

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister and
Minister for Infrastructure, Transport and Regional Development

Seat of Government (Administration) Act 1910

*Australian Capital Territory National Land (National Memorials, Territory Divisions and
Public Places) Ordinance 2022*

The *Australian Capital Territory National Land (National Memorials, Territory Divisions and Public Places) Ordinance 2022* (the Ordinance) provides for the location and character of national memorials in the Australian Capital Territory (ACT) on National Land and the naming of public places and Divisions on National Land in the ACT.

Authority

The Ordinance is made under paragraph 12(1)(d) of the *Seat of Government (Administration) Act 1910* (the Act). The provision empowers the Governor-General to make ordinances for the peace, order and good government of the ACT with respect to ‘National Land’, as defined by the *Australian Capital Territory (Planning and Land Management) Act 1998*.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power in an Act to make a legislative instrument includes the power to repeal or amend the instrument, subject to any conditions that apply to the initial power. The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

Purpose and operation

Under the *Legislative Instruments Act 2003*, all legislative instruments, such as Ordinances, are repealed automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Sunsetting ensures that legislative instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

The *National Memorials Ordinance 1928*, which the Ordinance replaces, is due to be repealed on 1 April 2022 pursuant to paragraph 51(1)(c) *Legislation Act 2003* and the *Legislation (Deferral of Sunsetting – ACT Self-Government Instruments) Certificate 2019*.

By repealing the *National Memorials Ordinance 1928*, and replacing it with the Ordinance it now complies with modern legislative and administrative drafting standards.

The Ordinance updates legislation first drafted in 1928 relating to the location and character of national memorials and the naming of Divisions and public places in the ACT on National Land.

The Ordinance continues to maintain the role of the Canberra National Memorials Committee (the Committee) established by the *National Memorials Ordinance 1928*. However, it ensures that its decision-making processes and powers under the Ordinance are articulated and modernised such as providing that determinations made under the Ordinance are published as

notifiable instruments and adding scope for the Committee to operate under modern-day practices.

To ensure transparent decision-making and improved administrative practices, the Ordinance provides that the Minister may make determinations relating to the location and character of national memorials and naming public places and Divisions on National Land in the ACT.

While decisions made under the Ordinance are not directed towards a person's particular circumstances because it does not affect the interest of anyone person. A person or organisation can still object to a decision made by the Minister. After an objection is made, the Committee must review the complaint and make a recommendation to the Minister. The Minister can then determine whether to accept the Committee's recommendation but must inform the Committee and the complainant about the objection's outcome.

The Ordinance also updates the naming criteria for Divisions and public places situated on National Land in the ACT to reflect modern values and standards of political discourse. For example, in relation to the use of words of Aboriginal and Torres Strait Islander languages, the Minister must take reasonable steps to consult an appropriate cultural group.

Consultation

With the Attorney-General's approval, the Department of Infrastructure, Transport, Regional Development and Communications conducted a thematic review in 2018-2019 of the *National Memorials Ordinance 1928* and seven other sunseting instruments relating to the administration of the ACT. As part of the review, the Department sought comments from a wide range of agencies, including the National Capital Authority (NCA), Departments of Finance, the Department of the Prime Minister and Cabinet, and the Department of Veterans' Affairs, and the ACT Government.

The Department also convened a working group, comprising representatives from the NCA, the Department of Finance and the ACT Government, to consider the provisions of the *National Memorials Ordinance 1928*.

National public consultation was undertaken via the release of exposure draft of the Ordinance inviting submissions between 21 February and 28 February 2022. Submissions were received from two organisations providing feedback on how the Ordinance could be amended in the future to take into account their policy concerns. These broader considerations may be reviewed by the Government for future amendments to the Ordinance.

Regulatory Impact Statement

The Office of Best Practice Regulation (OBPR) was consulted and considered that the Ordinance is unlikely to have a more than minor regulatory impact, and the preparation of a Regulation Impact Statement is not required. OBPR advised a Regulatory Impact Statement was not required (OBPR22-01716).

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

The proposed Ordinance commences on 1 April 2022.

Details of the proposed Ordinance are set out in the Attachment.

The Minute recommends that the Ordinance be made in the form proposed.

