



The Anthropological Society of Western Australia

May 30, 2019
Assistant Director General
Heritage Services
Department of Planning, Land and Heritage
Locked Bag 2506
Perth WA 6001

Dear Sir/Madam

Submission on the 'Review of the *Aboriginal Heritage Act 1972*: Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal heritage'.

The Anthropological Society of Western Australia (ASWA), has been actively engaged with the issues of Aboriginal heritage legislation and practice since its inception in 1958, playing an instrumental role in the development of the current *Aboriginal Heritage Act 1972* (AHA). Many of our members are involved in Aboriginal heritage consultancy, native title and cognate activities with Aboriginal communities throughout Western Australia and deal with the AHA on a daily basis. ASWA welcomes the opportunity to lodge a submission in response to the Review of the AHA.

ASWA commends the Government for the extensive and inclusive consultative process it has established as part of this reform process. We note that this approach is in sharp contrast to that instigated by the previous Government in 2014, which, as part of its strategy, involved accusing heritage professionals; consulting anthropologists and our archaeological colleagues, both in public and in private meetings of which we are aware, of being solely responsible for all that was wrong with the operation of the current AHA.

Yours faithfully

Dr Edward McDonald

Acting President



The Anthropological Society of Western Australia

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

Repeal the Aboriginal Heritage Act 1972 and replace it with modern legislation, regulations and policies.

ASWA supports the repeal of the AHA and replace it with a modernized legislative framework, together with sympathetic regulations and the introduction of transparent policies to support the legislation and regulatory practice. The existing AHA is a dated museum-based piece of legislation that is long over-due for repeal. ASWA is of the view that the AHA no longer reflects the developments of best practice in heritage management and fails to recognise the realities of Native Title.

ASWA supports the four key objectives as outlined in the Consultation Paper under Proposal 1. New legislation is needed to recognise the central role of Aboriginal cultural heritage to thriving Aboriginal communities now and in the future. In addition, heritage legislation must deal appropriately with both the tangible and intangible elements of Aboriginal heritage rather than purely 'places' and 'objects' as is the case with the current legislation. Undeniably, any new legislation needs to be premised on an understanding that places of heritage significance exist within cultural landscapes rather than in isolation and decisions regarding land use need to recognise the impacts on cultural landscapes rather than individual places.

A new Act would therefore help to bring Aboriginal heritage legislation into alignment with other pertinent legislation such as the Native Title Act, the Race Discrimination Act, the Environmental Protection Act, as well as international protocols and conventions, such as the United Nations Declaration on the Rights of Indigenous Peoples, the Australia ICOMOS Charter for Places of Cultural Significance, The Burra Charter, 2013 (*Burra Charter*). New legislation should acknowledge Aboriginal rights and cultural obligations to both past and future generations in respect to their heritage.



The Anthropological Society of Western Australia

A new Act must recognise that the respective Aboriginal peoples are the principal decision-makers about their heritage.

Importantly, the successful implementation and administration of the new Act must be adequately resourced. The resourcing of the new Act must recognise the specialist skills and knowledge required to develop an administrative culture that is sensitive to its context at central, regional and local levels. The resourcing of the new Act must also demonstrate the commitment of Government to Aboriginal heritage as core to the cultural heritage of the State.



The Anthropological Society of Western Australia

Proposal 2: Update definitions and scope of new Aboriginal heritage legislation

Extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage.

It is not proposed to extend the definitions in the new legislation to include intellectual property rights.

ASWA supports this proposal, and its listed objectives to:

- a. Adopt a new definition of 'place' that is aligned with the Australia ICOMOS Burra Charter, which includes 'tangible and intangible dimensions':
- b. Carry forward the protection of all Aboriginal cultural heritage places and objects, whether registered or not, consistent with the current Act.
- c. Continue to protect Aboriginal objects consistent with the current Act.
- d. Include culturally appropriate procedures to deal with ancestral remains.

We note that the intention here is to endeavour to bring the legislation into line with both Aboriginal cultural practices and with best practice landscape-scale management procedures, thus avoiding the artificial limitations on the notion of place that would seem to be inherent in the current Act with its focus on the concept of 'sites'. In focusing on landscape-scale management practices, ASWA recommends that **Cultural Heritage Management Plans** (CHMP) be given statutory recognition within the new Act as a means to standardize the management of landscapes/seascapes within the Western Australia jurisdiction. Within this scope Aboriginal cultural values with regard to surface and groundwater and their landscape context also need to be recognised and protected as Aboriginal people commonly state: "water is life" and water is central to Aboriginal cosmology and sacred geography throughout the State. The statutory recognition of CHMPs would assist in the management of issues related to the interconnectivity of water sources on country and across countries, for Aboriginal people have responsibilities not only to manage the water on their own country but to ensure that there are no detrimental impacts on the water of those whose country downstream. Statutory recognition of CHMPs could be effected through a formal



The Anthropological Society of Western Australia

registration process. Formal registration of CHMPs, to established standards, would also go some way toward managing impacts on Dreaming tracks/Song-lines, which are unique Aboriginal forms of intangible heritage.

