



NATIONAL TRUST
SOUTH AUSTRALIA

RESPONSE TO EXPERT PANEL ON PLANNING REFORM

PREPARED BY THE NATIONAL TRUST OF SOUTH AUSTRALIA

26 September 2014

1. BACKGROUND

In August 2014, Brian Hayes QC, chairman of an Expert Panel established to undertake a review of the South Australian planning system, presented a report to the South Australian Government entitled “Our Ideas For Reform”.

The Expert Panel has requested feedback from interested parties around four key questions:

- Which ideas are most workable and suitable?
- How can specific ideas be improved or modified?
- What costs, benefits or other implications should the panel consider?
- What other reform ideas should be considered?

This response to the questions and the reforms proposed in the report has been prepared by the National Trust of South Australia (NTSA).

The NTSA commends the Expert Panel for the depth and breadth of the report and the reforms put forward for further review and comment. The call for improved planning procedures with an emphasis on high design standards across the board is strongly endorsed by the NTSA.

The NTSA is pleased to see the inclusion of a detailed consideration of the interaction between planning matters and heritage conservation within the report.

EXECUTIVE SUMMARY

As well as facilitating change and development, the National Trust of South Australia believes that the planning system must also support conservation of what is valued.

The National Trust believes that the current heritage protection system enacted through the *Heritage Places Act* (1993) has largely proven effective, with a few significant exceptions. The interaction between the planning system and the heritage protection system needs to achieve a balance between the different purposes of each.

We have concern that a number of ideas in the report suggest that heritage protection can be subsumed within the planning system. We reject this suggestion. Heritage extends well beyond its intersection with planning issues. It is not a sub-set of the planning system. As the report notes, built-form heritage protection is currently split between two pieces of legislation. Local heritage matters fall under the Development Act and State heritage matters are dealt with under the Heritage Act. We believe all heritage matters – local and state -- should be handled under the Heritage Act.

The NTSA supports a new single integrated statute dealing with all heritage matters as a stand-alone statute and not as part of the planning legislation.

The NTSA strongly believes that any new statutory body to replace existing multiple heritage bodies should also be a dedicated stand-alone board or council established by statute with the power to call in expert advice when required and not an offshoot of the planning commission.

The NTSA supports greater formal involvement of key cultural heritage institutions in providing governance and advice on heritage matters, including the National Trust itself.

The NTSA supports in principle the proposal for the establishment of a new single heritage register under the Heritage Act, retaining the existing proven criteria for listing.

In order to ensure that listed heritage places can be properly signed, we propose a number of amendments to the current Development Regulations.

The NTSA supports the idea of a new heritage code of practice.

The NTSA agrees in principle with the appointment of private certifiers, subject to careful management by an independent statutory heritage council.

The proposal is supported in principle by the NTSA but the administrative and cost implications of this proposal need to be recognized in this item and it should not be seen as an opportunity for broad culling of items, based on lack of data, for example.

Financial subsidies for private owners of property included on the heritage register would bring a number of benefits to the community as well as the property owners.

We support in principle the proposal for an audit of heritage listings but the administrative and cost implications of this proposal need to be recognised in this item and it should not be seen as an opportunity for broad culling of items, based on lack of data, for example.

We also advocate the application of development levy to support the costs of managing and conserving publicly owned heritage places and of properly maintaining the heritage protection system.

2. GENERAL COMMENTS

We appreciate the opportunity to provide feedback on the draft report of the Expert Panel. The National Trust has already participated through one of the Reference Groups and values the broad and open consultation undertaken so far in the course of the review.

Our comments here primarily address *Reform 10: Heritage* in the draft report but include some comments on other areas. We also make a number of specific recommendations for consideration within the final report to Government.

Statement on Guiding Principles

Our first comment goes to the guiding principles set out for the review (Part 3). We believe there is an important one missing: conservation. As well as facilitating change and development, the planning system must also support conservation of what is valued. We propose that conservation is added as a guiding principle covering:

- Conservation of places and structures of recognised value and significance to the public;
- Preservation of the processes and standards that are currently working within our planning and heritage conservation systems.

