



Australian Government

**Department of Regional Australia,
Regional Development and Local Government**

Secretary

File Reference: 08/23470
Contact: Garrie Mallon

Mr Peter Stephens
Secretary
Joint Standing Committee on the National Capital
and External Territories
Parliament House
CANBERRA ACT 2600

Dear Mr Stephens

Submission to the Inquiry into the Administration of the *National Memorials Ordinance 1928*

Please find the Department of Regional Australia, Regional Development and Local Government's submission to the Joint Standing Committee on the National Capital and External Territories for the Inquiry into the Administration of the *National Memorials Ordinance 1928*.

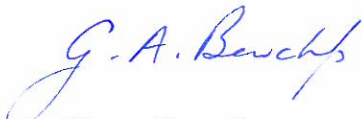
As agreed with the Committee Secretariat, the Department was granted an extension to enable consultation with other Commonwealth Departments and Agencies.

The Department's submission addresses each of the JSCNCET's Terms of Reference for the Inquiry.

A representative from the Department would be available to appear at a public hearing to discuss matters relevant to the Inquiry, should you wish.

Should the JSCNCET Secretariat need to contact the Department in relation to the Inquiry, the appropriate contact officer is Mr Garrie Mallon, Director, ACT and NT Section, who can be contacted on 02 6274 7232 or by email at Garrie.Mallon@regional.gov.au.

Yours sincerely


Glenys Beauchamp

26 September 2011



Australian Government

**Department of Regional Australia,
Regional Development and Local Government**

**Submission to the Joint Standing Committee on the National Capital and External
Territories**

Inquiry into the Administration of the *National Memorials Ordinance 1928*

September 2011

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Glossary

<i>Abbreviation</i>	<i>Definition</i>
ACT	Australian Capital Territory
Commemorative Guidelines	Guidelines for Commemorative Works in the National Capital, National Capital Authority, August 2002
Committee	The Canberra National Memorials Committee established under s 3 of the <i>National Memorials Ordinance 1928</i>
Department	The Department of Regional Australia, Regional Development and Local Government
JSCNCET	Joint Standing Committee on the National Capital and External Territories
Inquiry	Inquiry into the administration of the <i>National Memorials Ordinance 1928</i> by the Joint Standing Committee on the National Capital and External Territories
Minister	The Hon Simon Crean MP Minister for Regional Australia, Regional Development and Local Government and Minister for Arts
National memorials	National memorials considered, or agreed to, by the Canberra National Memorials Committee under the <i>National Memorials Ordinance 1928</i>
NCA	National Capital Authority
Ordinance	<i>National Memorials Ordinance 1928</i>
Secretary of the Department	The Secretary of the Department of Regional Australia, Regional Development and Local Government

Terms of Reference

On Wednesday 17 August 2011, the Minister for Regional Australia, Regional Development and Local Government, the Hon Simon Crean MP, asked the Joint Standing Committee on the National Capital and External Territories to inquire into, and report on, the Administration of the *National Memorials Ordinance 1928*.

The JSCNCET has been asked by Minister Crean:

1. To inquire into, and report on:
 - The administration of the National Memorials Ordinance 1928 (the Ordinance), with particular reference on:
 - the membership of the Canberra National Memorials Committee (CNMC);
 - the process for decision making by the CNMC;
 - mechanisms for the CNMC to seek independent, expert advice; and
 - opportunities for improving transparency in the administration of the Ordinance.
 - The appropriate level of parliamentary oversight for proposed National Memorials.
 - The appropriate level of public participation in the development of proposed National Memorials.
2. If changes to current arrangements are recommended, inquire into and report on transition provisions for current proposals for memorials which have not yet been constructed.

Background

Background to the *National Memorials Ordinance 1928*

Under the *Seat of Government (Administration) Act 1910*, ‘ordinances for the peace, order and good governance of the Territory’ with respect to National Land can be made by the Governor-General.¹

The Ordinance first commenced on 31 August 1928. A number of amendments were made to the Ordinance between 1930 and 1959,² including an amendment in 1953 to include the requirement for two ACT residents to be appointed to the Committee. Minor amendments were made in 1972 to replace the words ‘Canberra City District’ with ‘the Territory’. The most recent amendments in 1989, following the ACT being granted self-government, provided that the Ordinance ‘applies only in relation to National Land’ and replaced references to the ‘Department of the Interior’ with ‘the Department’.³

Records indicate that the Committee did not meet between 1952 and 1975 as the pressures of the Parliamentary members had increased significantly in that period.

