

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**HERITAGE AMENDMENT BILL 2019
Explanatory Statement**

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HERITAGE AMENDMENT BILL 2019

Introduction

This explanatory statement relates to the Heritage Amendment Bill 2019 (the bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

This explanatory statement must be read in conjunction with the bill. It is not, and is not intended to be, a comprehensive description of the bill. What is written about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the bill

The *Heritage Act 2004* (the Act) is the primary legislation for the recognition and protection of heritage places and objects, including Aboriginal places and objects in the ACT.

A range of enforcement actions are available to respond to offences against the Heritage Act, including:

- strict liability offences;
- heritage directions made by the ACT Heritage Council (the Council);
- heritage orders made by the Supreme Court; and
- prosecution for offences.

The purpose of the bill is to make a range of amendments to strengthen the way damage to heritage places and objects can be dealt with to both deter people from doing damage in the first place and to make them responsible for repairing any damage to heritage places or objects

There are limitations in the use of heritage directions for the protection of heritage places and objects. Currently, heritage directions can only be issued for places at 'serious and imminent threat', which does not generally allow for 'repair' directions to be issued after damage to a heritage place has occurred, such as in the case of unapproved works.

Additionally, heritage directions are unable to be used for minor to moderate offences due to the threshold wording of 'serious'.

Due to the current limitations in the Act, there is no mechanism to ensure that any damage to a heritage or Aboriginal place or object is repaired.

As such, the current deterrent system in place for heritage offences is not as effective as it could be, which may result in the loss of community confidence in a robust heritage regulatory system.

Summary of amendments to the Act

The bill includes provisions that will allow:

- the Council to issue a heritage direction under section 62, to be used where there is an imminent threat to the heritage significance of a place or object, removing the threshold wording of ‘serious’; and
- allow the Council to issue a repair damage direction for damaged heritage places and objects, if they can be repaired:
 - The bill creates an offence of contravening a repair damage direction, with a maximum penalty of 500 penalty units.
 - If the Territory has to carry out the requirements of a heritage direction, costs can be recovered from the person the direction was given to.
 - The giving of a repair damage direction and refusal by the Council to give an extension of time to comply with a repair damage direction will be a reviewable decision in the ACT Civil and Administrative Tribunal.
 - The bill also provides that, in line with current defined offence provisions relating to damage of a heritage place or object, the failure to comply with a repair damage direction can be grounds for the Supreme Court to make a heritage order.

New offence

This bill introduces a new provision to allow the Council to issue a repair damage direction if a person causes unauthorised damage to a heritage place or object, including an Aboriginal place or object.

New section 67C creates an offence, with a maximum penalty of 500 penalty units, for failing to comply with a repair damage direction issued under new section 67A. However, section 67C (2) provides that an offence has not been committed if the person has a reasonable excuse.

Section 69 of the Act presently allows the Supreme Court to issue a heritage order if the respondent has contravened, is contravening or is likely to contravene a defined offence provision and an order is necessary to avoid material harm to the heritage significance of the place.

Section 69 (3) outlines defined offence provisions about which a heritage order may be issued by the Supreme Court, such as publishing restricted information without approval, contravention of a heritage direction, diminishing the heritage significance of a place or object, damaging an Aboriginal place or object or contravention of an information discovery order.

For consistency, section 69 (3) is amended to include the contravention of a repair damage direction as a defined offence wherein a heritage order may be issued by the Supreme Court.

Section 116 presently outlines criminal liability of executive officers and outlines the circumstances whereby an executive officer of a corporation commits a relevant offence.

Section 116 (6) defines the relevant offence provisions such as contravention of a heritage direction, diminishing the heritage significance of a place or object and damaging an Aboriginal place or object.

For consistency, this clause is amended to include a contravention of a repair damage direction as a relevant offence.

This is a regulatory bill and owners, occupiers or a person undertaking work on a heritage place or object under a development approval under the *Planning and Development Act 2007* or Council advice or approvals under the Heritage Act should be aware of their responsibilities and obligations in relation to the approval or permit.

Compliance with the provisions of the bill is important to ensure the protection of the ACT's heritage assets for current and future generations. Once heritage places are lost, they – and all they represent – are permanently lost to future generations.

Justification for the newly created offence with a relatively high maximum penalty under new section 67C is provided in detail under the relevant clause.

Human rights implications

The bill does not have a significant impact on human rights.

As described above, new section 67C creates an offence of failing to comply with a repair damage direction. The creation of a new offence has the potential to engage the right to a fair trial, protected by section 21 of the *Human Rights Act 2004*, and rights in criminal proceedings, protected by section 22 of the Human Rights Act.