3. Reform 10 - Place heritage on renewed foundations

The National Trust believes that the current heritage protection system enacted through the *Heritage Places Act* (1993) has largely proven effective, with a few significant exceptions. The interaction between the planning system and the heritage protection system needs to achieve a balance between the different purposes of each. We have concern that a number of ideas in the report suggest that heritage protection can be subsumed within the planning system. We reject this suggestion. Heritage extends well beyond its intersection with planning issues. It is not a sub-set of the planning system. As the report notes, built-form heritage protection is currently split between two pieces of legislation. Local heritage matters fall under the Development Act and State heritage matters are dealt with under the Heritage Act. We believe all heritage matters should be handled under the Heritage Act.

Comments on specific ideas for reform

10.1 – This item is unclear as to what it means and is improved by deletion of “and not simply physical structures” but could be clarified by the inclusion of “and not simply the places included on the heritage register”. In our view, planning is about the management of physical space. We don’t see how or why the planning system would seek to deal with the non-physical dimensions of heritage.

10.2 – The National Trust of South Australia supports a new single integrated statute dealing with all heritage matters as a stand-alone statute and not as part of the planning legislation. Collections, objects, buildings, places, etc. that meet the criteria for inclusion on an integrated heritage register are, for those reasons, included on the register in perpetuity.

The report states that “*The panel’s engagement with communities across the state revealed a deep and abiding awareness of and pride in the heritage of South Australia’s buildings, landmarks and landscapes.*” Any publicised intention to remove an item from the current Heritage Register provokes immediate and strong community and political reaction.

The planning law, as evidenced in recent decades and by the very existence of this report by the Expert Panel, does need to be reviewed and updated on a regular basis.

For these reasons the National Trust of South Australia recommends that any redraft of heritage legislation should be as a single self-contained statute. The planning law should recognise and compliment the requirements and compliance obligations of the heritage law as it applies to the owners (public and private) of listed heritage assets.

Both statutes, on redrafting, should provide for the point made in item 10.6 to allow for sensitive and appropriate adaption and reuse of heritage listed properties.

10.3 – The National Trust of South Australia strongly believes that any new statutory body to replace existing multiple heritage bodies should also be a dedicated stand-alone board or council established by statute with the power to call in expert advice when required and not an offshoot of the planning commission.

10.4 – The NTSA supports greater formal involvement of key cultural heritage institutions in providing governance and advice on heritage matters. The National Trust itself has extensive experience in this area itself and has worked for 60 years to research, document and advocate for the State’s heritage. The NTSA can contribute much in this field of expertise.

10.5 – The NTSA supports this proposal for the establishment of a new single heritage register under the Heritage Act, albeit with various categories to deal with the broadened

scope suggested here. As noted above, any new register has significant resource implications, particularly at the local level.

The NTSA understands the point being made about Balfour's frog cakes and the Christmas pageant etc., in the report but sees these components of the States heritage as social heritage and therefore difficult to include with tangible heritage assets, particularly as they relate to planning law, obligations not to damage, to maintain and conserve, etc.

With respect to the placement of historic markers, the National Trust has for many years made plaques available to the owners of listed heritage buildings. The Development Regulations make it clear that the plaques (signs under the regulations) are not classed as development except, ironically, if they are to be placed on heritage buildings (heritage places under the regulations). This applies to all areas of South Australia including the City of Adelaide and the Colonel Light Gardens Heritage Area.

The effect is that a development application is required for each plaque. The cost, preparation and planning assessment time is prohibitive and appears to be unnecessary. It is certainly impossible for the National Trust which is a volunteer organisation.

In order to ensure that listed heritage places can be properly signed, we propose the following amendments to the current Development Regulations.

Development Regulations 2008 proposed amendments

Part 2- Development

Section 7- Exclusions from definition of development

(3) An exclusion under Schedule 3 does not apply in respect to a State heritage place.

Proposed addition: except to prescribed by Schedule 3 for the relevant act or authority.

Schedule 3 Add additional Section as follows:

19---Heritage Identification Signs

The placement and display of a sign not exceeding 0.2 sq meters in area, on an existing building listed as a Classified Item by the National Trust or as a State or Local Heritage Place, where that sign is solely for the purpose of identifying the building as a Heritage Place and/or the reason for its Heritage designation, and where the sign has been placed at the initiative of the Minister for Heritage, the Council for the site, or the National Trust of South Australia.