The Ordinance provides for the Minister to make decisions on the location and character of national memorials in accordance with advice from the Committee, and to name divisions (i.e. suburbs) and public places. The Ordinance applies only to National Land in the ACT.⁴

The Committee comprises the Prime Minister, the Leader of the Government in the Senate, the Leaders of the Opposition in the House of Representatives and the Senate, the Minister for Regional Australia, Regional Development and Local Government, the Secretary of the Department of Regional Australia, Regional Development and Local Government, and a Commonwealth officer appointed by the Minister, currently the Secretary of the Department of Veterans’ Affairs. The Ordinance states that the Committee also comprises two ACT residents appointed by the Governor-General as members, however, it is understood that these positions have never been filled.

Uniquely, the Ordinance gives the power for summoning Committee meetings to the Secretary of the Department rather than the Chairperson of the Committee.⁵ The Ordinance specifies the Prime Minister as the Chairperson of the Committee⁶. In the Chairperson’s absence, the Ordinance enables members present at a meeting to elect a Chairperson for the meeting.⁷

¹ The *Seat of Government (Administration) Act 1910*, s. 12(d).

² The *National Memorials Ordinance 1928* was amended in 1930, 1931, 1933, 1937, 1952, 1953 and 1959.

³ The *National Memorials Ordinance 1928*, addition of s. 1A and amendment to s. 3.

⁴ The *National Memorials Ordinance 1928*, s. 1A.

⁵ *Ibid*, s. 3(4).

⁶ *Ibid*, s. 3(3).

⁷ *Ibid*, s. 3(5).

Summary of Submission

Significant Australian events should continue to be commemorated in the national capital through the development of national memorials given Canberra's role as the national capital. This submission provides the JSCNCET with possible options for improving the operation of the *National Memorials Ordinance 1928*.

The Department considers the governance framework that supports the Committee needs to be reviewed to ensure the Committee operates efficiently and delivers high quality outcomes for national memorial proponents, ACT residents and the Australian public. This should be done by clarifying the role of the Committee, the Committee Chairperson and the NCA. Defining the term 'national memorial' in the Ordinance and any associated guidelines would also provide the Committee with clarity about its decision making role with respect to national memorials.

The Department also considers that the administrative processes need to be reviewed, and modernised, to ensure the Committee operates transparently and effectively. This could be achieved by making the Committee's proceedings and decisions publicly available and ensuring public consultation takes place before Committee decisions are made about the location and character of a proposed national memorial.

This submission addresses each of the terms of reference including:

- *the membership of the Committee;*

The Department supports the bipartisan nature of the Committee and including senior Parliamentarians to reflect the national significance of national memorials.

The Department supports all positions on the Committee being filled as soon as possible, including the two ACT-resident positions on the Committee in recognition of the particular interest ACT residents have in relation to the proposed location and character of national memorials. A process for appointing ACT residents to the Committee will need to be established. The Department suggests that the appointment of ACT-resident representatives should be made by the Minister, rather than the Governor-General.

To enable more regular face-to-face meetings, the Department believes the Parliamentarians and the Secretary on the Committee should be allowed to delegate their responsibilities to a limited class of persons.

The Department also recommends that the position of Deputy Chairperson be established, and the Chairperson or Deputy Chairperson be responsible for summoning Committee meetings, rather than the Secretary of the Department.

- *the process for decision making by the Committee;*

To support the Committee's decision making responsibilities, the Department suggests that publicly available decision making guidelines be developed, and agreed by the Committee. Decision making guidelines could include a period of mandatory, national consultation and the requirement for heritage, environmental and planning assessments to take place before the Committee considers the location and character of a proposed national memorial.

To ensure greater certainty for national memorial proponents, it would be worthwhile considering a two-stage process. The Department's proposed 'two-pass' approvals process would provide national memorial proponents with a clear understanding of what they are required to do to progress a national memorial proposal under the Ordinance, without unduly burdening the proponents. The proposed 'two-pass' approvals process would also provide the Committee with more detailed information on the heritage, environmental and planning implications of a proposed national memorial before considering the location and character of the proposed national memorial.

The 'two-pass' approvals process could be detailed in decision making guidelines and could involve a:

- First-pass assessment – The Committee being asked to consider the 'commemorative intent' of a proposed national memorial. This could include an assessment by the Committee of the proposed national memorial, its national significance and whether it meets the evaluation criteria specified in the Commemorative Guidelines.

National memorial proponents would then be required to prepare more detailed information for Committee consideration. More detailed information could be gathered by undertaking a period of national public consultation, undertaking environmental and heritage assessments, seeking planning advice and, if required, advice from the Department of Foreign Affairs and Trade. Once this detailed information has been prepared, the proposal could then be presented to the Committee as part of a second-pass assessment.

- Second-pass assessment – Would involve the Committee considering the location and character of a proposed national memorial.

The Department supports allowing flexibility in meeting procedures, such as amending the Ordinance to allow for meetings via telephone or video conference and for resolutions to be made via correspondence. The Department also supports strengthening administrative processes by amending quorum requirements to ensure Parliamentarians are in the majority at Committee meetings, and requiring all new national memorial proposals to be lodged with the Committee Secretariat.

