

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Docomomo Australia

Date Received: 25 June 2021

25 June 2021

The Chair
Standing Committee on Social Issues
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Sir,

**Docomomo Australia Submission regarding
Review of the NSW Heritage Legislation – Discussion Paper, April 2021**

Docomomo Australia makes the following submission regarding the April 2021 Discussion Paper on the Review of NSW Legislation being undertaken by the Standing Committee on Social Issues.

1.0 INTRODUCTION:

Docomomo Australia is the Australian branch of Docomomo International (an international organisation currently headquartered in Lisbon) which has member branches in 62 countries and is one of the advising organisations to UNESCO regarding modern architectural heritage. Docomomo is charged with identifying, documenting and conserving buildings, sites and neighbourhoods of the Modern Movement).
have already been identified.

2.0 EXECUTIVE SUMMARY:

1. Docomomo Australia submits that the Discussion Paper does not recognise the central importance of heritage places are those places the community esteems and considers important enough to keep for future generations.
2. Docomomo Australia respectfully submits that the Discussion Paper is based on unsubstantiated and false assumptions regarding the need to amend the Heritage Act and that the fundamental problem is the administration of the Act rather than the Act itself.
3. The bureaucracy charged with administering the Act (currently known as Heritage NSW) is seriously under-staffed and under-funded causing delays in assessing the significance of places in NSW and listing places of significance. The under-staffing and under-funding is also causing delays in assessing applications for conserving, adaptively re-using, or redeveloping those heritage assets that have already been identified.
4. The NSW Government should prioritise the protection of Aboriginal heritage through separate legislation drawn up in close consultation with the Aboriginal communities of NSW rather than prioritising yet another review of the Heritage Act.
5. The objectives of the current Heritage Act provide a robust foundation for the identification and protection of the non-indigenous heritage of NSW.
6. The Heritage Council of NSW members should be increased back to the original 14 and the members of the Council should be nominated by the relevant professional bodies, conservation and community organisations. Above all, the members must be committed participants in the conservation of NSW's heritage places.
7. A separate Act for Aboriginal cultural heritage should be enacted as soon as possible.

3.0 RESPONSE TO THE ISSUES RAISED IN THE DISCUSSION PAPER:

The following response is structured according to the structure of the April 2021 Discussion Paper.

3.1 Discussion Paper – Section 1 Introduction: History

The discussion Paper should have included a history of the Act that specifically included the changes to the Act and its Regulations since 1977 to reflect the changing circumstances. The major question that would have been answered by such an approach would have been, “Have the changes strengthened or weakened the Act in achieving the aims set out in the Objects to the Act?”.

3.2 Discussion Paper – Section 1 Introduction: A changing operating context

This section of the Discussion Paper contains statements that are not supported by any data. For example,

“Over the past decade a number of changes have fundamentally altered the operating context of the Act. The 2019 bushfires have highlighted how natural disasters and the impacts of climate change may affect heritage conservation, while COVID-19 has sharpened the focus on the role of heritage in job creation and economic recovery.”

This statement is incorrect. The **fundamental operating context** of the Heritage Act has not changed since 1977. The heritage places of NSW are still under threat of demolition or of significant, serious alteration. Considering that the vast majority of places on the State Heritage Register are owned by the people of NSW (ie in State Government custodianship) the greatest threat comes from the State Government, as it did in the early 1970s when the BLF was encouraged to step in to assist the citizens of NSW protect their heritage from the State Government through the imposition of Green Bans.

In addition, the effects of climate change would be seen as an encouragement to conserve our historic building stock not only because of the embodied energy of the materials of their construction but also because they were designed to work with the climate. When they were constructed, those buildings did not have the means of artificially altering the interior environment through modern intensive energy-consuming technology such as air-conditioning, etc.

COVID-19 has sharpened the focus on many of society’s priorities and weaknesses but the focus on the role of heritage “in job creation and economic recovery” would not, and should not, be anywhere near the centre of focus in maintaining a strong economy. Healthy urban environments (for exercise, recreation), sunlight and fresh air for residences, building response to virus isolation and containment, and the mental and physical health of the citizens should all be demanding the attention of government.

“The NSW Government’s policy priorities of customer service, a strong economy and well-connected communities with quality local environments have also highlighted shortcomings of the current heritage system.”

The Discussion Paper does not substantiate the above statement by listing the “shortcomings of the current heritage system”. What are they and what provoked this review of the heritage legislation?

“An effective heritage system will facilitate the community in harnessing the cultural and economic values of heritage sites. It will also provide a framework for managing competing values and adapting to the pressures and challenges of an ever-changing world.”