Note – building includes structure.

Schedule 3A Add additional Section as follows:

7---Heritage Identification Signs

The placement and display of a sign not exceeding 0.2 sq meters in area, on an existing building listed as a Classified Item by the National Trust or as a State or Local Heritage Place, where that sign is solely for the purpose of identifying the building as a Heritage Place and/or the reason for its Heritage designation, and where the sign has been placed at the initiative of the Minister for Heritage, the Council for the site, or the National Trust of South Australia.

Note – building includes structure.

10.6 – The NTSA supports the consideration of a new heritage code of practice to be incorporated in the new integrated Heritage Act referred to in item 10.2 above.

10.7 – This item has agreement in principle from the NTSA however, the appointment of private certifiers will need to be carefully managed by the recommended statutory heritage council (refer item 10.3)

10.8 – The opportunity to undertake an audit will exist at the merging of heritage items on the recommended integrated heritage register. The proposal is supported in principle by the NTSA but the administrative and cost implications of this proposal need to be recognized in this item and it should not be seen as an opportunity for broad culling of items, based on lack of data, for example.

10.9 – Financial subsidies for private owners of property included on the heritage register would bring a number of benefits to the community as well as the property owners. Clearly the community supports the preservation of heritage places and should reasonably therefore, subsidise those that bear the cost of maintenance and conservation. However, by the same token those private owners of heritage property should not be able to make a capital gain by the use of public money to offset outgoing and repairs. The issue warrants further consideration and a revenue stream such as a development levy to fund this expenditure could be examined.

Similarly, a development levy could also be used to support the costs of managing and conserving publicly owned heritage places and the heritage protection system.

4. SPECIFIC FEEDBACK ON OTHER SECTIONS

We offer the following comments and suggestions on other parts of the report and specific proposals

Part 4: Roles, responsibilities and participation

Reform 1- Establish a State Planning Commission

The NTSA supports the idea of an independent State Planning Commission, empowered to make decisions fully independent of State Government and with clearly proscribed powers for Ministerial intervention.

Reform 2- Create a network of regional planning boards

The NTSA is not convinced that the alleged benefits of the proposed regional planning boards outweigh the cost of establishing another layer of planning administration and the loss of close local connections to planning decisions. We share the concerns expressed by local government that regional planning boards would further remove local communities from planning decisions that vitally affect their interests.

Any proposal for regionally-based decision making needs to be made with the consent of local government authorities not as a way to exclude them from the planning process.

Reform 3 – Enact a charter of citizen participation

The NTSA endorses this as an important reform to enable early and meaningful dialogue between interested citizens and/or groups and planning authorities. The current limitations on an individual's ability to present in a legitimate forum on bona fide matters of concern need to be removed. It needs to allow for independent and differing views to be heard and accounted for and to carry through into the recommendations listed in Reform 4 as evidence presented at independent planning enquiries, to ensure consideration by the commissioners of all information pertaining to a particular planning matter under review.

While we support the principle of participation we note that the report lacks specific proposals on enforceable rights within the proposed charter. Any charter for citizen participation must include enforceable rights in consultation and decision making if it is to have genuine substance.

The benefits of creating a clear and enforceable system of citizen rights in the planning system would significantly diminish the costs of uncertainty noted in the report.

Reform 4 – Allow for independent planning enquiries

The NTSA believes this is an important reform and as mentioned above will enable due consideration of alternative views and desired outcomes to those often presented by the property development industry.

Reform 5- Make the role of Parliament more meaningful

The NTSA supports the idea of Parliament playing a more proactive role in the planning system, particularly in establishing principles and standards and in reviewing Executive decision making.

Part 5: Plans and plan-making

Reform 9 – Build design into the way we plan

The NTSA strongly endorses this approach, particularly the items 9.3, 9.4 and 9.5. It is true that “character” is a much used term in planning and real estate marketing jargon. It is also true that character is not heritage and the two are often confused with each other. Nonetheless, the relationship between the two needs to be made clear in legislation.

In our view character includes a common architectural style of a particular period, common building heights, materials and setbacks, although infill development should not mimic a style of an earlier period but instead blend with it.