- *mechanisms for the CNMC to seek independent, expert advice;*
Independent, expert advice may assist the Committee in considering some aspects of national memorial proposals. The Department recommends that the proposed decision making guidelines recognise the need for the Committee to seek independent, expert advice in making some decisions.

The Department supports clarifying the role of the NCA in advising the Committee and recommends that a representative from the NCA be appointed as an ‘expert advisor’ to the Committee. The proposed ‘expert advisor’ should not have any voting rights so as to ensure there are no actual or perceived conflicts of interest between the NCA’s role in providing expert advice and the NCA’s role in considering planning applications for proposed national memorials.

- *opportunities for improving transparency in the administration of the Ordinance.*
The Department supports the Committee operating efficiently, effectively and transparently. To improve transparency in the administration of the Ordinance, the Department recommends releasing a public record of Committee proceedings and decisions within a prescribed timeframe and ensuring all guidelines that support the Committee are publicly available.
- *Parliamentary oversight for proposed national memorials*
The Department considers that ongoing Parliamentary oversight of national memorials is appropriate given the Commonwealth’s direct and enduring interest in Canberra as the national capital. The Department supports the involvement of Parliamentarians on the Committee.

The Department notes that the current mechanisms for Parliamentary oversight of national memorials include JSCNCET oversight of the administration of the Ordinance, as demonstrated by the current Inquiry. The JSCNCET could provide further Parliamentary oversight of national memorials by making recommendations to the Committee on the ‘commemorative intent’ of memorials. Parliamentary oversight is also provided through the process of Senate Estimates and other Parliamentary hearings.

The Department suggests that ministerial determinations under the Ordinance should not be required to be tabled as disallowable instruments. Ministerial determinations under the Ordinance are essentially planning decisions and are not of a legislative character. The Department does support publicising ministerial determinations. Making ministerial determinations public would ensure transparency in the decision making process, without requiring additional Parliamentary oversight.

- *Public participation in the development of proposed national memorials*
Currently, the NCA advises the Committee on possible issues regarding the location and character of proposed national memorials without undertaking public consultation.

Design competitions are conducted to determine the design of national memorial proposals. This provides a limited opportunity for members of the public to contribute to proposed national memorials.

The Department supports increased public participation in the development of proposed national memorials. The Department notes that an appropriate way of increasing public participation would be through requiring a period a mandatory, national public consultation on proposed national memorials.

The Department suggests that requirements for mandatory, national public consultation be developed and formalised in decision making and consultation guidelines agreed by the Committee. The decision making and consultation guidelines should:

- specify at what stage national memorial proposals should be subject to mandatory, national public consultation;
- acknowledge that while the public consultation process is national, it should have a component that focuses on consulting with the ACT community on matters of particular relevance to ACT residents due to their geographic proximity to proposed national memorials; and
- detail how consultation on proposed national memorials should be advertised so that the public and interested stakeholders are aware of the public consultation process.

The Department considers that the NCA has the required skills and expertise to effectively undertake national consultation on proposed national memorials.

- *Transitional arrangements*
In the interests of procedural fairness, any proposed changes to the administrative arrangements that support the Committee resulting from the Inquiry should only apply to new national memorial proposals. Any changes in the Committee's operation or decision making processes should not adversely affect national memorial proponents whose projects have already been considered by the Committee.

However, the Department notes that the Committee, under existing arrangements, may decide to review its decisions in relation to proposed national memorials, that have not yet been constructed, at any time.

Although the terms of reference specifically address the administration of the Ordinance with respect to national memorials, it is noted that the Ordinance also provides for the Committee to make decisions on the nomenclature of public places and divisions of the Territory.

Following self-government in 1989, public places in the ACT have been named in accordance with the *Public Place Names Act 1989*.

The Department recommends that in modernising the Ordinance, consideration should be given to whether the naming of public places and Territory divisions remains a relevant function of the Committee given the operation of the *Public Place Names Act 1989*.

Submission

1. Introduction – Analysis of the administration of the Ordinance

As the national capital, Canberra has a dual role as a functional capital and a city of symbolic national importance. The Commonwealth has a direct and enduring interest in Canberra as the seat of Federal Government and as a place where significant historical events are commemorated, national achievements celebrated and major national and international events held. As Paul Reid notes ‘*the stories may not all be written in the national capital but they should be told here*’.⁸ Given Canberra’s symbolic role, it is fitting that national memorials are constructed in the national capital.

Under the Ordinance, the Committee is responsible for making decisions about the location and character of national memorials. In the Department’s view, the Committee’s key objectives should be clarified and consideration given to expanding the Committee’s decision making powers, for example enabling the Committee to approve the commemorative intent of a proposed national memorial.