ASWA supports the proposal, consistent with the current Act, to continue protecting all Aboriginal cultural heritage places and objects whether registered or not. ASWA also supports the continued protection of Aboriginal objects and 'cultural material' consistent with the current Act.

Though ancestral remains are protected by both State and Commonwealth legislation, an improvement in procedures to deal with ancestral remains is a positive step. At its heart should be a consultative process which meaningfully and decisively involves consultation with the local traditional owners or custodians.

ASWA accepts the view that intellectual property rights are the remit of Commonwealth legislation.



The Anthropological Society of Western Australia

Proposal 3(A): Local Aboriginal Heritage Services

Provide for the appointment of Local Aboriginal Heritage Services to:

- ❖ ensure the right people to speak for particular areas of country and related cultural heritage are identified;
- ❖ make agreements regarding Aboriginal heritage management and land-use proposals in their geographic area of responsibility.

ASWA is of the view that the recognition of the rights of Aboriginal people in respect of their land and its heritage and the management of both is a very welcome addition to the proposed new Act. Accordingly, a key principle of the new Act should be that the local Aboriginal community ought to determine who the right people to speak for the relevant cultural heritage area and what is important to them.

If it is anticipated that Prescribed Bodies Corporate (PBC) (Registered Native Title Bodies Corporate) will apply to become a Local Aboriginal Heritage Service (LAHS), then it is absolutely essential that these bodies are adequately resourced to undertake the tasks assigned to them. This is particularly so if it expected that time frames and standards will apply to the advice and services provided. Many of the existing PBCs are currently struggling, due to a lack of resourcing, to meet the current demands upon them. The additional responsibilities in meeting the criteria and status of a LAHS will only add another level of burden and may result in the breakdown of heritage processes in a particular area. In this context it may also be advisable to look at regional support services, such as those offered by the existing land Council.

The proposal outlined requirements for LAHS, including,

- a. Be 100 per cent Aboriginal-owned.
- b. Have genuine connection with the area it proposes to represent (including through member and Board composition).
- c. Have demonstrable support from a broad constituency of the Aboriginal people within, and 'cultural authority' over, the area it proposes to represent.



The Anthropological Society of Western Australia

- d. Be incorporated under either the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) or Corporations Law.
- e. Have rules that are consistent with the requirements imposed on PBCs, especially in terms of obligations to consult on certain decisions.
- f. Have demonstrable capacity to undertake the functions required of it and maintain appropriate standards of good corporate governance.

There are a number of PBCs in the State that in a sense are already providing LAHS type services very successfully. However, there also a number that are marked by ongoing conflict and disputation between members. ASWA recommends that mechanisms for the management and mediation of conflict and disputes ought to be included from the outset in the provisions for the registration of LAHS. There are examples where particular sets of people control Native Title group Working Parties and largely nominate themselves as the 'right people to speak for the relevant cultural heritage area' to the exclusion of other, including community Elders, because of the financial rewards involved in heritage work. Indeed, the current proposals do not seem to pay adequate attention to the fact that Aboriginal heritage process are and will continue to be a major economic contributor to Aboriginal communities. Aboriginal groups therefore have not only cultural interests, rights and obligations for their heritage but also commercial interests. These sometimes competing interests need to be managed appropriately.

The Department needs to be adequately and appropriately staffed and resourced not only to perform the functions of LAHS where no local services exist but also to assist and support LAHS in their day to day operations.



The Anthropological Society of Western Australia

Proposal 3(B): Aboriginal Heritage Council

- a) Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system.
- b) Abolish the Aboriginal Cultural Material Committee.

ASWA agrees that the Aboriginal Cultural Material Committee (ACMC) should be replaced by the proposed Aboriginal Heritage Council (AHC), as the central body providing advice and strategic oversight of the Aboriginal heritage system. ASWA also agrees that with the new proposals the statutory function of the Registrar of Aboriginal sites is no longer required.

ASWA welcomes the plans to appoint an Aboriginal chair and suitably qualified Aboriginal people to the AHC and the proposal that the AHC should have strategic oversight of Aboriginal heritage in the State. The proposal brings Aboriginal heritage into line with what's occurring in non-Aboriginal heritage. ASWA agrees that the AHC's role ought to include:

- ❖ Oversight of the Aboriginal Heritage Register
- ❖ Setting standards for the LAHS and Heritage professionals
- ❖ Make decisions about land use proposals
- ❖ Provide advice to the Minister on land use proposals
- ❖ Ensure that consultation is undertaken in good faith
- ❖ Provides a central point of advice
- ❖ Promotes Aboriginal heritage and ensure that it is managed according to best practice

ASWA suggests that a meaningful step forward would be to form a panel of professional experts (anthropologists and archaeologists and Departmental personnel) that draw up templates and guidelines that suit different types of work proposals/land-uses which can easily be slotted into agreements.