This statement, like the majority of the Discussion Paper, concentrates on the “economic values of heritage sites”. What is surprisingly absent from the Discussion Paper is the central essence of heritage:

Heritage places are those places the community considers are important for today’s community and that the community considers are important enough to be kept for future generations.

“The NSW community of today looks vastly different to that of the 1970s, when the Heritage Act was first introduced. Greatly increased cultural diversity and a renewed focus on Aboriginal culture and heritage, mean that many of the items protected by the SHR may no longer fully reflect the many different narratives and values that underpin our communities of today and tomorrow.”

The NSW community has become increasingly culturally diverse. The 1970s saw a large influx of Vietnamese refugees and migrants following the end of the Vietnam War and their impact on the culture of NSW has been immense. The SHR does contain non-Anglo-Celtic heritage items but any lack of

representation, if this is the case, would be a result of lack of resources within Heritage NSW to actively increase the number of items on the SHR.

As stated previously, the identification and protection of Aboriginal culture and heritage should be a priority for the NSW Government and the preparation of any additional or new legislation should be carried out in full and complete consultation with the Aboriginal communities of NSW.

3.3 Discussion Paper – Section 1 Introduction: Aboriginal Cultural Heritage

See the comments above regarding separate legislation determined by the Aboriginal communities of NSW.

3.4 Discussion Paper – Section 1 Introduction: The rationale for a review of the NSW Heritage Act 1977

“The Heritage Act was last reviewed in 2007, but the last major reforms took place in 1999. The Act is now in its fifth decade of existence and has been amended many times as its operating context changed. Despite these updates, the Act is now widely considered to be out-of-step with trends in heritage conservation and land use planning and development.”

There is no justification given in the Discussion Paper for the statement that “the Act is now widely considered to be out-of-step with trends in heritage conservation and land use planning and development”. As one organisation working in the field of conservation of the State’s heritage Docomomo Australia submits that the Act is not “out-of-step”. The Objects of the Act are still relevant and at the core of the responsible identification, conservation and promotion of the State’s heritage.

The lack of resources allocated to Heritage NSW has severely limited its ability to pro-actively research and list places of heritage significance. Often places have Interim Heritage Orders (IHOs) made when proposals are made to alter or demolish places that the community thought were safe, thus triggering the community’s interest in a place. Under-resourcing and under-identification lead to a lack of certainty in the planning process.

The lack of resources allocated to Heritage NSW also impedes its ability fulfil its obligations under the Act in assessing application under Section 60.

“It reflects an outdated reliance on prescriptive regulatory measures and compliance mechanisms to achieve its objectives, and is generally considered onerous, procedurally complex and adversarial to adaptive reuse.”

Prescriptive regulatory measures are not outdated. They establish certainty in the process. Any move to a self-assessment or self-certification of the heritage development process would lead to a catastrophic loss of heritage places. The private certification of buildings, with the associated self-certification by parties to the process, has been shown to be a failure in the development of high-rise apartment buildings and has been to the detriment of thousands of citizens who have had their most valuable asset (their homes) suffer from poor workmanship.

Adversarial situations in the application process to conserve and/or adaptively re-use heritage properties often arises when the heritage significance of a place is ignored and the proposed uses are detrimental to preserving the significance of the place. There are many examples of award-winning adaptive re-use schemes designed to respect and highlight the heritage components of the scheme without stifling the creativity of the designers and without compromising the successful use of the building for a different use to that for which it was designed.

3.5 Discussion Paper – Section 1 Introduction: Guiding themes to underpin the review

Docomomo Australia submits that the three guiding themes do not include the most important theme;

Ensuring the Heritage Act identifies and protects what the NSW citizens want protected and kept for future generations.

The three guiding themes of the review process are rightfully sub-themes of this main goal.

3.6 Discussion Paper – Section 2 Purpose of the Heritage Act 1977

The Discussion Paper states that the original purpose of the Act was to “put into law mechanisms to conserve important NSW heritage items”. This purpose is still relevant.

After listing the current seven Objects of the Act, the Discussion Paper states that changes have been made “to attempt an acceptable balance between heritage conservation, owner rights and the changing needs of communities across the state for housing, job opportunities, infrastructure and community and open spaces.” The Paper does not give examples of how the original Act impeded these activities and it only infers that the Act continues to impede these activities.

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

FQ1.1: First and foremost, the Heritage Council of NSW should be an independent body that examines issues and, based on the evidence of experts and the community, establishes policy for the protection of the heritage places of NSW.

FQ1.2: The opinion of the Heritage Council should not be predetermined by the Government of the day but the Heritage Council should take a long-term view of what the citizens want to protect and pass down to future generations.