Authority: Section 12(1) of the *Seat of Government (Administration) Act 1910*

Attachment A

Details of the Australian Capital Territory National Land (National Memorials, Territory Division and Public Places) Ordinance 2022

Part 1—Preliminary

Part 1 of the Ordinance deals with preliminary issues.

Section 1 – Name

This section provides that the title of the Ordinance is the *Australian Capital Territory National Land (National Memorials, Territory Division and Public Places) Ordinance 2022* (the Ordinance).

Section 2 – Commencement

This section provides for the commencement of each provision in the Ordinance on 1 April 2022.

Section 3 – Authority

This section provides that the Ordinance is made under the *Seat of Government (Administration) Act 1910*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned. Any other item in a Schedule to the Ordinance has effect according to its terms.

Section 5 – Simplified outline of this Ordinance

This section gives a simplified outline of the Ordinance.

Section 6 – Definitions

This section provides the definition of terms used in the Ordinance. It also notes, that the term “National Land” has the same meaning, as provided for in the *Australian Capital Territory (Planning and Land Management) Act 1988*.

Part 2 – National memorials, divisions of the Territory, public places and other matters

Division 1 – Location and character of national memorials

Section 7 – Application of this Division

Section 7 provides that Division 1 of this Ordinance relates to national memorials that are going to be located on National Land.

Section 8 – Minister to determine location or character of national memorials

Section 8 provides that the Minister may determine the location and character of a national memorial. The Ordinance provides that the Minister makes their decision based on a recommendation by the Canberra National Memorials Committee (the Committee), which the Minister must consider. The Minister's decision is made by a notifiable instrument, as provided by subsection 8(3) of the Ordinance. The Ordinance also allows the Minister to amend or repeal a notifiable instrument made under this section. A determination made by notifiable instrument, under this section, does not alter the law but rather administratively determines the location and character of national memorials.

A notifiable instrument is an instrument that is likely to be of long-term public interest for which public accessibility and centralised management is desirable. A notifiable instrument made under this Ordinance is available from www.legislation.gov.au.

This section does not apply merit review principles as the type of decisions made by the Minister are not directed towards a particular person's circumstances. By its nature, a determination relating to the location and character of national memorials does not affect the interest of anyone person. The Ordinance provides a mechanism to deal with objections under Division 4.

Section 9 – Proposals regarding location or character of national memorials

Section 9 provides that the Minister can give the Committee proposals related to national memorials' location and character. A proposal from the Minister can be a submission or referred to the Minister under section 10 of this Ordinance. It is also open to the Minister to initiate a proposal.

Once the Committee receives a proposal, it has three months to consider it and provide the Minister with a recommendation as outlined in the paragraphs to subsection 9(3) of the Ordinance.

Within three months of the Minister receiving the Committee's recommendation, the Minister must consider it; this also includes a recommendation for the Minister to reconsider a proposal under paragraph 9(3)(c). The Minister must then notify the Committee of what action they will take concerning the proposal. It is also open to the Minister to submit a revised proposal to the Committee under subsection 9(1).

Section 10 – Submissions regarding location and character of national memorials

This section provides a person or group can make a submission to the Committee or Minister about a national memorial's location or character (or both). When the Committee receives a submission, they must provide it to the Minister within 28 days.

The section also provides that the Committee may make its own submission to the Minister about the location and/or the character of a national memorial.

Within three months of receiving a submission from a person or group, or the Committee, the Minister must consider the submission. Where a submission was made or referred by the Committee, the Minister must prepare a report and provide it to the Committee.

Division 2 – Naming of division of the Territory

Section 11 – Minister to determine name of division of the Territory

Section 11 provides that by a notifiable instrument, the Minister may determine the name of a Territory division or a part of a Territory division on National Land. When making this decision, the Minister must ensure they have regards to the names of people who have made notable contributions to the existence or advancement of Australia as a nation.

The Ordinance also allows the Minister to amend or repeal a notifiable instrument made under this section. A determination made by notifiable instrument, under this section, does not alter the law but rather administratively determines the name of a division of the Territory.

This section does not apply merit review principles as the type of decisions made by the Minister are not directed towards a particular person's circumstances. By its nature, a determination relating to the naming of a Territory division does not affect the interest of any one person. The Ordinance provides a mechanism to deal with objections under Division 4.