The creation of a new offence, however, does not necessarily mean that a human right has been limited. In the case of new section 67C, the recipient of a repair damage direction should be aware of the obligation to comply with the direction. Additionally, section 67C (2) provides that an offence has not been committed if the person has a reasonable excuse. Any prosecution for the new offence of failing to comply with a repair damage direction requires the prosecution to prove that the defendant intended not to comply with the direction.

New section 67A introduces a provision to allow the Council to issue a repair damage direction if a person causes unauthorised damage to a heritage place or object, or Aboriginal place or object, if the damage can be repaired. The Council may issue a repair damage direction to the owner or occupier of the place or an owner or custodian of the object, or a person whose work affects the place or object.

The right to equality, protected by section 8 (3) of the Human Rights Act has the potential to be engaged by the provision of new section 67A because not all individuals who have been given a repair damage direction will have the financial resources to carry out the repair works.

However, this does not necessarily mean that a human right has been limited as section 46 of the *Legislation Act 2001* provides that the power to make a direction includes the power to amend or repeal the direction. The power to amend or repeal the direction is exercisable in the same way, and subject to the same conditions, as the power to make the direction. In this context, the Council has the power to revoke the repair damage direction should a person demonstrate financial hardship.

Additionally, new section 67B allows the Council to give an extension of time to comply with a repair damage direction upon application from the person who has been given the direction.

The application for an extension must be in writing and state the reasons why the extension is required. In this context, financial hardship may be demonstrated by the applicant as a reason for an extension.

Acceptable reasons why an extension is required is not defined in the bill to ensure the decision-maker's discretion is not limited; however, the reasons must be one that an ordinary member of the community would accept as reasonable in the circumstances.

In making its decision, the Council must consider the reasons why an extension is required as outlined in the application for an extension of repair damage direction. Factors the Council may take into account may include, but are not limited to, serious or life-threatening injury or illness of the applicant or someone who has caring responsibilities, disabilities the person may have, family emergency/bereavement, planned or unplanned travel, financial hardship and unavailability of a suitable or qualified tradesperson to undertake the work.

A decision by the Council to give a repair damage direction or to refuse to give an extension of time to comply with a repair damage direction is a reviewable decision (see amendments to schedule 1 made by clause 14).

New section 67D applies if a person subject to a repair damage direction fails to comply with the direction within the time stated in the direction or the extended time, if an extension was granted by the Council. The Territory may, with necessary assistance, enter the premises and repair the damage, and recover the reasonable costs of repairing the damage as a debt owed to the Territory by the person.

The right to equality, protected by section 8 (3) of the Human Rights Act has the potential to be engaged by the provision of new section 67D (3) whereby reasonable costs incurred by the Territory in repairing the damage under section 67D (2) is a debt owing to the Territory by the person to whom the direction is given. This is because not all individuals will have the financial resources to reimburse the Territory for carrying out the repair works.

However, this does not necessarily mean that a human right has been limited as section 131 of the *Financial Management Act 1996* allows the Treasurer to waive the right to payment of an amount to the Territory. Additionally, the Treasurer may postpone any right of the Territory to be paid a debt in priority to another debt; or allow the payment by instalments of an amount payable to the Territory; or defer the time for payment of an amount payable to the Territory.

The right to privacy and reputation, protected by section 12 of the Human Rights Act has the potential to be engaged by the provision of new section 67D (2) if a person subject to a repair damage direction fails to comply with the direction within the time stated in the direction or the extended time. In these circumstances, the Territory may, with necessary assistance, enter the premises and repair the damage.

However, this does not necessarily mean that a human right has been limited as section 67D (3) provides that the authorised person may only enter the premises between 8am and 6pm; or at any reasonable time with the occupier's consent. The authorised person may only enter the premises to carry out the task and may only remain at the premises until the task is complete.

Additionally, section 67D (5) and (6) also provides that the Council must at least 7 days before the proposed action is to begin, endeavour to give each interested person for a place or object written notice of the action proposed under subsection (2), and what the notice must include.

CLAUSE NOTES

Clause 1 Name of Act

This clause names the Act as the *Heritage Amendment Act 2019*.

Clause 2 Commencement

This clause provides for the commencement of the Act on the day after its notification day.

Clause 3 Legislation amended

This clause provides that the Act amends the *Heritage Act 2004*.

Clause 4 Meaning of *interested person* New section 13 (2) (da) and (db)

Section 13 of the Act provides a definition of the term ***interested person*** in the context of notification of a decision, and for the purposes of reviewable decisions.

This clause provides new interested people in relation to new provisions under section 67A whereby the Council may issue a repair damage direction if a person causes unauthorised damage to a heritage place or object, including an Aboriginal place or object.