FQ1.3: In order to achieve such an independent body the appointment of the majority of members to the Council should come from professional, conservation and community organisations and not be nominees of the Government of the day. The skill sets of members listed in Section 8(3) of the Act are appropriate. Those nominated should be informed individuals regarding the heritage of the State of NSW and who are concerned to conserve the heritage of NSW.

FQ1.4: The current size of the Heritage Council (9 members of whom 8 are appointed by the Minister) should be increased to the original size of 14 in order to increase the diversity of skills brought to bear on policy-making.

FQ1.5: There is currently a major conflict of interest in the process of listing places on the State Heritage Register. Because the Heritage Council of NSW can only recommend to the Minister that places be listed (unlike the Victorian Heritage Council which is a determining body) The recommendation to list buildings in public ownership should not be determined by the Minister. In the absence of such determining powers being vested in the Heritage Council the final decision should be referred to the Independent Planning Commission. An example of such a conflict of interest was the Government’s refusal to list the Sirius Building in The Rocks after the Heritage Council of NSW recommended its listing. The reported reason for refusal was that the Government would not obtain the best price when the building was sold as a development site if it were listed. This is Government acting as a developer rather than a body whose existence is the long-term welfare of the citizens.

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

FQ2.1: The original Government intention of legislating a separate Act to identify and protect Aboriginal Heritage should be pursued as the highest priority.

FQ2.2: The content of such legislation should be determined by the indigenous communities of NSW.

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

FQ3.1: Docomomo Australia submits that the seven Objects of the Heritage Act 1977 provide a broad but strong basis for the management of the state’s heritage and are still relevant.

FQ3.2: However, it is Docomomo Australia’s opinion that the administration of the Act is requiring attention rather than the Act per se.

FQ3.3: For example Object (g) could be achieved with greater resources to Heritage NSW to increase its staff and technical expertise, thus providing greater assistance to owners of heritage places. Moreover, greater incentives through the taxation system could be provided (see Focus Question 6).

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

FQ4.1: The NSW “community” is diverse but the Objects of the Act reflect the expectations of the citizens of NSW to protect and give continued life to the heritage places of NSW.

FQ4.2: Any actual or perceived failure is due to how the Objects are translated into positive policies and actions to actively conserve heritage places.

FQ4.3: The failure of Government to adequately fund the bureaucracy is the reason for any community disquiet.

FQ4.4: In addition Community expectations are not met by the policies of Government that deliberately over-ride the provisions of the Heritage Act in what the citizens perceive as Government being led by the development industry in planning the State (eg State Significant Developments such as West Connex destroying part of the Haberfield Heritage Conservation Area).

FQ4.5: The use of financial hardship as a reason for not listing has been misused by the Government (eg the Sirius Building). In its decision on the proposal to list the former MLC Building at North Sydney the Independent Planning Commission examined the NSW Land & Environment Court case, Millers Point Community Association Incorporated v Property NSW and Others [2017] NSWLEC92. The IPC clearly distinguished between financial loss and “undue financial hardship” and this should form a precedent in future claims against listing on the SHR.

3.7 Discussion Paper – Section 3 Activating our Heritage

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

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

FQ5/6.1: Docomomo Australia concurs with Section 3 of the Discussion Paper in that greater financial incentives should be provided and this will involve Government at State and Federal levels enabling such incentives.

FQ5/6.2: Whilst small-scale programs such as grants to private owners and schemes such as the Sydney Living Museums Endangered Houses Fund are important, wider schemes are needed to assist private owners to embrace the conservation of their private properties.

FQ5/6.3: Tax incentives at Federal, State and City level in the USA are a major source of conservation revenue and have, for example, resulted in the conservation of the exteriors and significant interiors of high-rise offices towers converted to residential use in Dallas. Such incentives in Australia would prove effective in encouraging owners to conserve their buildings.

FQ5/6.4: Another major incentive would be to permit the sale of “heritage floor space” in CBDs in NSW. The scheme in the City of Sydney, started in the 1970s, is successful in protecting heritage buildings and in providing funds for the buildings’ conservation.

FQ5/6.5: As the NSW Government is the custodian for over two-thirds of the items listed on the SHR more regular, skilled and competent maintenance of the physical assets should be prioritised with adequate funding and appropriately skilled consultants and tradespeople. Too many assets are disposed of because maintenance costs are too high, primarily through the lack of adequate ongoing maintenance.

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

FQ7.1: See Focus Questions 5 & 6.