The definition of character in planning terms and the protection of neighbourhood character in the consideration of development applications is a vexed question. The issue was addressed by Nathan Alexander and Paul Stark in a paper presented at the 2003 Planning Institute of Australia national conference entitled “Neighbourhood character – mono – or multi-cultural”. The authors recommended neighbourhood character strategies, based on an analysis of the elements of a neighbourhood, be used as the primary planning tool for the assessment of new development in a particular neighbourhood.

The term “character” in this context embodies social and subjective values as well as definable design values and elements evident in respected and well designed “places”. The NTSA makes the point that “character” cannot be artificially forced and is most effectively organic in nature, however, often the catalyst for the establishment of socially popular and comfortable places is historic or heritage streetscapes and buildings that do contribute to the character. Some developers readily recognise this relationship and use it to advantage.

We believe that character can be best protected through the application of specified criteria, as with heritage. It should be based on a clear definition and inclusive of such things as topography.

Reform 11 – Make changing plans easy, quick and transparent

NTSA supports a simplified system of changing, adapting and updating uses as defined by zoning plans, subject to the procedures outlined earlier in the report. However, changes to planning law that negatively impact on listed heritage places must be subject to the provisions of the heritage statute.

Part 7: Place-making, urban renewal and infrastructure

Reform 20: Reinforce precinct- based urban renewal

The NTSA believes that precinct based urban renewal and place-making present opportunities with an integrated planning and design approach, to adapt and reuse existing buildings and facilities.

Precinct planning and development allows for opportunities to fund and benefit from the added design and heritage values of older buildings within the precinct, without significant cross subsidization or other penalties. Opportunities to offset conservation and adaption costs against augmentation costs of other state owned infrastructure should be investigated.

5. Issues with local heritage protection under the Development Act

Many of the general concerns around heritage cited in the report relate particularly to the current system of local heritage management. We note the following issues with local heritage when handled under the Development Act. We also offer a number of suggestions on how to address these issues which the panel might consider in their final report.

The current provisions under the Heritage Act have led to a large number of locally listed heritage places, but the pattern over the state lacks consistency and the effect of listing can be uncertain.

The Planning system struggles with cumulative impacts within heritage places, but there are not many heritage places and the consideration of whether a development proposal supports or diminishes heritage values is fairly obvious. Any decision

making body should be able to judge what is acceptable. The fact is that most unacceptable heritage impacts are poor maintenance, demolition and deliberate adverse decisions.

The issue of planners facilitating outcomes when dealing with applicants is an important one for the Trust. When Heritage Places or Items are affected, heritage advice should be sought by applicants. Getting that advice after a proposal is put forward for decision usually leads to frustration.

The current requirement for demolition approval for Heritage Items has not worked. Penalties should apply when items that have been refused demolition approval are deliberately poorly maintained. Equally, Planning and/or financial assistance should be provided to owners of Heritage Items as occurs elsewhere.

- A major issue with the current provisions is adequacy of financial resources to implement them. Local government receives declining revenues from State government in this connection, with a trend nevertheless to devolve listings from State to Local. There are insufficient funds for Local heritage studies, preparation of costly Development Plan amendments, or on ground conservation at a Local heritage level. We believe this is the root cause of the fragmentation and inconsistency in local heritage listings noted by the Panel.

While we support the idea of a single integrated heritage register under the Heritage Act as suggested in Idea 10.5, we believe it must be adequately resourced to be effective and to ensure that all listings are sustainable and enforceable.

- We believe there is a mismatch in using legislation designed to facilitate building construction and re-development to also assess places for heritage protection. e.g. Council staff in charge of preparation of local heritage lists are also in charge of promoting efficacious, orderly and economic development of their region, arguably responsibilities that are at cross-purposes. As noted above heritage protection is best dealt with outside the planning system.
- There is no timely and straightforward process prescribed for public nomination of local heritage places. Members of the public must contact the local

government body and suggest listing, but in the absence of any study by the Council or decision to amend the Development Plan, there might not be action arising from such contact. In any case a local heritage Development Plan amendment is a costly process and may take 2-3 years in which period the place is lost.

e.g. an attempt to nominate the one teacher school at South Hummocks for heritage listing was referred to the local council who advised they had conducted a study some years ago and although that did not consider the school, it had no plans to do another study or Development Plan amendment.