The use of publicly available guidelines to clarify decision-making, consultation and other processes is preferred over establishing subordinate legislation under the *Seat of Government (Administration) Act 1910*, the Ordinance or other Commonwealth legislation.

In preparing this submission, the Department sought input from a range of other Commonwealth agencies.

Governance arrangements and administrative processes

The Department recommends that the governance arrangements that support the Committee should provide clarity about the role of the Committee, the Committee Chairperson and the NCA as the Committee Secretariat and the responsible planning agency, to ensure accountability for decision-making. This recommendation is consistent with the Report on the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Report), which recommends that there should be clarity of roles within an organisation’s governance arrangements.⁹ A sound governance framework will help ensure the Committee delivers high quality outcomes for national memorial proponents, ACT residents and the general public.

The Department also supports modernising the administrative processes that support the Committee to apply the core principles of public sector governance as identified by the Australian National Audit Office (ANAO).¹⁰ For example, making the Committee’s proceedings and decisions publicly available. Applying the ANAO’s public sector

⁸ Paul Reid in D Headon, *The Symbolic Role of the National Capital*, National Capital Authority, Canberra, 2003, p 179.

⁹ J Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003.

¹⁰ Australian National Audit Office, *Public Sector Governance, Better Practice Guide Framework, Processes and Practices*, Volume I, July 2003, p 8.

governance principles would lead to more transparent and efficient decision making by the Committee.

Defining 'national memorials'

While defining 'national memorials' is not included in the terms of reference, the Department is aware that the question of what constitutes a national memorial under the Ordinance has been raised at Committee meetings.

The Ordinance does not define what constitutes a 'national memorial', apart from providing that the Ordinance only applies in relation to National Land.¹¹ In making decisions about the location or character of a proposed national memorial, the Committee considers the *Guidelines for Commemorative Works in the National Capital*. However, these Commemorative Guidelines use the term 'commemorative works', rather than national memorials, and also apply to other public works that are not required to be considered by the Committee under the Ordinance, for example some commemorative plaques.

The Commemorative Guidelines refer to appropriate commemorative subjects as including 'individuals, groups, organisations, ideas or events' that:

- have cultural significance for the nation – that is 'aesthetic historic, scientific or social value for past, present or future generations' of Australians;
- closely reflect the evolving values, ideas and aspirations of the Australian community;
- contribute to the education of all Australians by enhancing our sense of place and increasing an understanding of cultural diversity; and
- exemplify Australia's unique heritage.¹²

The Department supports clarifying what constitutes a 'national memorial' by:

- defining the term 'national memorial' in the Ordinance and in any future decision making guidelines; and
- ensuring the term 'national memorial' is used consistently in the Ordinance and any associated guidelines, such as the current Commemorative Guidelines.

Defining 'national memorial' in guidelines that support Committee decision making would reduce confusion about what proposals can properly be considered by the Committee as national memorials.

This submission uses the term 'national memorial' to reflect the language in the Ordinance.

¹¹ The *National Memorials Ordinance 1928*, s. 1A.

¹² National Capital Authority, *Guidelines for Commemorative Works in the National Capital*, August 2002, p 7.

2. Membership of the Committee

The Department supports the current membership of the Committee provided by the Ordinance. The bipartisan Committee, with senior Parliamentarians, appropriately reflects the national significance of national memorials. The Ordinance provides that two residents of the ACT must be appointed to the Committee.¹³ The requirement of two ACT members was added in 1953. The Department notes that ACT members have not been appointed since the provision was enacted.

In terms of the membership of the Committee, the Department recommends:

- filling all positions on the Committee as soon as possible;
- establishing a process for appointing ACT-resident representatives to the Committee;
- amending the Ordinance so that the Minister, rather than the Governor-General, is responsible for appointing the ACT-resident representatives as members of the Committee;
- allowing for Parliamentarians and the Secretary of the Department to delegate their responsibilities to a limited class of persons to enable more regular face-to-face meetings;
- establishing the position of Deputy Chairperson and appointing an existing Committee member to the new position of Deputy Chairperson; and
- amending the Ordinance to require the Chairperson or Deputy Chairperson to summon meetings, rather than the Secretary of the Department.

ACT representation

In making decisions under the Ordinance, the Committee should always have regard for how decisions could affect Canberra residents. While there is a national interest in the commemorative intent of proposed national memorials, the location and character of proposed national memorials will be of particular interest to ACT residents because of their geographic proximity.

The Department supports the appointment of two ACT residents to the Committee as one way of enabling local community involvement in considering the impact of proposed national memorials in Canberra. However, the role of ACT-resident representatives will need to be defined, including appropriate voting rights, to ensure ACT community views are represented adequately on the Committee on issues of local significance, while balancing views with matters of national significance.

