or not the development site is a registered, provisionally registered or nominated heritage place. Such advice can be sought from the ACT Heritage unit or by accessing online the Heritage Council website (which is currently the subject of a major overhaul and upgrade project).

Response: These are matters to be taken up in the making of the transitional – draft territory plan and any future amendments to that plan.

It is noted that S.183 refers to *Essential design elements* however this term is not specifically defined in the Dictionary of the draft Bill or in the draft regulations. This is an oversight that should be addressed.

Recommendation: The working paper on development controls stated that the planning authority have the ability to exercise discretion in favour of high-quality development outcomes.

Response: It is noted S.9 Planning Principles states that *high-quality design principles* mean the following:

- (a) *development should be focussed on people and designed to—*
 - (i) *reflect local setting and context; and*
 - (ii) *have a distinctive identity that responds to the existing character of its locality; and*
 - (iii) *effectively integrate built form, infrastructure and public spaces;*

The existing character of an area will, in some instances, be substantially shaped by the heritage values of the area. There is no definition of what a *high-quality development outcome* is. The Council is of the view that all new development in the ACT should be of a high quality and that this should not be a factor in overriding the expert advice from a referral entity on a DA.

S185 of the draft Bill only permits approval against Conservator advice for a ‘territory priority project’ but S185 permits approval against Council advice for all applications. It is recommended that any approval contrary to Heritage Council advice is limited only to territory priority projects whereby written reasons be provided to the Council as to why its advice has not been adopted. As mentioned later in this submission the Heritage Council should be given first party rights to ACAT in these and other circumstances where the Territory Planning Authority do not adopt its advice.

On the issue of discretion S.185 *Development approval contrary to entity advice* allows the Territory Planning Authority (in this case the Chief Planner has these powers) the right to approve a development proposal which is inconsistent with entity advice, including advice from the Council on registered heritage places and objects, and Aboriginal places and objects. Criteria enabling this to occur include when the decision-maker is satisfied that acting contrary to that advice ‘*will significantly improve the planning outcome to be achieved*’ or, in the case of a declared protected matter, the proposal would provide a ‘*substantial public benefit*.’ As ‘cultural heritage conservation principles’ are not currently identified in S.9 *Principles of Good Planning*, this system would effectively allow development to be approved without any consideration of Heritage Act requirements.

In other words, the expert advice of the Council can be dismissed and hence there is no guarantee that the cultural heritage place will be protected and conserved. Such an outcome is contrary to the role of the Council under the Heritage Act 2004 and undermines its authority as a statutory body. Such an outcome also prioritises natural heritage (ecosystems, habitat and biodiversity) over cultural heritage in decision making, as provisions only allow the Authority to act inconsistently with Conservator advice for ‘territory priority projects.’

These particular provisions of S.185 are inappropriate and place at risk the future of ACT's rich and diverse heritage. In the context of these provisions the Heritage Council refers, for example, to the Juukan Gorge decision. All Australian jurisdictions are exploring opportunities to significantly improve their Aboriginal heritage conservation framework – and a new Planning Bill which allows significant Aboriginal places to be destroyed without appropriate consideration of heritage values is a poor framework and one out of step with professional standards and the direction of Aboriginal heritage management.

S.185 (2) also allows the chief planner to approve a DA for a significant development even when that development is 'likely to have a significant adverse impact on a declared protected area'. A declared protected matter is defined in S.214 and S.215 of the draft Bill as a matter protected by the Commonwealth or when the Minister declares a matter to be protected.

A significant development is defined in S.91 as :

- (a) an estate development plan under section 39;*
- (b) consultation with the design review panel under section 97;*
- (c) an environmental impact statement under section 102.*

Note A regulation cannot exempt a significant development from requiring development approval (see s 141 (2)).

It is possible under the draft Bill an estate development plan which is the subject of a DA and/or an EIS which is referred to the Council for advice may be approved even though the Council may be of the view that such a plan will have a significant adverse impact on the heritage values of the place. Such a situation further weakens the role of the Council in fulfilling its role and functions under the ACT Heritage Act 2004. Estate development plans are greenfield development plans where there is a risk of any heritage values on such land not being considered because of the desire to provide more space for urban development. These outcomes are unacceptable to the Council and need to be rectified in the proposed new planning legislation.

