



Our Ref: D1923434

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By email: [AHAreview@dplh.wa.gov.au](mailto:AHAreview@dplh.wa.gov.au)

Dear Ms McGowan

**REVIEW OF THE *ABORIGINAL HERITAGE ACT 1972***

I refer to your letter dated 11 March 2019 in relation to the review of the Aboriginal Heritage Act 1972.

Thank you for the opportunity to make a submission in relation to the proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal Heritage.

The Department of the Premier and Cabinet has reviewed the proposals and provides the attached submission for your consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Darren Foster', written over a white background.

Darren Foster  
**DIRECTOR GENERAL**

Att

30 MAY 2019



**Submission by the Department of the Premier and Cabinet to the  
Review of the Aboriginal Heritage Act 1972  
*Proposals for new legislation to recognise, protect and celebrate  
Western Australia's Aboriginal Heritage***

**Discussion Paper March 2019**

## **Introduction**

The Department of the Premier and Cabinet (DPC) takes a lead role in the development and implementation of policies and practices that support Aboriginal social and economic outcomes in Western Australia. DPC assists Western Australian Government agencies operating under the *Native Title Act 1993 (Cth) (NTA)* and the *Aboriginal Heritage Act 1972 (WA) (AHA)* and works to promote a whole-of-government approach to Aboriginal affairs, focussing on agreement making and mutually beneficial outcomes with Aboriginal people.

DPC is supportive of the proposals outlined in the Discussion Paper and notes that they intend to facilitate a more collaborative approach to heritage protection between Aboriginal people and the broader community. DPC notes the extensive consultation with Aboriginal communities that has occurred in this process to date, and that this consultation is developing a modern heritage protection system that best protects Aboriginal heritage and better reflects the aspirations of Aboriginal people.

DPC looks forward to working with the Department of Planning, Lands and Heritage (DPLH) in considering the proposed systems in more detail and how they might work in practice, particularly in ensuring the changes do not adversely impact existing native title agreements, and current negotiations, to which the State is a party.

### **PROPOSAL 1: Repeal the Aboriginal Heritage Act 1972 and deliver new Aboriginal heritage legislation**

DPC supports the creation of new legislation that will protect and celebrate Western Australia's Aboriginal heritage. The proposal to replace the AHA with modern legislation, regulations and policies is needed in order to empower Aboriginal people and communities across Western Australia to effectively and efficiently protect, manage and preserve their heritage and foster respectful, positive and transparent relationships with other land users.

DPC acknowledges the views held by some people in the Aboriginal community that the current system under the AHA is outdated and does not adequately reflect Aboriginal culture and practices in recognising and protecting heritage. The introduction of the NTA in 1993, and the legislative processes through which native title rights and interests are assessed, recognised, managed and protected, has at times been difficult to reconcile with the current heritage framework.

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It is important to align the Aboriginal heritage process with the Government's policy approach to resolving native title claims across the State. The Government is committed to agreement making as the vehicle for the resolution of native title claims, with the objective of facilitating sustainable Aboriginal economic and social outcomes for current and future generations.

The aims outlined under Proposal 1 in the Discussion Paper are broadly aligned with DPC's key objectives regarding economic and social outcomes for Aboriginal people, which are to:

- develop meaningful relationships with Aboriginal people and communities and other partners;
- establish a partnership approach to facilitating Aboriginal interests in land across Government; and
- improve social and economic outcomes of Aboriginal people and communities.

Recognising Aboriginal people as the primary stakeholders in decisions affecting Aboriginal heritage is critical to this process. DPC commends DPLH on the extensive consultation that has been undertaken with Aboriginal communities as a part of this legislative review.

## **PROPOSAL 2: Update definitions and scope of new Aboriginal Heritage legislation**

DPC welcomes the proposal to broaden the scope of what will be covered in the new legislation to cater for cultural landscapes, intangible heritage and ancestral remains. Heritage definitions that take into account a broader range of criteria for identifying culturally significant places and objects not only maximise heritage protection, but more accurately reflect the views of Aboriginal people as to what aspects of heritage need to be protected.

In adopting the new definitions and processes, consideration needs to be given to how they will operate in practice alongside the NTA and what impact there might be for project proponents and current land users. DPC looks forward to discussing this further with DPLH as the new legislation is developed.

## **PROPOSAL 3(A): Local Aboriginal Heritage Services**

The proposal to decentralise a number of functions to appropriately accredited local Aboriginal bodies complements the mechanisms established under the NTA. The NTA provides for the establishment of Registered Native Title Bodies Corporate, which are established to hold in trust recognised native title rights and interests on behalf of the native title holders. Using these bodies to undertake heritage related duties aligns with DPC's policy direction to maximise economic development opportunities for native title holders.