There are several possible processes for selecting ACT-resident representatives to be appointed to the Committee, including:

- advertising the two vacant positions and asking that potential ACT-resident applicants provide a written expression of interest. ACT-resident representatives would then be appropriately selected based on the written applications received;
- asking the ACT Chief Minister to nominate two ACT-resident representatives;

¹³ The *National Memorials Ordinance 1928*, s. 3(2).

- asking the ACT Legislative Assembly to nominate two Members of the Legislative Assembly to be appointed as ACT representatives on the Committee;
- appointing two Members of Parliament or Senators that represent the ACT; or
- A combination of the above options, for example one ACT resident nominated by the ACT Chief Minister and one Member of Parliament or Senator that represents the ACT.

The Department considers that all the options outlined above for selecting ACT-resident representatives on the Committee are viable.

Regardless of what option is adopted for selecting ACT-resident representatives, currently under the Ordinance the two ACT residents must be appointed by the Governor-General and the appointed members ‘hold office during the pleasure of the Governor-General’.¹⁴ Inconsistently, the Ordinance provides that the Minister must appoint ‘an officer’ to the Committee. To promote administrative efficiency, the Department recommends that appointments to the Committee should be for a fixed term and all be made by the Minister. This would require amending the Ordinance.

Allowing Committee members to delegate responsibilities

Given the seniority of Committee members, it has been difficult for the Committee to meet face-to-face with a majority of the members present. The Ordinance does not give any members of the Committee an express power to delegate their functions and duties as members.

The Department supports enabling Committee members to delegate their functions, including their voting rights. This option should not be viewed as devaluing the importance of decisions concerning national memorials, nor causing the decision making process to become more opaque. Rather, allowing Committee members to delegate their responsibilities would enable the Committee to meet face-to-face more regularly and enable senior Parliamentarians to continue to contribute to the decision making process via their nominated delegate.

Limiting the class of persons that members could delegate their responsibilities to would ensure a sufficient level of seniority is maintained at Committee meetings, reflecting the national significance of national memorial proposals. For example, ministers and shadow ministers may only delegate to other members of parliament or senators, and the Secretary of the Department may only delegate to a senior executive colleague.

Alternatively, to ensure the Committee operates effectively, the bipartisan nature of the Committee could be retained, but the seniority of members represented on the Committee reduced. For example, the Ordinance could be amended to specify certain Parliamentary Secretaries and Shadow Parliamentary Secretaries as Committee members or to enable the Governor-General or Minister to appoint members of the JSCNCET to the Committee while maintaining the bipartisan composition of the Committee.

¹⁴ The *National Memorials Ordinance 1928*, s. 3(2) and s. 5(1).

Allowing members to delegate their responsibilities to a limited class of persons would help the Committee to operate more efficiently and effectively while maintaining the current, senior composition of the Committee.

Role of the Chairperson in summoning meetings of the Committee

The Ordinance is unique in that it requires the Secretary of the Department to summon Committee meetings rather than the Chairperson. This requirement creates the unusual situation of a Departmental Secretary having the power under the Ordinance to summon senior parliamentarians, including the Prime Minister as Chairperson of the Committee, to attend Committee meetings. Normal practice would suggest that the Chairperson would be the most appropriate member to summon meetings.

The Department recommends that to address this irregularity, the Ordinance be amended to establish the position of Deputy Chairperson and allow a member of the Committee to be appointed as the Deputy Chairperson. The responsible Minister would be an appropriate Deputy Chairperson given the Minister's responsibility for the Ordinance and the Commonwealth's interest in the ACT. The Department also recommends amending the Ordinance to prescribe that the Chairperson or Deputy Chairperson is responsible for summoning meetings.

3. The process for decision making by the Committee

The Department supports a decision making process that is documented in guidelines that are publicly available.

The Department recommends that an appropriate decision making process includes:

- establishing a two-stage approvals process for national memorial proposals based on a 'two-pass' approvals process (see discussion of the Department's proposed 'two-pass' process under the heading 'Decision making process');
- allowing flexibility in meeting procedures and ensuring appropriate quorum and voting requirements for the Committee are in place; and
- strengthening administrative processes to ensure there is a single point where all national memorial proposals are directed, such as the Minister, Committee Chairperson or the Committee Secretariat.

Currently, the Ordinance enables the Committee to make decisions about the location and character of national memorials,¹⁵ but does not provide the Committee with a clear decision making framework. The lack of a clear decision making process has led to confusion about how national memorial proposals are progressed under the Ordinance and to public criticism of the administrative processes that support the Committee.¹⁶

¹⁵ The *National Memorials Ordinance*, s. 6 and s. 7.

¹⁶ C Knaus, 'Lake memorials face enquiry', *The Canberra Times*, 18 August 2011.

