

EXPERT EVIDENCE

A person participating in either a Heritage Council Registration or Permit Review Hearing ('Hearing') may choose to include expert evidence with its Hearing submissions. Directions in relation to expert evidence may be given at any time by a Heritage Council Registration or Permit Review committee ('Committee'), including as a result of a Heritage Council Directions Hearing. Protocol 6 is intended to assist parties to understand the purpose of expert evidence and the principles which apply to it. Other forms of evidence may also be accepted by the Heritage Council.

1. Expert witnesses

- 1.1 Expert witnesses are individuals with established or recognised expertise in a relevant subject area who are called by a person participating in the Hearing for the purpose of giving expert evidence. A person may be recognised as holding such expertise whether as a result of training, experience, qualifications, publications, awards, peer recognition, or any combination thereof.
- 1.2 The opinion and evidence of an expert witness should be fair, unbiased and within the area of their expertise. Expert witnesses have an over-riding duty to the Heritage Council and the Committee, rather than to the person relying on their evidence. Expert witnesses are expected to provide reasoned, fair and impartial evidence, rather than to act as an advocate for the person relying on their evidence.
- 1.3 A person participating in a Hearing cannot be an expert witness, nor give expert evidence, for the purpose of that Hearing.

2. Production of an expert witness's report

- 2.1 The opinion and evidence of an expert witness must be set out in a report. That report must include the following matters:
 - (a) the full name and address of the expert witness;
 - (b) the expert's qualifications, experience and relevant area or areas of expertise;
 - (c) a statement setting out the expert's expertise to make the report;
 - (d) reference to any private or business relationship between the expert witness and the person for whom the report is prepared;
 - (e) all instructions that define the scope of the report (original and supplementary and whether in writing or oral);
 - (f) the facts, matters and all assumptions upon which the report proceeds;
 - (g) reference to those documents and other materials the expert has been instructed to consider or take into account in preparing his or her report and the literature or other material used in making the report (this may include any maps, plans or other pictorial material, as well as audio or visual material, which may be included with the report, or which may be required to be made available by the expert witness, whether at the request of a person participating in the hearing or the Committee);

(h) the identity and qualifications of the person who carried out any tests or experiments upon which the expert relied in making the report;

(i) a statement:

- summarising the opinion of the expert;
- identifying any provisional opinions that are not fully researched for any reason (including the reasons why such opinions have not been or cannot be fully researched);
- setting out any questions falling outside the expert's expertise; and
- indicating whether the report is incomplete or inaccurate in any respect.

(j) a signed declaration by the expert that:

*'I have made all the inquiries that I believe are desirable and appropriate. No matters of significance which I regard as relevant have to my knowledge been withheld from the Heritage Council. I have not used Generative Artificial Intelligence to generate the content of this expert witness report.'*¹

(k) If the hearing is to be held online, or if the expert will be presenting evidence from a different location by video conference, they must append to the above declaration:

'I confirm I:

- *will be alone in the room from which I am giving evidence and will not make or receive any communication with another person while giving my evidence except with the express leave of the Committee*
- *I will inform the Committee immediately should another person enter the room from which I am giving evidence*
- *during breaks in evidence, when under cross-examination, I will not discuss my evidence with any other person, except with the leave of the Committee*
- *I will not have before me any document, other than my expert witness statement and documents referred to therein, or any other document which the Committee expressly permits me to view.'*

2.2 Legal practitioners and unrepresented parties must draw the requirements of this Protocol and *Heritage Council of Victoria Practice Note – Use of Generative Artificial Intelligence (Gen AI) in Heritage Council of Victoria Proceedings* to the attention of experts when instructing them.

2.3 Generative Artificial Intelligence ('Gen AI') must not be used to draft or prepare the content of an expert witness report without prior permission from the Heritage Council of Victoria.

2.4 Any application for permission to use Gen AI in the drafting or preparation of expert witness reports must identify:

- (a) the purpose for which Gen AI is proposed;
- (b) the Gen AI program (including the version) that will be used and whether it is a closed-source or open-source program or contains privacy and or confidentiality settings;
- (c) the benefit to be derived from the proposed use of Gen AI in the preparation of the expert report;
- (d) any documents which it is proposed to submit to the Gen AI program for the purposes of generating any aspect of the expert report.

¹ Unless leave to use generative artificial intelligence has been given by the Heritage Council. See paragraphs 2.3-2.5.

2.5 If an expert witness obtains prior leave to use Gen AI for any purpose in preparing an expert evidence report for the Heritage Council of Victoria, the expert witness must:

- (a) disclose in the report what part(s) of it was prepared using Gen AI or drawing upon Gen AI produced material and the Gen AI program (and version) that was used;
- (b) keep records and identify in an annexure to the report a record of how the Gen AI tool or program was used (for example any prompts used, any default values used, and any variables set), except where the Heritage Council of Victoria grants leave to dispense with this requirement (for example, where the Heritage Council of Victoria determines this to be voluminous or unnecessary); and
- (c) if the use of Gen AI is regulated or addressed by any relevant code of practice or principles that bind or apply to the expert, identify that fact and annex to the report a copy of the relevant code(s) or principle(s).

3. Circulation of expert evidence

3.1 If any person seeks to rely on expert evidence for the purpose of a Hearing, that person must ensure that the report of that expert evidence is included with the submission of that person when it is sent to the Heritage Council Secretariat in advance of the Hearing. This enables the Committee to read the report in advance, and for the report to be circulated to all others participating in the Hearing.

4. Arrangements for the attendance of expert witnesses at a Hearing

4.1 When notice is given of a Hearing, the Heritage Council requests any persons seeking to be heard to complete and return either *Heritage Council Form B – Registration Hearing Participation Form* or *Heritage Council Form D – Permit Review Hearing Participation Form*, depending on the type of hearing. In completing that form, all persons seeking to be heard must name any expert witness(es) that they plan to call and give an estimate of the amount of time required for the expert witness(es) to give their evidence-in-chief. The Heritage Council Secretariat may liaise with those participating in a Hearing in order to prepare a timetable for the Hearing.

4.2 All hearing participants, other expert witnesses and members of the public in attendance are normally permitted to be present at the Hearing during the presentation of expert evidence (including cross-examination).

5. Cross examination of expert witnesses at a Hearing

5.1 Direct questioning of an expert witness by any Hearing person is permitted and the Committee will normally provide an opportunity to all Hearing participants to ask questions of an expert witness. However the Committee may not provide such an opportunity to any Hearing participants who have not been present during the evidence-in-chief of the expert witness.

5.2 The purpose of questioning an expert witness is to test the evidence and to inform the Committee. Questions which are irrelevant, repetitive, badgering or otherwise inappropriate shall be disallowed at the Chair's discretion.

6. Questions directed to the Executive Director's representative at a Hearing

- 6.1** The Executive Director's representative does not act as an expert witness in a Hearing and is therefore not to be cross-examined. However, in recognition of the Executive Director's role as the decision maker in the first instance under the *Heritage Act 2017*, a limited range of questions of clarification may be directed through the Chair to the Executive Director's representative. Questions of clarification directed to the Executive Director's representative by other participants are only permitted with the leave of the Chair and are intended to allow participants to a Hearing to clarify any assessment, submission and/or decision made by the Executive Director which is relevant to the Committee's consideration.

7. Directions and questions from the Committee

- 7.1** The Committee may at any time, including as a result of a Directions Hearing, give directions to Hearing participants about expert evidence, cross examination and questioning.
- 7.2** A Committee may ask questions of all and any participants and witnesses at any stage of a Hearing.