The development of a set of criteria for the nomination and selection of local Aboriginal heritage services (LAHS) will be essential to avoid complexities arising from the implementation and management of the native title agreements currently in operation in the State. Some of these agreements provide for the creation of local corporations that are designed to provide a number of services, including land, community and economic services, and that are not solely focused on heritage matters.

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In particular, DPC is concerned about the possibility that LAHS providers may be set up under the proposed new legislation in areas where there are existing, or soon to be established, corporations that are currently contractually bound to provide similar services through agreement with the State. This may result in the duplication of heritage services and the development of tensions between different providers.

One option to mitigate this risk is to include, in the criteria for the nomination and selection of a proposed LAHS provider, a requirement that there is not another functional corporate structure providing heritage services in operation in the area of interest.

Proposal 3A states that “[t]o be considered for recognition as a [LAHS], an organisation must [...] have genuine connection with the area it proposes to represent (including through member and Board composition)”. The reference to “genuine connection” requires further clarification to avoid potential confusion in relation to who holds authority to speak for country on heritage matters, and those recognised as holding native title rights and interests.

Providing the necessary support and capacity building services to the LAHS providers will be vital to capitalise on economic opportunities and foster positive relationships with local proponents. DPC understands funding will be provided to LAHS providers to assist with start-up costs and looks forward to further details on this funding scheme in the next phase of consultation.

The Discussion Paper is silent on the role LAHS may play in the proactive identification and management of Aboriginal heritage. Cultural mapping has been identified in native title negotiations as an important aspect of heritage protection. Further consideration should be given to how this could be promoted and supported in this process.

### **PROPOSAL 3(B): The Aboriginal Heritage Council**

DPC broadly supports the concept and proposed functions of the Aboriginal Heritage Council (AHC), but makes the following points.

Criteria for appointment of AHC Members should be developed in a manner that ensures the Aboriginal community and proponents have trust and confidence in the AHC as a body with appropriate expertise and authority (including cultural authority).

Appointment of the LAHS by the AHC should reflect native title determinations and agreements that recognise Prescribed Bodies Corporate, and equivalent Traditional Owner Corporations, as having the primary rights and interests in relation to local heritage, provided the Corporations can also make appropriate provision for the involvement of any knowledge holders, who may not also be native title holders. This could occur by way of a Cultural Advice Policy. Any AHC role in managing the performance of a LAHS function by these Corporations will need to take account of their broader mandate, legislative and contractual responsibilities.

With respect to the proposed AHC’s role of ratifying heritage agreements (see also Proposal 6), pre-existing agreements that are legally binding contracts, developed as part of a native title agreement, should either not be subject to ratification or should be automatically ratified.

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Guidelines will need to be developed in relation to proposed criteria for the ratification of agreements, including criteria that consultation and agreement-making have been done 'equitably' and in 'good faith' (see also Proposal 6). The 'good faith' requirement in the native title context has a specific interpretation which should inform the development of these guidelines. DPC can provide additional input to DPLH to develop these criteria.

The State Government Standard Heritage Agreement, and bespoke Noongar Standard Heritage Agreement and Esperance Nyungar Government Standard Heritage Agreement, set out processes, timeframes and a schedule of standard costs which all parties must adhere to. Standards set by the AHC for services provided by LAHS and heritage professionals should take into consideration the terms of these agreements. To the extent of any inconsistency, the terms of these agreements should prevail.

Similarly, any dispute resolution functions of the AHC will need to take account of existing heritage agreements, which already contractually bind the parties to particular dispute resolution processes. The process contemplated in Proposal 3(B) must not supersede the terms of these agreements, but rather complement them – where appropriate and necessary.

### **PROPOSAL 3(C): The Minister's role**

In relation to proposal 3(C), DPC understands that Ministerial oversight and decision making is needed to ensure confidence in the heritage system and streamlined processes. DPC supports the proposal for the Minister to intervene in matters that are contentious or of significance to the State, and notes that sufficient opportunity should be provided for Aboriginal people to provide input into this process.

### **PROPOSAL 3(D): The role of the Department of the Planning, Lands and Heritage**

DPC is supportive of the proposed functions of DPLH. In addition, DPC notes that where no suitable body exists to perform the role of the LAHS, or has been nominated to take on these tasks, consideration could also be given to the potential role of existing Native Title Representative Bodies (NTRBs) in providing support to DPLH in performing this function where appropriate. NTRBs are appointed under the NTA and assist Aboriginal people with all aspects of their native title claims. NTRBs commonly already provide heritage services to native title groups. In addition, NTRBs are generally accepted as having direct knowledge and authority in relation to heritage management and may, therefore, have a role to play in providing input to DPLH regarding heritage management in a particular area, and ensuring the right people to speak for country.