The Committee's governance and decision making framework should provide clarity about the role of the Committee, the Committee Chairperson, and the NCA as the Committee Secretariat and agency responsible for providing planning approval for constructions on National Land.

Decision making process

A decision making process, consistent with the Administrative Review Council's (ARC) best practice guidelines, should observe procedural fairness, be available to the public and provide memorial proponents with reasons for decisions.¹⁷ Adopting the ARC's best practice guidelines would improve the transparency of the Committee's decision making process and provide memorial proponents with a clear process for progressing national memorial proposals.

To ensure greater certainty for national memorial proponents, it would be worthwhile considering a two-stage approvals process. A 'two-pass' assessment of proposals by the Committee, with increasing levels of detail at each stage, would ensure that national memorial proponents have a degree of certainty and direction from the Committee before undertaking detailed planning work. The Department's proposed 'two-pass' approval process would also support the Committee's informed consideration of the location and character of a proposed national memorial.

In the context of developing a decision making process to support the Committee, the 'two-pass' approval process could involve:

- First-pass assessment – The Committee would be asked to consider the 'commemorative intent' of a proposed national memorial. This would include an assessment by the Committee of the proposed national memorial, its national significance and whether it meets the evaluation criteria specified in the Commemorative Guidelines. (Currently, the Committee notes the commemorative intent of proposed national memorials, but does not have capacity under the Ordinance to make decisions on 'commemorative intent'.)

The national memorial proponent is then required to prepare more detailed information for the Committee to consider. More detailed information would be gathered by undertaking a period of mandatory, national public consultation, undertaking environmental and heritage assessments, seeking planning advice and, if required, advice from the Department of Foreign Affairs and Trade. Once this detailed information has been prepared, the proposal could then be presented to the Committee for the second-pass assessment.

- Second-pass assessment - Would include the Committee considering the location and character of a proposed national memorial.

¹⁷ Administrative Review Council 2007, *Best Practice Guides 1-5*, Attorney-General's Department, viewed 13 September 2011, <http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Other_Documents>.

Once the Committee has provided a national memorial proposal with the first and second stage passes, ministerial determinations would be made under the Ordinance and the national memorial proponents would be responsible for delivering the project within the parameters agreed by the Committee.

The proposed 'two-pass' decision making process would ensure the Committee is provided with comprehensive proposals before ministerial determinations are made reserving sites for proposed national memorials. The 'two-pass' process could require national memorial proponents who have been granted first-pass approval to work closely with the NCA to develop a design competition brief, run a public design competition, identify possible locations, consult with ACT residents and arrange for an *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) assessment to take place before the proposal moves to the second-stage assessment.

Before a national memorial proposal progresses to the second-pass assessment, consideration should be given to the specific requirements of Part 3 of the EPBC Act. This legislation has a role in regulating proposals that significantly impact on matters protected by the EPBC Act. This includes matters of national environmental significance, actions involving the Commonwealth and actions taken on, or impacting on, Commonwealth land. The matters protected under the EPBC Act include, for example, places on the National Heritage list and the Commonwealth Heritage List.¹⁸

Allowing flexibility in meeting and decision making requirements

Currently, the Ordinance requires the Committee to meet face-to-face to make decisions. The narrow protocols for decision making have led to delays, for example, in considering the Boer War Memorial design competition and finalising design selections for the Australian Peacekeeping and the World War I and World War II Memorials.

The Ordinance should be updated given the significant changes in telecommunications technology since the Ordinance first came into effect. The Department recommends allowing flexibility in meeting requirements to take advantage of new technologies and improve the operation and efficiency of the Committee. For example, the Department supports allowing Committee meetings to occur via telephone or video conference and for the Committee to make resolutions via correspondence.

The Ordinance provides that three members shall form a quorum at any Committee meeting¹⁹ and implies that a simple majority vote is required for Committee decisions. Therefore, it is currently possible under the Ordinance for the Committee to meet and make decisions with no Parliamentarians present. This is inconsistent with the senior and representative nature of the Committee's membership. The Department supports amending the Ordinance to require a minimum number of Parliamentarians to be present at meetings to provide a quorum.

¹⁸ The Department of Sustainability, Environment, Water, Population and Community provided advice on the EPBC Act during consultation.

¹⁹ The *National Memorials Ordinance 1928*, s. 3(7).

Mechanisms for review

Decisions made by the Committee under the Ordinance are administrative decisions to which the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) applies. The ADJR Act provides for a system of judicial review that is undertaken by the courts and is concerned with the legality of the decision making process.

The Attorney-General's Department advised that if Committee decisions involve a mandatory public consultation process, as has been recommended in this submission, it would not be appropriate for decisions to be subject to merits review by the Administrative Appeals Tribunal. This is because processes which include public inquiries and consultations that require the participation of many people would be time-consuming and costly to repeat on review.