It is argued that it is entirely inappropriate for a member of the executive government to override statutory protection of the Territory's natural and cultural heritage places. Heritage protections are arrived at through a robust process which is legitimated through the involvement of experts, specialist interests, consultation with the general public and approval by the minister. Allowing a single member of a government department such powers as to override this process and outcome is inappropriate. A decision to overturn statutory protections needs to be taken at the ministerial level to allow for proper oversight and public accountability. It is noted that in relation to Conservator advice the Territory Planning Authority will not be able to override that advice unless it is a territory priority project and yet the Heritage Council advice on cultural heritage matters can be overridden. This difference in how advice is treated by two government entities is inappropriate and inconsistent with good decision making practices.

It is noted that applications must submit a Statement of Heritage Effect (SHE) application where heritage impacts are proposed, which are assessed by the Council under Sections 61G and 61H of the Heritage Act. SHE applications place the onus on proponents to demonstrate that there are 'no other reasonably practicable' alternatives to impacting heritage places and objects afforded protection under Sections 74 and 75 of the Heritage Act. The Heritage Council has found these provisions extremely useful when dealing with a DA that may adversely impact heritage places and objects, and application of this process often results in applicants finding alternative ways of delivering development in ways that also achieve best practice heritage outcomes. S.185 of the draft

Bill in essence can negate the outcome of this process consultation with the applicant by the Heritage Council, which in reality often finds acceptable development outcomes that maintain heritage conservation requirements.

Recommendation: Ensure the planning provisions for new development adjacent to a heritage place are compatible with conservation of the heritage values of the place, including protection of view lines that enhance conservation of the heritage place.

Response: The definition of ‘environment’ in the draft Bill includes:

‘qualities and characteristics of areas that contribute to their biological diversity, ecological integrity, scientific value, heritage value and amenity.’

A development proposed on a site adjacent to an individual heritage place or a heritage precinct will be part of the ‘environment’ in which the impact of a DA should be assessed. The content of the Transitional – draft Territory Plan will be important in addressing this concern of the Council to ensure that the intent of the new planning act in terms of context and amenity of an area embraces its heritage values. It is noted that views of the heritage place from the public domain are often integral to the context in which a DA is assessed.

The Heritage Council believes that the most appropriate way of addressing appropriate development outcomes adjacent to heritage places and objects is via planning controls in district strategies. Dealing with this issue through individual DAs creates a risk of inconsistent approaches noting that Council’s authority on individual DAs under this draft Bill is limited to spatial boundaries within register entries. Furthermore, S.27 of the Planning (General) Regulation does not require referral of DAs relating to nominated places or objects to the Council. This creates risk that places of likely heritage significance may be damaged or demolished without consideration of their heritage values and without advice from the Heritage Council.

The Council is responsible for assessing the heritage significance of places and objects with reference to Section 10 criteria of the Heritage Act. However, the Council’s ability to make timely decisions on nominated places and objects is limited by the resourcing of its Secretariat by the ACT Government. Currently, ACT Heritage’s Registration Team consists of 1 SOGC Manager and 1.5 ASO6 Officers; and as a result, some places are on the nomination list for years before they are assessed. Presently, the nomination list is seventy-five, and at its peak, it contained 320 nominations. Where the Territory does not resource the Council to make timely decisions on nominations, the potential impacts of development on nominated places must be considered – and S27 of the Regulation must be amended.

5. DEVELOPMENT ASSESSMENT

Recommendation: All DAs proposing works at or near heritage places and objects (spanning registered, nominated, and Aboriginal places and objects) are referred to the Council for entity advice.

Response: There do not appear to be any clear provisions in the draft Bill to require referral to the Council as a referral entity for a development application near a heritage place or object. The exception would be, for example, where the development site is within a designated heritage place which encompasses an area and not an individual site under the Heritage Act. The Territory Plan will need to address this issue given that inappropriate development adjacent to a heritage place can adversely impact on the heritage values and visibility of that place from the public realm

In the case of Aboriginal heritage S.27 of the Planning (General) Regulation limits referral of DAs to when 'the Authority is aware that the proposed development may impact an Aboriginal place or object.' While current database issues are recognised, S.27 should be amended to ensure that all DAs relating to Aboriginal places and objects are referred, without qualification.