The new interested people in relation to the giving of a repair damage direction or an extension of a repair damage direction include the person to whom the direction is given, the person who applied for the extension and the owner of the heritage place or object.

Clause 5 Establishment of heritage register New section 20 (4) (ba)

Section 20 of the Act establishes that the Council must keep a register of heritage places and objects.

Sections 20 (3) and (4) detail the information which is required to be held in the ACT heritage register for each place or object including details of the place or object, each heritage guideline, heritage direction, heritage agreement and each enforcement order.

New section 20 (4) (ba) provides that each repair damage direction must also be included on the heritage register.

Clause 6 Application of heritage guidelines
New section 27 (2) (ba)

Part 5 of the Act establishes that the Council may make heritage guidelines to conserve the heritage significance of a place or object and the process in which heritage guidelines must be made.

Section 27 of the Act provides that the conservation of a place or object must be exercised in accordance with any applicable heritage guidelines.

This clause provides that the application of heritage guidelines includes the giving of a repair damage direction.

Clause 7 Heritage direction by council
Section 62 (3) (a)

This clause amends section 62 (3) (a) of the Act.

Section 62 of the Act allows the Council to issue a heritage direction.

Section 62 (3) (a) provides that a heritage direction may be given only if the Council is satisfied on reasonable grounds that immediate protection of the place or object is justified because a *serious and imminent* threat exists that would harmfully affect the heritage significance of a place or object, or an Aboriginal place or object.

This clause amends section 62 (3) (a) to remove the threshold wording ‘serious’ to allow the Council to issue a heritage direction where there is merely an imminent threat to the heritage significance of a place or object.

Clause 8 Extension of heritage direction
Section 64 (1) (a)

This clause amends section 64 (1) (a) of the Act.

Section 64 outlines provisions to extend the period for which a heritage direction is in force.

The bill amends section 64 (1) (a) to be consistent with the amendments made by clause 7 to section 62 (3) (a), as outlined above.

Clause 9 New part 11A

This clause inserts new part 11A into the Act. New part 11A is concerned with repair damage directions that can be issued by the Council. The scheme created by new part 11A is outlined below.

67A Repair damage direction by council

New section 67A introduces a provision to allow the Council to issue a repair damage direction if a person causes unauthorised damage to a heritage place or object, or Aboriginal place or object, if the damage can be repaired.

In this context, 'unauthorised damage' means damage that is not caused by conduct in accordance with a heritage guideline, a heritage direction, a heritage agreement, an approved conservation management plan, a development approval under the *Planning and Development Act 2007*, an excavation permit or an approved statement of heritage effect.

The Council may issue a repair damage direction to the owner or occupier of the place or an owner or custodian of the object, or a person whose work affects the place or object.

A repair damage direction must be in writing and state the place or object to which it applies, the damage to be repaired and when the direction must be complied with.

A repair damage direction is a reviewable decision in the ACT Civil and Administrative Tribunal (see amendments to schedule 1 made by clause 14).

67B Extension of repair damage direction

New section 67B allows the Council to give an extension of time to comply with a repair damage direction upon application from the person who has been given the direction.

The application for an extension must be in writing and state the reasons why the extension is required.

Acceptable reasons why an extension is required is not defined in the bill to ensure the decision-maker's discretion is not limited however, the reasons must be one that an ordinary member of the community would accept as reasonable in the circumstances.

In making its decision, the Council must consider the reasons why an extension is required as outlined in the application for an extension of repair damage direction. Factors the Council may take into account may include serious or life-threatening injury or illness of the applicant or someone for whom they have caring responsibilities, disabilities the person may have, family emergency/bereavement, planned or unplanned travel, financial hardship, unavailability of a suitable or qualified tradesperson to undertake the work.

A decision by the Council to refuse to give an extension of time to comply with a repair damage direction is a reviewable decision (see amendments to schedule 1 made by clause 14).

67C Offence—fail to comply with repair damage direction

This clause creates an offence with a maximum penalty of 500 penalty units for failing to comply with a repair damage direction issued under new section 67A.

However, section 67C (2) outlines that an offence has not been committed if the person has a reasonable excuse. The meaning of the term reasonable excuse is not defined in legislation but the excuse must be one that an ordinary member of the community would accept as reasonable in the circumstances.

Many places and objects are heritage registered because they are rare, unique or excellent examples of a type or class of place or object. As previously stated, once heritage places are lost, they – and all they represent – are permanently lost to future generations.

Failure to comply with a repair damage direction is significant, due to the risk of further damage or deterioration to the place or object that is the subject of the direction.