FQ7.2: “Activation” uses should not be at the expense of identified heritage significance. Uses must be compatible and such uses may need Government contributions to make the projects viable. The activation of the former military buildings in the lands administered by the Sydney Harbour Federation Trust is an excellent example of Government seeding funds and private investment to activate the buildings for a multitude of commercial and community uses. Seeking an adequate return to cover the costs of conservation and on-going maintenance should be the aim rather than expecting commercial returns.

3.8 Discussion Paper – Section 4 Heritage Identification and Listing

Docomomo Australia does not support the proposed recategorization of heritage items within NSW.

The current four level system (World, National, State, Local) is clear and concise and is not confusing to the public.

The proposed system is confused and confusing. Why would landscapes or areas be identified in a different category. Would that not be confused in the public's mind with statutory Heritage Conservation Areas at a Local level?

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

FQ8.1: Docomomo supports the wider use of Site Specific Exemptions as these will make the administration of complexes and large sites easier and clearer. This is especially important since Conservation Management Plans (which contained policies that described site specific exempt work) are no longer being endorsed by the Heritage Council.

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

FQ9.1: Residential properties are already accommodated at a State level and at a Local level.

FQ9.2: For SHR-listed residential properties, detailed Site Specific exemptions would enable more speedy repairs and decision regarding development of the property.

FQ9.3: Locally-listed residential properties are best accommodated by detailed Development Control Plans determined by the local communities through their local Councils.

3.9 Discussion Paper – Section 5 Streamlining Heritage Processes

3.9.1 Improving the listing process

The smaller state of Victoria has more items listed on its State Heritage Register than NSW and this cannot be because there are more places worthy of listing in Victoria.

The listing process is overly long, primarily because there are not enough resources within Heritage NSW to process the nominations in a speedy manner. There are examples of major series of listing nominations being prepared by professional bodies that are not processed for want of adequate resources. This puts the whole listing process into disrepute.

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

FQ10.1: Most Local Government heritage studies involved the community in the entire process. Such heritage studies, if adequately-funded by the State Government, would be more comprehensive than such studies in the past, which were notoriously under-funded and, therefore, were incomplete.

FQ10.2: Comprehensive LGA wide heritage studies would be the best method of increasing the number of Local heritage items as well as identifying potential State heritage items.

FQ10.3: Notwithstanding the above opinion, some Local Government Areas are antithetical to heritage listings and local residents should still have the right to nominate directly to Heritage NSW.

3.9.2 Amending existing listings on the SHR

Focus Question 11: Would streamlining enhance the listing process?

FQ11.1: Docomomo Australia supports reforming the listing process with regard to updating information on the listing, correcting errors, change of ownership (eg from public to private) etc.

FQ11.2: Where an item has been destroyed the delisting process should be equally simple.

FQ11.3: However, any delisting of an item because the owner (including the Government) wants it delisted should not occur. Such delistings should follow a period of community consultation and submissions and be referred to the Heritage Council.

3.9.3 The heritage permit process

The term “permit” is not used in the Act. “Application” is the term used.

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

FQ12.1: Heritage NSW staff involved in assessing applications to undertake work should have the requisite skills for the application (eg be architects for applications to undertake work on buildings, be archaeologists on projects involving archaeological investigations, be engineers for bridges and infrastructure, etc).

FQ12.2: Heritage NSW should be better resourced in terms of the numbers of relevant staff assessing applications.

FQ12.3: Heritage NSW staff assessing applications must visit the site of the proposed works.

FQ12.4: Integrated Development Applications (IDAs) are currently not integrated. Application has to be made to the LGA and to the Heritage Council. To be truly integrated, IDAs should involve only one application (ie to the Local Council). However, consultation with the Applicant by Heritage NSW and the Local Council must be undertaken if there are matters of concern rather than refusing the application outright. With the advent of on-line meetings and consultation this would be easier than co-ordinating face-to-face meetings.

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

FQ13.1: There is currently a major conflict of interest in the process of determining applications for works to places on the State Heritage Register. Applications to buildings on the SHR that are in public ownership should not be determined by the Minister but by an independent body such as the Independent Planning Commission.

FQ13.2: The regulatory thresholds for Standard Exemptions should be determined by the Heritage Council after consulting widely with the community.

FQ13.3: Site specific exemptions should be determined and used to speed the process on works to places on the SHR that have had a CMP prepared that clearly defines the limits of what works should be exempt from approval or notification.

FQ13.4: There should be close liaison with Local Government Authorities to align the exempt works so there is no confusion as to what is exempt works under the Heritage Act and what is exempt work under the Environmental Planning & Assessment Act.

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

FQ14.1: As mentioned earlier (in response to Focus Question 12, FQ12.4), the IDA system is not functioning as an integrated system. The IDA application route still requires two applications, thus negating any form of integration.