Recommendation: Where the Heritage Council advises that a proposed development is likely to have a significant adverse heritage impact, the development 'must not be approved.'

Response: As mentioned already there are provisions in Sections 166, 169, 184 and 185 of the draft Bill dealing with referral of DAs and the powers of the decision maker on DAs. The territory planning authority must refer a development application to a referral entity (e.g. ACT Heritage Council). Council advice on S.185 provisions are set out above, relating to the decisions contrary to entity advice. Additionally, S.169 (1) (b) states:

(b) if the development application was referred to the entity under section 166 or section 167—the approval is substantially consistent with the entity's advice.

There is no definition for the term 'substantially consistent.'

S.184 deals with *Restrictions on development approval* and states, in particular:

(1) A decision-maker may approve a development application for a development proposal only if the proposal is consistent with the following:

(c) for development in relation to which an entity has given advice under section 168—the entity's advice;

Note Advice given outside the time required by s 168 is not entity advice for the purpose of that section, but may be considered under s 181 (h).

(d) for development that will affect a registered tree or declared site—the advice of the conservator of flora and fauna in relation to the application;

S.184 (1) (c) ensures that a DA that is consistent with the Heritage Council's advice as a referral entity is supported.

However, then S.185 Development approval contrary to entity advice states, amongst other matters:

(1) A decision-maker may approve a development application if—

(a) the application is for—

(i) a development proposal that is inconsistent with entity advice mentioned in section 184 (1) (c); or

(ii) a territory priority project that is inconsistent with the advice of the conservator of flora and fauna mentioned in section 184 (1) (d); and

(b) the proposal or project does not involve a protected matter; and

(c) the decision-maker has considered both of the following:

(i) the desired outcomes applying to the proposal under the territory plan;

(ii) for a proposal or project requiring an EIS—any reasonable alternative development options; and

(d) the decision-maker is satisfied that acting contrary to the advice will significantly improve the planning outcome to be achieved.

Note The decision-maker for an application for a territory priority project is the chief planner (see s 140).

In effect S.185 enables the territory planning authority to act contrary to the advice of the Council on a DA even though it is the Council that not only has the expertise and experience on matters of cultural heritage significance as recognised in the ACT Heritage Act but has an important statutory role in protecting and conserving these places and objects. The processes of evaluation undertaken by the Heritage Council are extremely thorough and evidence based. This situation of overriding its advice, is unacceptable to the Council. It is also noted that there must be statutory criteria or stated decision guidelines provided to assess the term '*significantly improve the planning outcome to be achieved.*'

Recommendation: EIS and ESO referrals are made to the Heritage Council for activities at registered, provisionally registered and nominated heritage places and objects and Aboriginal places and objects.

Response: Part 6.3 Sections 99 to 138 deals with Environmental impact assessment (EIS) and Environmental significance opinions (EOS). S.114 states that the territory planning authority **may** consult on a draft EIS with an entity e.g. the Council. If the EIS is dealing with a heritage place be it registered, provisionally registered or nominated the term 'must' be consulted should apply.

Recommendation: DA submission requirements be formally defined to include heritage information requirement.

Response: Sections 162 to 165 of Division 7.5.2 address *Making a development application*. Information about a place or object that is registered or provisionally registered under the Heritage Act, or an Aboriginal place or objects, on the site would need to be included according to these requirements. However a place or object that has been nominated may not be represented in the DA information. This omission needs to be addressed.

Recommendation: Entity advice period be responsive to nature and complexity of the application – minimum 15 working days and 30 working days for large and complex referrals and legislation allows entities to request (and be approved) an extension of response timeframes for individual referrals.