- Existing criteria under the Development Act are dated and fail to take account of restorable heritage buildings which (subject to an owner's consent) could satisfy criteria if inappropriate additions or modifications were removed; consideration of environmental heritage factors such as greenhouse gases and energy embodiment as part of a qualification for heritage listing; registration of landscapes of contributing items individually not sufficient, but together of overall heritage significance; or registration of unprotected native vegetation remnants and other features of natural or biodiversity significance.

e.g. remnant native vegetation in the Adelaide Metropolitan area is excluded from protection under the Native Vegetation Act.

- The provisions to protect local heritage in the Development Act lack public accountability, are unclear, and too open to interpretation. (This is in contrast to the provisions of the Heritage Act, which are clear and based on internationally recognised standards.) The deficiencies in the Development Act provisions for local heritage can lead to demolition of local heritage places on the decision of Council staff under delegated authority.

e.g. Bradey cottage (1840s), a quarry worker's residence, the oldest building in Mitcham Council area and local heritage listed was demolished following a decision by a staff member that it was unhealthy, termite and salt damp affected, (notwithstanding that these could be rectified and a local member of the public was interested in purchasing it to that end)

- Councils are not mandated to conduct heritage studies nor related Development Plan amendments either initially or at regular intervals, and this can lead to failure to protect local heritage even if identified under State based studies. e.g. some councils have no local heritage list, others have not updated them in 2-3

decades.

- When a place is heritage listed there is again no statutory process for preparation of any appropriate conservation management plan or strategy, mandatory or otherwise.
- Local Heritage listed or contributory items in Historic Conservation Zones are subject to demolition control, but there is no requirement of public advertisement and comment.
 - e.g. the local listed Bradey's cottage in Mitcham was demolished without public notice or formal opportunity for comment.
- There are no statutory details of what may constitute a contributory item in Historic Conservation Zones. This means it is a discretionary matter, leading to inconsistencies and anomalies.
- Many local heritage places are not listed for a range of reasons and this can mean demolition is uncontrolled e.g. owner objection, failure by Council to update or even prepare a list.
- There are no provisions to avoid a conflict of interest between Council plans or proposals and listing or other treatment of a Local heritage place. e.g. Nuriootpa Railway Station was Local heritage listed but demolished in 2013 because the Council had other plans for the site. In this case there was a clear conflict of interest as the owner and the listing agency.

6. Suggestions on improving the handling of local heritage through legislation

We make the following suggestions to address the above issues which could be implemented by amendments to both the *Development Act* and the *Heritage Places Act*.

- Amend the *Heritage Places Act* to include **detailed prescription of how registered places are described**, to include as appropriate the whole site of any building and its contextual elements, including ornamentation (interior or exterior, e.g. wallpaper, fountains) all structures (e.g. fences, rails, steps,

paving, routes) and remnants (e.g. graves, archaeological deposits) and natural elements (planted exotic or indigenous vegetation, geology, landscape views). This is consistent with the suggestions made at 10.6 and 10.8.

- Amend both acts to allow the **Heritage Council to determine registration of both State and Local heritage**. However responsibility for management could remain with owners and administration remain divided between Local or State agencies. This could remove the conflict of interest between promotion of development and consideration of heritage at the local level, but there would need to be new levels of expertise appointed to the Heritage Council a more democratic process for nomination and registration to balance the loss of the local role. This is consistent with the idea at 10.5.
- Amend the *Heritage Places Act* to make the **power of ministerial intervention in registration subject to disallowance by Parliament**. The Minister could be required to furnish a report to Parliament giving reasons for a proposed intervention to prevent registration of a heritage place, with opportunity for democratic oversight through disallowance by a majority of either House of Parliament. This already applies to other Executive actions such as the making of regulations under Acts.
- Include in the *Heritage Places Act* detailed **conflict of interest provisions** regarding decision- making and ownership or other vested interest.
- Amend the *Heritage Places Act* to prescribe a **new registration process** including immediate interim protection of the place upon nomination, a timetable within which nomination, research and consideration must be undertaken, and a detailed hearing process which encompasses Committee(s) and Council roles with rights of different parties to discuss perspectives presented and rights of reply to all parties.
- **Amend the criteria for registration** under *Heritage Places Act* to allow registration of restorable heritage buildings (subject to an owner's consent) which could satisfy criteria if inappropriate additions or modifications were removed; to allow consideration of environmental heritage factors such as materials, carbon, greenhouse gases and energy embodiment as part of a

qualification for heritage listing; to allow registration of landscapes of contributing items individually not sufficient but together of overall heritage significance; and to register unprotected native vegetation remnants and other features of natural or biodiversity significance.