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

FQ15.1: Heritage must be included at the strategic planning level but it is important that a comprehensive heritage study is undertaken of the area which is the subject of the strategic planning, whether that be localized area, a Local Government Area, or a region.

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

FQ16.1: Docomomo Australia supports, in principle, the reform proposal of a graduated system of intermediate enforcement powers, subject to examining the final proposals.

3.10 Discussion Paper – Section 6 Heritage Promotion and Engagement

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

FQ17.1: Local Government Authorities usually promote their local heritage well and often participate and/or facilitate activities in Heritage Week.

FQ17.2: Heritage NSW should support Local Government in these activities by providing funds and/or expertise. This would require greater resourcing of Heritage NSW by the State Government.

FQ17.3: As the custodian of over two-thirds of the State's heritage items on the SHR, the State Government should lead by example in the identification, conservation and maintenance of the people's heritage assets.

This should be achieved by:

- Requiring Government agencies to establish, maintain and communicate (publicly as well as within the agency) the places on the agency's Register. This has not happened in any uniform manner and the Section 170 Heritage & Conservation Registers are often not available on-line to the public.
- Heritage assets in public custodianship should be conserved and maintained to the highest level thus communicating a pride in the local heritage assets by the Government as well as illustrating best practice in keeping our heritage safe.
- Heritage Assets in public custodianship that are no longer in use by the agency should be occupied by other government agencies or, if that is not possible, by community groups until the asset is once again required. An example of the mismanagement of such "disused" assets is the disposal of government schools in areas of falling enrolment. Decades later there is usually a shortage of public schools because of a change of the demographics to a younger population with children and the State Government, at great public expense, acquires land and buildings to construct a new school. There are many examples of this. One such example of this was the closure and sale of the Naremburn Public School in the 1980s. After a change in the demographics of the area to once again comprise young families with children, the local schools of Artarmon and Cammeray became overcrowded and the State Government had to purchase the ANZAC Club in Cammeray in order to construct a new Primary School. This is a waste of public assets over the long term..

FQ17.4: Government must take a long, strategic view of heritage places and building stock to consider the long term economic and environmental effects of its decisions.

FQ17.5: The loss of professional heritage expertise within Government when the Government Architect's Office was effectively closed as an architectural practice, has left many government departments and agencies without professional expertise upon which to call for assistance with the technical aspects of conserving and maintain their heritage stock.

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

FQ18.1: The first requirement for heritage tourism is to have authentic heritage places to visit. This requires a greater effort by the State Government to preserve places and areas of heritage importance.

FQ18.2: Recent activities by the State Government have worked actively against heritage tourism. A case in point was the destruction of the oldest Georgian town square on the mainland of Australia by driving the new Windsor bridge access through Thompson Square. The alternative of detouring the road around Windsor would have conserved the square as well as removed more through traffic from Windsor. This was a short-sighted decision.

FQ18.3: The Rocks in Sydney is one of the major tourist drawcards of Sydney with regard to heritage tourism, along with the adjacent Millers Point housing. The Rocks was developed as a tourist area because it was sensitively and professionally managed by the Sydney Cove (Redevelopment) Authority (later known as the Sydney Harbour Foreshore Authority) and its disbanding has left the area without a locally-based pool of professional archaeologists architects and planners that could oversee the continuing development of the area. The area is at risk of losing its tourist appeal.

3.11 Discussion Paper – Section 7 Publicly Owned Heritage

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

FQ19.1: To meet the needs of the local community the buildings must be kept within public ownership and be used for the original purpose. An example of how Federal and State policies have severely affected local communities and their heritage assets is the reduction of funding to TAFE NSW and the resultant closure of regional and country campuses. The private colleges that have sprung up to fill the gaps do not necessarily survive or provide the quality education required by the community of the TAFE system.

FQ19.2: For our submission regarding buildings that cannot be used for their original purpose see our response to Focus Question 17 at FQ17.3.

FQ19.3: Government does not exist only to provide services. It facilitates many other things such as environmental protection and protection of the community's heritage assets. In other words, it assists in maintaining the physical and mental health of the community. Such heritage assets do not have to work as productive assets as if they were a factory or workshop, but must be maintained by the community for their intrinsic meaning to the community. An example of this is the retention of a disused bridge that is of importance to the local community, the State and the Nation; the sandstone bridge at Lapstone is no longer a part of the state's road network but is considered important to retain and maintain for its heritage significance.

4.0 CONCLUSION

Please refer to the Executive Summary at the beginning of this submission for the major points of the Docomomo Australia submission.

Yours faithfully

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President
Docomomo Australia