Response: S.168 deals with Entity advice on development applications. S.29 of the draft Planning (General) Regulations 2022 identifies the required response time for entity advice as follows:

The number of days prescribed is—

(a) for a referral under the Act, section 166 (When authority must refer development application)—

(i) if the development application is for a significant development—20 working days from the day the referral is made; and

(ii) for any other development application—15 working days from the day the referral is made or a shorter period agreed in writing by the authority; and

(b) for a referral under the Act, section 167 (Further entity referral—more information or amended application)—10 working days from the day the referral is made

These regulations do not acknowledge the complexity of significant development applications, and the time required for entities such as the Heritage Council to provide its advice on such applications. Unless the Council's Secretariat is adequately resourced to realistically meet these tight timelines and perform the wide range of other functions under the Heritage Act the timelines should be changed as per the Council recommendation.

Appropriate referral timelines for the Heritage Council are as follows:

- For DAs on registered and provisionally registered heritage places (other than for a significant development) the time for advice be 15 working days from the day the referral is made.
- For DAs on nominated heritage places the time for advice be 30 days from the day the referral is made to enable the Heritage Council to assess the likely heritage significance of the place and the impact, if any, of the DA on that significance. It is noted that S.60 of the Heritage Act 2004 currently specifies a 15 day timeline but this has proven to be unrealistic with the current resources within the ACT Heritage Secretariat and hence the need to amend this legislation too for consistency.
- For DAs on registered or provisionally registered heritage places that are 'significant developments' the time for advice be 30 working days from the day the referral is made to the Heritage Council.

Recommendation: All DA approval decisions, regardless of whether they have been referred to the Heritage Council for entity advice, include a standard condition requiring that unexpected heritage finds be managed in accordance with Heritage Act provisions.

Response: The draft Bill allows for a condition on a DA to include the applicant entering into a heritage agreement in relation to a registered or nominated for provisional registration place or object (S.182 Conditional approvals (2) (I)).

The Heritage Council supports the approach of where a DA is approved in relation to a place registered, or nominated for provisional registration, including an Aboriginal place or object, that a condition be applied that requires the applicant to undertake heritage conservation measures to the satisfaction of the Heritage Council.

As noted already even if the site has been nominated for registration there is no obligation in the draft Bill for the Territory planning authority to refer that DA to the Heritage Council. This anomaly must be addressed. DAs related to nominated places and objects need to be referred to the Heritage Council for entity advice. A nomination list exists and would be readily available to the Territory Planning Authority via the Council's website or by contacting the ACT Heritage Secretariat.

Recommendation: When approvals longer than 5 years are being considered the Council is to be notified of this as part of the referral process and the Council allowed to identify any additional heritage conditions appropriate to a longer term approval period.

Response: There is no statutory obligation for the territory planning authority to adopt these conditions under the draft Bill.

Recommendation: For exempt development, require that works do not contravene the Heritage Act, and additionally require Council advice on Class 10 structures.

Response: The main issue relates to the qualification of Class 10 structures in S.1.10(2) of the new Planning (Exempt) Regulation where a Class 10 structure e.g. garage, shed, carport located behind

the front zone is excluded from this provision. It is recommended that the following words be removed from S.1.10(2) regulation:

'(other than a class 10 building or structure located behind the front zone)'

The above comments on the DA process in the draft Bill indicate that the territory planning authority is not required to adopt the advice of the Heritage Council including conditions that may relate to proposed works (see S.185). This situation places the draft Planning Bill and the current Heritage Act in potential conflict and may result in inconsistent development outcomes in places of heritage significance.

Recommendation: Ensure education and training for certifiers on heritage criteria and guidelines.

Response: The draft Planning Bill does not address education and training for certifiers on heritage criteria and guidelines and yet this should be a responsibility of the new Territory planning authority.

Recommendation: Entities providing advice under S149 of the PDA be defined as interested entities in Schedule 6.

Response: Schedule 6 of the draft Bill deals with reviewable decisions, eligible entities and interested entities. The proposed definition for *'material detriment'* does not include damage or loss of heritage places or objects, and Aboriginal places or objects, and yet it is clear that such places and objects are integral to the identity, character, and sense of place of the ACT.