However, contravention of a repair damage direction is not considered as serious as contravening a heritage direction (issued prior to the damage occurring) due to the fact that once the damage has occurred a degree of integrity will be lost. The maximum penalty for the offence of failing to comply with a repair damage direction has therefore been set at 500 penalty units, significantly less than the maximum penalty for the current offence of failing to comply with a heritage direction, which is 1000 penalty units.

High penalties are necessary in a heritage context to:

- ensure genuine disincentive is provided to protect these, often, rare and unique places and objects; and
- send a strong message to the building and development community that disregard for the Heritage Act should not be seen as a mere cost of doing business.

If penalties for heritage offences are set too low, the cost of penalties to be paid may in some cases simply be viewed as the effective cost of redeveloping a site to its maximum potential to achieve a desired development outcome, potentially resulting in significant commercial advantage.

As such, penalties for damage to heritage places and objects and Aboriginal places and objects must be significant enough to deter such thinking to protect these important places and objects.

A clear message must be set that wilful and illegal destruction of our heritage will not be tolerated. The ACT Government plays a critical and public role in safeguarding the ACT's heritage assets for current and future generations. It is important that the Government leads by example in the way it cares for, maintains and protects these assets. This includes robust, efficient and effective regulatory and compliance legislation.

67D Repair of damage by Territory

New section 67D applies if a person subject to a repair damage direction fails to comply with the direction within the time stated in the direction or the extended time, if an extension was granted by the Council. The Territory may, with necessary assistance, enter the premises and repair the damage, and recover the reasonable costs of repairing the damage as a debt owed to the Territory by the person.

New section 67D (3) provides that authorised person may only enter the premises between 8am and 6pm; or at any reasonable time with the occupier's consent. The authorised person may only enter the premises to carry out the task and may only remain at the premises until the task is complete.

Section 67D (5) and (6) also provides that the Council must at least 7 days before the proposed action is to begin endeavour to give each interested person for a place or object written notice of the action proposed under subsection (2), and what the notice must include.

New section 67D (7) provides that sections 97 and 98 of the Act apply to any action taken if the Territory repairs the damage, meaning that any damage caused by the Territory's actions must be minimised and compensation for the exercise of enforcement powers may be due.

Clause 10 Heritage order
Section 69 (3) (ba)

Section 69 of the Act allows the Supreme Court to issue a heritage order if the respondent has contravened, is contravening or is likely to contravene a defined offence provision and an order is necessary to avoid material harm to the heritage significance of a place or object.

Section 69 (3) outlines defined offence provisions about which a heritage order may be issued by the Supreme Court, particularly publishing restricted information without approval, contravention of a heritage direction, diminishing the heritage significance of a place or object, damaging an Aboriginal place or object or contravention of an information discovery order.

This clause amends section 69 (3) to include the contravention of a repair damage direction as a defined offence about which the Supreme Court may issue a heritage order.

Clause 11 Exceptions to part 13 offences
New section 76 (2) (a) (ia)

Part 13 of the Act creates heritage offences.

Section 76 includes exceptions to part 13 offences so that it is not an offence to diminish the heritage significant of a place or object or damage an Aboriginal place or object if a person is engaging in conduct in accordance with:

- a heritage guideline;
- a heritage direction;
- a heritage agreement;
- a conservation management plan;
- a development approval under the *Planning and Development Act 2007*;
- an excavation permit; or
- a statement of heritage effect approved by the council.

This clause amends section 76 (2) to include that heritage offences do not apply to a person who is engaging in conduct in accordance with a repair damage direction.

Clause 12 Power to enter premises
New section 80 (1) (b) (ii)

Division 14.3 of the Act outlines the powers of authorised people under the Act.

Section 80 sets out the circumstances under which authorised people may exercise the power to enter premises, such as for issuing a heritage direction.

This clause amends section 80 (1) (b) (ii) to provide that an authorised person may enter premises to give a repair damage direction to an owner, occupier, or the person to whom the direction is given.

Clause 13 Criminal liability of executive officers
Section 116 (6), definition of *relevant offence*, new paragraph (aa)

Section 116 of the Act provides for the criminal liability of executive officers and outlines the circumstances under which an executive officer of a corporation commits a relevant offence.

Section 116 (6) provides definitions for section 116.

This clause amends section 116 (6) to include contravention of a repair damage direction as a ***relevant offence*** for which executive officers will have criminal liability.

Clause 14 Reviewable decisions
Schedule 1, new items 5A and 5B

Schedule 1 of the Act outlines the reviewable decisions made under the Act.

This clause amends schedule 1 to include the following as reviewable decisions:

- the decision to give a repair damage direction; and
- the decision to refuse to give an extension of time to comply with a repair damage direction.

Clause 15 Dictionary, new definition of *repair damage direction*

This clause inserts a new signpost definition of the term ***repair damage direction*** into the dictionary.