Strengthening administrative processes that support decision making

Currently, the Ordinance enables national memorial proposals to be sent to the Minister or the Committee. A single point where all national memorial proposals are directed would increase the efficiency of the Committee and provide a clear process for proponents to progress national memorial proposals. Options include the Minister, Committee Chairperson or the Committee Secretariat. The Department considers that Committee Secretariat would be best placed to administer, receive, and provide the Committee with new national memorial proposals.

4. Mechanisms for the Committee to seek independent, expert advice

The Department supports the Committee seeking independent, expert advice when appropriate. The Department recommends:

- establishing decision making guidelines that recognise independent, expert advice should be sought by the Committee as required; and
- clarifying the role of the NCA in advising the Committee and appointing a representative from the NCA as an 'expert advisor' to the Committee.

In some areas of public administration, it is common for expert evidence to be provided to decision makers.²⁰ Depending on the decision making process that is established for the future, the Committee may be required to take into consideration issues such as the heritage impact of a proposed national memorial, or whether a proposed national memorial is consistent with the National Capital Plan, prior to making a decision about the location or character of the national memorial. In this context, the Committee's ability to seek expert advice could be enhanced through decision making guidelines.

²⁰ Administrative Review Council 2007, *Best Practice Guide 3 – Evidence, Facts and Findings*, Attorney-General's Department, viewed 13 September 2011, p 9.
<http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_ARC_Best_Practice_Guide_3_-_Evidence_Facts_and_Findings>.

The NCA has regularly been asked to provide expert advice to the Committee. Given the NCA's statutory responsibility for the National Capital Plan and its role in the development and maintenance of national memorials, the NCA has provided the Committee with advice on the location and design of proposed national memorials. The Department supports a representative from the NCA being appointed as an 'expert advisor' to the Committee. However, to ensure there are no actual or perceived conflicts of interest between the NCA's role in advising the Committee and its planning approval role, the 'expert advisor' should not have voting rights.

If a proposal for a national memorial has an international component, then the Committee should consult with the Department of Foreign Affairs and Trade. This consultation could occur in the form of the Committee requesting expert advice be provided by the Department of Foreign Affairs and Trade or for that advice to be included as part of the proposed 'second-pass' phase of the decision making process.

5. Opportunities for improving transparency in the administration of the Ordinance

The Department supports the Committee operating efficiently, effectively and transparently. To improve transparency in the administration of the Ordinance, the Department recommends:

- releasing a public-record of proceedings and Committee decisions within a prescribed timeframe. This could be the responsibility of the NCA as Committee Secretariat, and the NCA's protocols outlined in its 'Commitment to Community Engagement' document could apply;²¹ and
- ensuring all guidelines that apply to the Committee are publicly available and accessible on-line.

Detailing the decision making process in publicly available guidelines would provide the Committee, and national memorial proponents, with a transparent decision making process. Committee decisions should also be made public at each stage of the decision making process by being published on the NCA website within a prescribed timeframe, for example within 28 days of the Committee meeting taking place. Publicly releasing guidelines and Committee proceedings and decisions would be consistent with the Australian Government's integrity agenda, which includes promoting greater transparency in decision making by Government and the public service.²²

²¹ National Capital Authority 2011, *Commitment to Community Engagement*, Draft, April 2011, National Capital Authority, viewed 12 September 2011, <<http://www.nationalcapital.gov.au/haveyoursav/index.php/community-consultation/commitment-to-community-engagement>>.

²² A Godwin, Merit Protection Commissioner 2009, *The Merit Protection Commissioner and Ethical Decision Making*, Australian Public Service Commission, viewed 9 September 2011, <<http://www.apsc.gov.au/ethics/mpc.pdf>>.

6. Parliamentary oversight for proposed national memorials

Parliamentary oversight of national memorials involves:

- JSCNCET oversight of the administration of the Ordinance; and
- Departmental and NCA officials attending Senate Estimates hearings and other Parliamentary and Committee hearings as required.

An option for providing further Parliamentary oversight of national memorials would be to require ministerial determinations to be tabled in Parliament as disallowable instruments. The Department notes that ministerial determinations made by the Committee are not of legislative character (see discussion below under heading ‘Tabling of ministerial determinations under the Ordinance’).

Given the Australian Government’s ongoing interest in, and responsibility to, the national capital, it is appropriate that there is Parliamentary oversight of national memorials. The JSCNCET is able to provide some Parliamentary oversight of national memorials as demonstrated by the current Inquiry. The JSCNCET could provide further Parliamentary oversight of national memorials by making recommendations to the Committee on the ‘commemorative intent’ of memorials.

Although not a Parliamentary oversight mechanism, Parliamentarians are involved in the process of considering national memorials through senior, bipartisan membership of the Committee.