The table accompanying Schedule 6 does not recognise a referral entity such as the Heritage Council as an 'interested entity' meaning that if the Council wishes to be involved in an ACAT case it would need to be joined by an interested entity listed in column 4 of the table. It is noted that the Facts Sheet on *Strategic and Spatial Planning* accompanying the draft Bill information states that:

'Community participation is a fundamental element of a good planning system.'

The more detailed Facts Sheet on the draft Planning Bill acknowledges that entity referral is *'expert advice.'*

As already mentioned, the important matters to achieving the Object of the Act include:

(a) the knowledge, culture and tradition of the traditional custodians of the land, the Ngannawal people;

(c) the ACT's biodiversity and landscape setting, including the integration of natural, built, cultural and heritage elements;

(d) high-quality, people-focussed and design-led built outcomes that respond and contribute to the distinctive characteristics of the local area, and sense of place;

It is both illogical and irrational to not include the Heritage Council as an *'eligible entity'* when dealing with reviewable decisions that involve a registered, provisionally registered or nominated heritage places and objects, and Aboriginal places and objects. The draft Bill seeks the expert advice of the Heritage Council but denies it direct representation as an eligible entity at ACAT. To fulfil this role as a party in its own right at ACAT will require adequate resources being provided to ACT Heritage. This however should not deny the Council its right to be a party to an appeal against a DA.

Section 3 Objects of the ACT Heritage Act states:

(e) to provide a system integrated with land planning and development to consider development applications having regard to the heritage significance of places and heritage guidelines.

The land planning and development system in the ACT includes the role and functions of ACAT. As the statutory body responsible for the protection and conservation of the Territory's natural and cultural heritage places and objects, including Aboriginal places and objects, it is unreasonable and inappropriate for the Heritage Council to be denied this right of direct representation at ACAT.

Therefore it is noted that where the draft Bill allows Heritage Act provisions to be overturned without due consideration of heritage impacts, on the grounds of 'good planning' (noting there are no cultural heritage principles in the draft Bill as yet) that such action is contrary to the advice of an independent statutory authority e.g. the Heritage Council. Such decisions should be transparent and accountable and the Council should have the ability to seek review at ACAT as a direct party.

Recommendation: Development Assessment Direction 4 is supported provided that the process for managing strategic developments such as urban intensification integrates relevant heritage parameters/considerations into the planning regime in the interest of consistency and clarity.

Response: The content of the proposed strategic planning and spatial documents referred to in the draft Bill as well as the Transitional Territory Plan will all be important in determining whether cultural heritage considerations are integrated into these documents.

6. SYSTEM OPERATION

Recommendations:

Aid the interpretation of reformed development controls provided that the design and guidelines developed are consistent with the relevant Council policies and guidelines.

Provide a greater line of sight between controls and policies provided that these documents acknowledge the importance of protection and conservation of ACT's natural and cultural heritage where relevant.

Provide stronger guidance regarding the development assessment process including when an applicant also requires an approval from the Council.

Response: These matters relate primarily to the proposed hierarchy of planning strategies and the Transitional - draft Territory Plan – all of which is at present unknown to the Heritage Council in terms of structure and content.

One of the Facts Sheet on '*The New Planning Bill-overview*' states:

This is about planning for the future – where people will live, how they will move around, how the natural environment will be protected and how our city will be resilient to the impacts of climate change.

It is noted that it is also about protecting, conserving, and enhancing ACT's built cultural heritage environment but this is not mentioned in the Fact Sheet.

The more detailed Facts Sheet identifies *Principles of good planning* that '*must be taken into account in strategic and spatial planning.*' Again it includes '*Natural environment conservation principles*' but omits again the built cultural heritage environment. As stated already this is a serious omission when talking about good planning principles.

This Facts Sheet states also:

The content of the new Territory Plan will be informed through a review of the policy intent of existing planning strategies and policies and related Government strategies that can be given effect through the planning system. This includes opportunities to better integrate current Government policy into the new Territory Plan, such as the ACT Housing Strategy, the Climate Change Strategy, and the ACT Transport Strategy.

A Heritage Strategy for the ACT which deals with all elements of cultural heritage significance including Aboriginal places and objects would be an appropriate document for integration into the new Territory Plan and provide greater line of sight between the object of the Act and the strategies, policies and controls relating to development and when dealing with cultural heritage places and objects.