### **PROPOSAL 3(E): Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards**

DPC welcomes the proposal to provide a list of appropriately qualified heritage professionals, and the development of standards required for heritage investigations, community consultations and the reporting of heritage information. This proposal will ensure a more streamlined heritage reporting system, and increase the integrity of site information held by DPLH.

Consideration could also be given as a part of this proposal to investigate ways in which the State can assist and encourage Aboriginal people to become heritage consultants for this purpose.

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#### **PROPOSAL 4: Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register**

DPC supports promoting greater use of the Aboriginal Heritage Register as a tool for heritage protection and facilitating discussions and agreements between land users.

Feedback received by DPC from some stakeholders to date, in relation to the existing register for Aboriginal heritage, indicates a lack of confidence in some Aboriginal communities in using the register to protect heritage. Consideration should be given to how trust can be further established in the heritage register, as an appropriate place to store heritage information, and as a mechanism to protect sites of significance.

#### **PROPOSAL 5: Introduce a referral mechanism to facilitate tiered assessments and approvals of proposed land uses**

DPC supports this proposal, noting it is consistent with the heritage protection framework contained in the Government Standard Heritage Agreement. The Government Standard Heritage Agreement also adopts a tiered approach to heritage protection, depending on the level of impact and disturbance of the proposed activity, and the nature of the environment. This approach will assist in facilitating local agreement making and streamline the approvals process for proposed land users.

#### **PROPOSAL 6: Encourage and recognise agreement making**

DPC supports the proposal that local traditional owners and knowledge holders be empowered to enter into agreements in relation to areas of heritage significance, subject to the comments in Proposal 3B above, in relation to existing agreements.

#### **PROPOSAL 7: Transparency and Appeals**

As outlined above, it is important that Aboriginal people have confidence in the process of heritage protection in the State. Proposal 7 is therefore important for the transparency of any decisions made under a revised legislative framework.

DPC notes this proposal may be problematic if the rationale for the decision arises from obligation existing under a particular Heritage Agreement, whose content might be confidential.

#### **PROPOSAL 8: A modernised enforcement regime**

DPC supports the proposal to create a modern and efficient enforcement regime to avoid and penalise unauthorised damage to Aboriginal heritage. DPC notes, in particular, that Proposal 8(ii) to limit the current “ignorance” defence to circumstances where the land user has done everything “reasonably practicable” to make themselves informed is a positive move. However, it is not clear how “reasonably practicable” will be defined.

In the heritage agreement negotiations DPC has undertaken, a common criticism and deep concern has been the lack of enforceability of the AHA. In view of this, DPC suggests a clear set of criteria is developed to inform the decision that a proponent has done everything “reasonably practicable” to inform himself. This will ensure the new legislation is effectively enforceable.

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Proposal 8(v)(d), which aims to empower the Court to order compensation, raises the question of how this would operate. In developing this proposal further, it may be useful to review the decision in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwuru and Nungali Peoples* [2019] HCA 7 (“Timber Creek”) delivered on 13 March 2019. In that decision, the High Court determined the approach to be taken to resolving native title compensation claims, including by reference to cultural loss. DPC is currently developing a policy approach to native title compensation, with reference to Timber Creek, and looks forward to exploring heritage compensation further with DPLH to ensure the approaches are complementary.

### **Proposal 9 – Protected Areas**

As noted in the Discussion Paper, the Protected Area provisions of the AHA are restrictive and under-utilised. The aim of recognising and providing maximum protection for Aboriginal heritage sites that are of outstanding importance, in a way that allows relevant Aboriginal people to actively manage those sites, should be a key priority of Aboriginal heritage legislation. To the extent this proposal allows active management of Protected Areas by the appropriate people, DPC is of the view that this is a valuable proposed reform.

The Discussion Paper acknowledges that, in accordance with the NTA, a future act process must be followed before a Protected Area can be declared. DPC understands the time and cost involved in complying with the NTA has been a contributing factor to the issues raised in relation to this aspect of the AHA. DPC is willing to participate in further discussions about the native title implications for Protected Areas and how they may be addressed in native title negotiations.

In areas where no native title exists, consultation with recognised Traditional Owners should be considered in the absence of NTA future act procedures.

### **Conclusion**

A modern legislative framework, supported by Aboriginal people and accessible to proponents, is vital in providing adequate recognition and protection for Aboriginal heritage in Western Australia. Providing efficient and reliable processes for land users in meeting their heritage protection obligations also assists Aboriginal people and the State to manage and maintain Aboriginal heritage for the benefit of all Western Australians into the future.

DPC supports the move to adopt new legislation, to deliver and promote a heritage system and practices on the ground that is transparent, equitable and efficient in line with modern heritage management.

In particular, DPC notes the importance of Aboriginal people across the State of Western Australia playing a central role in the protection, preservation and management of their heritage and culture.

DPC looks forward to working with DPLH to develop this best practice legislation.