Tabling of ministerial determinations under the Ordinance

In addition to approving the location and character of national memorials, at present the Committee can also make decisions about the nomenclature of public places and divisions of the Territory. Currently, the Ordinance does not require ministerial determinations about the location or character of national memorials or the nomenclature of public places to be subject to tabling in Parliament, or disallowance. Inconsistently, the Ordinance does require ministerial determinations about the nomenclature of divisions of the Territory to be tabled in Parliament and such determinations are then subject to disallowance.

The Department supports amending the Ordinance so that a consistent process applies to all ministerial determinations under the Ordinance. The Department recommends that ministerial determinations under the Ordinance should not be required to be tabled as disallowable instruments. The Department suggests that ministerial determinations under the Ordinance should not be required to be tabled as disallowable instruments. Ministerial determinations under the Ordinance are essentially planning decisions and are not of a legislative character as they do not determine the law, alter the content of the law, affect a privilege or impose an obligation.²³ The Department does support publicising ministerial determinations. Making ministerial determinations public would ensure transparency in the decision making process, without requiring additional Parliamentary oversight.

²³ *Legislative Instruments Act 2003*, s. 5.

7. Public participation in the development of proposed national memorials

In addition to clarifying the decision making process and improving the transparency of the administration of the Ordinance, the Department supports increasing public participation in the development of proposed national memorials and recommends establishing:

- transparent decision making and consultation guidelines that draw on principles from the *Best Practice Regulation Handbook*; and
- a period of mandatory, national consultation, the views of ACT residents would be sought as part of this national consultation process.

Currently, the NCA advises the Committee on possible issues regarding the location and character of proposed national memorials without undertaking public consultation.

Design competitions are conducted to determine the design of national memorial proposals. This provides a limited opportunity for members of the public to contribute to proposed national memorials.

Consistent with the Australian Government's *Best Practice Regulation Handbook*,²⁴ any consultation process adopted by the Committee should ensure that public consultation starts early in the development of a proposed national memorial, captures a diversity of interested stakeholders and provides stakeholders with sufficient time to respond to proposals. The consultation process should also 'ensure that stakeholders can readily contribute' and promote 'transparent and comprehensive participation'.²⁵ While the Australian Government has agreed to these consultation principles in the context of regulatory proposals and policy development, the same principles could apply to decision making by the Committee.

The Department suggests that requirements for mandatory, national public consultation be developed and formalised in decision making and consultation guidelines agreed by the Committee. The decision making and consultation guidelines should:

- specify at what stage national memorial proposals should be subject to mandatory, national public consultation;
- acknowledge that while the public consultation process is national, it should have a component that focuses on consulting with the ACT community on matters of particular relevance to ACT residents due to their geographic proximity to proposed national memorials; and
- detail how consultation on proposed national memorials should be advertised so that the public and interested stakeholders are aware of the public consultation process.

The Department considers that the NCA has the required expertise to effectively undertake national consultation on proposed national memorials. Undertaking a comprehensive public consultation process should facilitate public participation in the development of national memorials and improve the transparency of Committee decision making.

²⁴ Australian Government 2010, *Best Practice Regulation Handbook*, Appendix C, Best Practice Consultation, Canberra, p 7.

²⁵ *Ibid.*

8. Transitional arrangements

Any proposed changes to the administrative arrangements that support the Committee should only apply to new national memorial proposals. In particular, any changes to the Committee's operation or decision making processes should not adversely affect national memorial proponents whose projects have already been considered by the Committee.

Consideration of existing national memorial proposals

The Committee has agreed to the location of five proposed national memorials.²⁶ While the Minister has issued determinations reserving sites for these proposed national memorials, construction has not yet commenced. Under existing arrangements, the Committee may decide to review its decisions in relation to proposed national memorials at any time based on the Ordinance and the Commemorative Guidelines that were in effect at the time the original decision was made.

The Department notes that the Committee can review previous decisions and, subject to the Committee's recommendation, the Minister can revoke previous ministerial determinations. A ministerial determination under s. 7(2) of the Ordinance can be revoked by relying on the Ordinance and s. 27(1) of the *Interpretation Act 1967*.

9. Other Issues

Although the terms of reference specifically address the administration of the Ordinance with respect to national memorials, it is noted that the Ordinance also provides for the Committee to make decisions on the nomenclature of public places and divisions of the Territory. Following self-government in 1989, public places in the ACT have been named in accordance with the *Public Place Names Act 1989*.

The Department recommends that in modernising the Ordinance, consideration should be given to whether the naming of public places and Territory divisions remains a relevant function of the Committee given the operation of the *Public Place Names Act 1989*.

²⁶ Australian Peacekeeping Memorial, Boer War Memorial, Immigration Place, National Workers' Memorial, and the World War I and World War II Memorials. The Battle for Australia Memorial has been considered by the Committee but has not been granted a site reservation.