Recommendation: Provide greater transparency of development assessment applications.

Response: The proposed Territory Planning Authority is not required to give written reasons for a decision on a DA which may be contrary to the advice given by a referral entity such as the Council and so transparency on decision making of this nature is opaque and accountability is in question..

There needs to be statutory guidance in the exercise of discretion when the Territory Planning Authority is evaluating and making decisions on DAs that involve cultural heritage places as well as transparent mechanisms to explain these decisions.

Recommendation: Improve the accessibility of information.

Response: The draft Bill does not specifically state how access to information will be improved from what currently operates. Further information is sought on this matter by the Council.

Recommendation: Improve levels of compliance not only with the building and planning processes but also with the Heritage Act.

Response: The draft Bill and the Facts Sheets do not specifically highlight improved levels of compliance other than the processes outlined in Chapter 13 Enforcement. The draft Bill needs to ensure that developers comply with approved developments including stated heritage conservation outcomes.

Recommendation: Improve reporting mechanisms to track achievement of strategic policies.

Response: Part 5.5 Review of territory plan at least once every five years is a decision by the Minister. The Minister may delay such a decision for not more than one year. The territory planning authority is required to prepare a draft review report and consult with the Council on that report. Matters to be addressed in the review are outlined in S.88. There is however no specific requirement in the draft Bill about reporting mechanisms to track achievement of strategic policies on an annual basis. Annual monitoring of the performance of the planning strategy, district strategies and policies is a means of evaluating whether or not the object of the Act is being achieved and the outcomes being sought by the Act are being delivered.

7. CONCLUSION

Although there are elements of the draft Planning Bill that address the concerns raised by the ACT Heritage Council in its detailed submission of July 2021, it is of the opinion there are several proposed provisions which have the potential to result in outcomes where the rich and diverse cultural heritage of the ACT including Aboriginal places and objects will be damaged and/or

destroyed. It is argued that the conservation of places and objects of heritage and cultural significance, be they registered, provisionally registered, or nominated to the ACT Heritage Council will not be secured for current and future generations enjoyment and sense of place.

Just as the new Planning Act will be guided by the application of good planning principles, the development of planning strategies and policies should also be informed by these principles. The planning principles listed in the draft Bill include natural environment conservation principles but not cultural heritage conservation principles. This is a major omission that needs to be corrected.

The making and implementation of high level strategic documents in the planning and development sector is a well-recognised approach to holistic and integrated planning decision making. Already the ACT has a number of strategic documents e.g. Housing Strategy. It is anticipated the purpose and direction of that strategy will be reflected in the new Territory Plan. However, as yet, a strategy for the natural and cultural heritage of the ACT does not exist even though the matters of importance of achieving the object of the Act include:

- *the knowledge, culture and tradition of the traditional custodians of the land the Ngunnawal people;*
- *the ACT's biodiversity and landscape setting, including the integration of natural, built, cultural and heritage elements; and*
- *high-quality, people-focussed and design-led built outcomes that respond and contribute to the distinctive characteristics of the local area, and sense of place.*

A Heritage Strategy for the ACT would inform the content of the proposed planning strategies and policies and, as importantly, the content of the new Territory Plan.

There are also concerns with the proposed provisions dealing with development applications and environmental impact statements as well as the opportunity for the Heritage Council to appear in its own right as a party to ACAT hearings. The new Planning Act and the Heritage Act 2004 should complement one another and not seek to undermine or dismiss the expert advice of the Heritage Council when dealing with places of heritage significance. To do so, devalues and threatens the protection and conservation of the Territory's heritage.

Finally, there are terms adopted in the draft Bill that warrant inclusion in the Dictionary or adopt a different terminology to that applied by the Heritage Council. These include terms such as heritage areas and not heritage places or objects; essential design element; high-quality development outcomes; substantially consistent; significantly improve the planning outcome; and public benefit.

As for matters that pertain to the making of the ACT Planning Strategy and District Strategies as well as the proposed Transitional – draft Territory Plan, the Heritage Council looks forward to making a positive contribution to these documents if and when the drafts are available for its input.