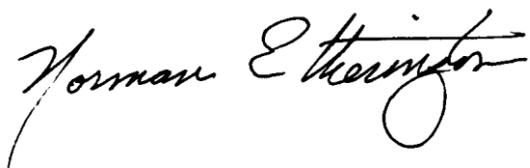
- Amend the *Heritage Places Act* to provide **two rights of appeal to either nominator(s) or owner(s)** of a heritage place; one right to appeal to the administrators of the process based on reasons for registration/non-registration supplied by that administrative body with its decision, to be conducted by an independent mediator; a second right of appeal of parties to the Environment, Resources & Development Court.
- Amend the *Heritage Places Act* to **require preparation of a Conservation Management Plan or Strategy** for each place registered with two years, with provision for grant assistance to be made where appropriate. What is to be included in such a plan or strategy should be prescribed to an effective level in the Act, with less complex plans required for some types of places than others.
- Amend the *Heritage Places Act* to provide for a **public notification/complaint process** where registered places are being allowed to deteriorate, which sets down the requirement for a certain level of investigation, what is or is not required and furnishing of material reasons to both complainant and owner.
- Put local and state heritage registration under one body, or amend the *Development Act* to include a process for **public nomination of Local heritage places** (including contributory items, Historic Conservation or Character Zones) with immediate interim protection of the place, a timetable within which nomination, research and consideration is to occur, and a detailed hearing process involving nominator(s) and owner(s).
- **Amend the criteria for Local heritage registration** under the present *Development Act* to allow registration of restorable heritage buildings (subject to an owner's consent) which could satisfy criteria if inappropriate additions or modifications were removed; to allow consideration of environmental heritage factors such as materials, carbon, greenhouse gases and energy embodiment as part of a qualification for heritage listing; to allow registration of landscapes of

contributing items individually not sufficient but together of overall heritage significance; and to register unprotected native vegetation remnants and other features of natural or biodiversity significance.

- Amend the *Development Act* to **require local councils to establish a Local Heritage Committee** following public advertisement for nominations. This committee to oversee consideration of nominations for Local heritage places, preparation of Development Plan amendments, conduct public hearings in connection with the above or any re-development proposals concerning to heritage items, and make advisory recommendations to Development Assessment Panels on applications to re-develop Local heritage places¹⁹.
- Amend the *Development Act* to require **public advertisement and opportunity for comment on any proposal to demolish a Local heritage place** or contributory item, with a hearing before the Local Council Heritage Committee.
- Amend the *Development Act* to **mandate preparation of studies and Development Plan Amendments on Local heritage** every four years with a requirement of State government funding assistance.
- Amend the *Development Act* to require a **Local heritage place Conservation Management Plan or Strategy** to be prepared within two years of registration. This amendment could include requirement of a grant fund to assist needy proprietors in this process and implementation.
- Amend the *Development Act* to **define what may constitute contributory items** in a Historic Conservation Zone or Character Zone.
- Amend the *Development Act* **limiting the capacity of a Council to make decisions on redevelopment or demolition of Local heritage items in which they have ownership, planning or other close interests** (such as related or adjacent development proposals in which they have an interest), requiring such matters to be referred to the State Heritage Council (with power to make mandatory recommendations) and the Development Assessment Commission as Category 3 development.

7. Final comments

Finally, we congratulate the panel on its open approach to consultation during this phase of the review. We trust that the next steps in the process — the presentation of the Expert Panel's Final Report and the framing of the Government's response — will be equally transparent and participative.

A handwritten signature in black ink that reads "Norman Etherington". The signature is written in a cursive style with a large, prominent loop at the end of the last name.

Professor Norman Etherington
President, National Trust of South Australia