Division 3 – Naming of public places

Section 12 – Minister to determine name of public place

This section provides that, by a notifiable instrument, the Minister may determine the name of a public place or part of a public place on National Land. When determining the name of a public place, the Minister must have regard to the criteria listed in subsection 12(2) of the Ordinance.

When the Minister is considering paragraph 2(c) of this section, ‘the words of Aboriginal and Torres Strait Islander languages’, the Minister must take reasonable steps to consult an appropriate cultural group.

The Ordinance also allows the Minister to amend or repeal a notifiable instrument made under this section. A determination made by notifiable instrument, under this section, does not alter the law but rather administratively determines the name of public places.

This section does not apply merit review principles as the type of decisions made by the Minister are not directed towards a particular person's circumstances. By its nature, a determination relating to the naming of a public places does not affect the interest of anyone person. The Ordinance provides a mechanism to deal with objections under Division 4.

Division 4 – Objections to determinations

Determinations made under section 8, section 11 and section 13 exclude merit review principles because a decision made by the Minister does not affect the interest of anyone person. However, the Ordinance does apply a process so that persons or bodies can make objections to those determinations. While the final decision is not independent as the Minister makes it, there is a requirement for the Minister to consult with the Committee before deciding under paragraph 14(2)(b) what action the Minister will take concerning the objection.

Section 13 – Objections to determinations

This section provides that a person or body can object to a determination made by the Minister. The objection must be made in writing and lodged with the Minister within 21 days of the determination commencing.

A person can object to the following matters under the Ordinance: section 8 (location or character of national memorials), section 11 (name of division of the Territory) and section 12 (name of public place) as outlined in subsection 13(1).

Where an objection is lodged in accordance with subsections 13(1) and (2), the Minister must refer the objection to the Committee within 28 days after it is received by the Minister.

Section 14 – Consideration of objection

Section 14 provides that within three months, the Committee must consider the objection referred to it by the Minister at subsection 13(3), and give a recommendation to the Minister, which may include, repeal the determination; amend the determination as set out in its recommendations, or neither amend nor repeal the determination.

After receiving the Committee's recommendation, within three months, the Minister must consider it, and then notify the Committee and the person or body who objected, about whether the Minister will take action concerning the determination and then advising what the action will be.

Division 5 – Other matters

Section 15 – Consideration of other matters

This section provides that the Committee may refer to the Minister matters not otherwise mentioned in Part 2 of the Ordinance for consideration.

The Minister must consider the matter referred under subsection 15(1) and provide the Committee with a report.

Part 3 – Canberra National Memorials Committee

Division 1 – Continuation of Canberra National Memorials Committee

Section 16 – Continuation of Canberra National Memorials Committee

Section 16 ensures the continuation of the Canberra National Memorials Committee established by the then *Memorials Ordinance 1928*.

The Committee was established in 1927 in response to a perceived need for high-level parliamentary consideration of the nomenclature (naming) of Canberra divisions and public places. In 1928, the Committee's role was extended to include memorials and formalised in the *Memorials Ordinance 1928*.

Division 2 – Membership of the Committee

Section 17 – Membership of the Committee

This section provides the membership of the Committee and that the Prime Minister is the Chair of the Committee. In addition, it provides that the Governor-General may by instrument appoint a person to act as a Committee member as set out in paragraphs 17(3)(a) and (b).

Subsection 17(4) provides that section 34AAB of the *Act Interpretation Act 1901* applies where the Minister may authorise others to perform the Minister's functions as a Committee Member.

Section 18 – Appointment of person by Minister

Section 18 provides that the Minister can appoint by instrument a class of persons that would be suitably qualified to be Committee members. This class includes: Senior Executive Service officers (SES), or those acting as SES, a person who holds or is acting in a position equivalent to that of an SES employee, or a person who the Minister thinks has the relevant expertise to assist with the functions of the Committee.

An appointment made under subsection 18(1) can either be in the name of the person appointed or to the specified position or office that a person holds from time to time. A person appointed is a member of the Committee on a part-time basis, and their appointment must not exceed three years on terms and conditions determined by the Minister.

The Remuneration Tribunal will determine the remuneration paid for a person appointed under this section and if the Tribunal makes no determination, a person is to be remunerated as prescribed by rules.

Section 19 – Appointment of Territory residents by Governor-General

This section provides that the Governor-General may appoint two people who usually reside in the Australian Capital Territory by instrument. These persons are Committee members on a part-time basis, and their period of appointment must not exceed three years on terms and conditions determined by the Governor-General.

A person appointed under this section ceases to be a Committee member if they stop ordinarily residing in the Australian Capital Territory. The Remuneration Tribunal will determine the remuneration paid under this section, and if the Tribunal makes no determination, a person is to be remunerated as prescribed by rules.

Division 3 – Operation of Committee

Section 20 – Meetings of the Committee

Section 20 provides a legislative framework for how the Committee will conduct its meetings and the procedures that will assist it to operate effectively. The Committee holds meetings, as are necessary for it to perform its functions under the Ordinance efficiently, and may, given the circumstances, adjust proceedings for meetings as appropriate.

Committee meetings are convened by the Minister or the Secretary of the Department with administrative responsibility for the Ordinance under the Administrative Arrangement Orders. The Chair of the Committee must be present at all meetings to preside. If the Chair of

the Committee is not present, Committee members may appoint another member to preside over that meeting.

At a convened meeting, a quorum is constituted by three members of the Committee. Where a question arises, that matter is determined by a majority vote of the Committee members present. The Chair of the Committee or the Committee member presiding at the meeting has a deliberative vote, and if votes are equal, a casting vote to determine a resolution.

The Committee is required to keep minutes of its meetings.

Section 21 – Decisions without meetings

This section provides the Committee with an alternative process for making decisions, where meetings do not need to be held. This allows a majority of Committee members to vote on a proposal and indicate their agreement without a meeting. For section 21 to operate effectively, the Committee must determine the kind of decisions that can be made without a meeting and determine how Committee members are to indicate their agreement.

For clarification, the Ordinance indicates that a Committee member is not entitled to vote under this section, if they were not entitled to vote at a Committee meeting. The Committee is also required to keep a record of decisions made under this section.

Part 4 – Miscellaneous

Section 22 – Rules

Section 22 provides that the Minister can, by legislative instrument, make rules as required or permitted by the Ordinance or as necessary or convenient to give the Ordinance effect. This also allows the Minister to ensure that the Ordinance can operate effectively.

The rules made under this section cannot create an offence or civil penalty; provide powers of arrest or detention or entry, search or seizure; impose a tax; or directly amend the Ordinance.

Part 5 – Application, saving and transitional provisions

Section 23 – Transitional – definitions

This section provides transitional definitions so that the Ordinance can operate effectively. Under Part 5 of the Ordinance, ‘old law’ has the same meaning as the *National Memorials Ordinance 1928* as in force before ‘transition time’. ‘Transition time’ means at the time this Ordinance commences.

Section 24 – Things done under the old law

This section provides that if something could be done under the old law, and that same action could be carried out under the Ordinance, it has been done under the Ordinance. Section 24 does not apply to a determination or an appointment under the Ordinance.

While the old law has been repealed, the old law continues to apply after the transition time to a process that had already started for a national memorial, a division of the Territory or a public place, which was not completed before the Ordinances’ transition time.

Section 25 – Application – appointments

Section 25 provides that for the purposes of appointments, this Ordinance applies for subsection 18(3) to (6) and 19(2) to (5) after the transition time.

Schedule 1 – Repeals

National Memorials Ordinance 1928

1 The whole of the Ordinance

This section provides that the *National Memorials Ordinance 1928* is repealed.

Attachment B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Australian Capital Territory National Land (National Memorials, Territory Division and Public Places) Ordinance 2022

The *Australian Capital Territory National Land (National Memorials, Territory Division and Public Places) Ordinance 2022* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Australian Capital Territory National Land (National Memorials, Territory Divisions and Public Places) Ordinance 2022* (the Ordinance) provides for the location and character of national memorials in the Australian Capital Territory (ACT) on National Land and the naming of public places and Divisions on National Land in the ACT.

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Human rights implications

The Ordinance does not engage any of the applicable rights or freedoms. Further to this, the modernising of the Ordinance includes consultation is undertaken by the Minister with regards to words of Aboriginal and Torres Strait Islander languages to ensure cultural sensitivities are handled in an appropriate manner.

Conclusion

This Ordinance is compatible with human rights as it does not raise any human rights issues.

**Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister
and Minister for Infrastructure, Transport and Regional Development
The Hon Nola Marino MP**