ASWA welcomes the proposal that the AHC will be tasked to promote heritage to the wider community, provide training and generally be pro-active in developing a positive platform for WA's Aboriginal heritage. To emphasise this, ASWA recommends that the



The Anthropological Society of Western Australia

long title of the new Act, incorporate the promotion of Aboriginal heritage as a core purpose.

ASWA would like to stress, however, that the AHC will need adequate funding, the requisite skills and adequate support from the Department in order to undertake its many functions efficiently and to meet the desired outcomes.



The Anthropological Society of Western Australia

3(C): The Minister's Role

The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in Western Australia, but may delegate certain decisions and functions to the Aboriginal Heritage Council.

ASWA agrees with the proposition that the Minister should have overall accountability and decision-making powers in respect of Aboriginal heritage in the context where decision-making is being devolved into the LAHS, with the support and oversight of the AHC, to which the Minister may delegate powers. ASWA is also supportive of the Minister retaining decision-making powers for projects of State Significance and where a land use proposal may result in significant damage to Aboriginal heritage.

ASWA agrees that transparency in respect of land use decisions with the publication of reasons for decisions is important for the successful operations of the system and believes that the lack of transparency is a major flaw with the present regime. ASWA is also supportive of the notion that the Minister would be able to issue stop work order in cases where Aboriginal cultural heritage is threatened by unauthorised land use activities.

ASWA also welcomes the concept that the Minister has an important role in the promotion of Aboriginal heritage, something that profoundly lacking the current heritage system.

ASWA hopes that the proposed new role for the Minister will facilitate the effective and efficient operations of the Aboriginal heritage system.



The Anthropological Society of Western Australia

3(D): Role of the Department of Planning, Lands and Heritage

The Department of Planning, Lands and Heritage remains responsible for the day to day operation of the Act.

ASWA agrees with the proposal that the Department of Lands, Planning and Heritage (Department) should be responsible for the day to day operations of the new Act and should provide support to the Minister, the AHC and the LAHSs.

ASWA shares the view that the Department is currently inadequate resourced in terms of numbers and qualification of staff. One of our senior members recalls being told, some years ago, by the then Registrar of Aboriginal sites, that the Department's staff did not have the skills to interpret an ethnographic report. Our members report numerous examples which would indicate that this situation continues. For example, from time to time, on behalf of Aboriginal communities and other clients, ASWA members review 'Place Summaries' prepared by the Department as part of the process of evaluating the importance and significance of reported places. A common concern of ASWA members is that the Department's 'Place Summaries' do not evidence appropriate levels of anthropological or ethnographic competence. ASWA has, on a number of occasions, offered to assist the Department with staff development and skill formation.

The Department will need to be adequately funded and resourced and have the necessary levels of expertise and skills in order to fulfil its role to adequately and competently support the Minister and the AHC in respect of:

- ❖ the strategic oversight of the Aboriginal heritage system;
- ❖ undertaking strategic and operational policy development and capacity building in the system;
- ❖ ensuring timely and efficient performance of the functions of Local Aboriginal Heritage Services where no such service exists; and
- ❖ maintaining the register as a reliable source of data on Aboriginal heritage and actively enforcing the provisions of the Act.



The Anthropological Society of Western Australia

ASWA hopes to see the Department working in a cooperative manner with Aboriginal community groups, proponents, Heritage Professionals and other interested parties to achieve a level of professional consistency across the Aboriginal heritage system in Western Australia.

With adequate funding, staff resources and the appropriate levels of skills and competence, ASWA believes that the Department can achieve the desired outcomes. ASWA notes that the integration of Aboriginal heritage into the Department has already initiated important and positive changes.



The Anthropological Society of Western Australia

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

Aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the Department's website a public Directory of Heritage Professionals and the standards required for heritage investigations, community consultation and reporting of heritage information.

For many years, ASWA has suggested that there ought to be a public Directory of Heritage Professionals and explicit standards for heritage investigations, community consultation and reporting. ASWA has, on a number of occasions, offered to work with the Department in developing standards of consultation, research and reporting. There was a period in the late 2000s when there was a high degree of cooperation between ASWA, the archaeological professional organisations and the Department. This cooperation resulted in a series of seminars being jointly organised with a view to promoting professional standards. However, recent years have been marked by a decided exclusion of the heritage professions and a marked insularity on the part of the Department. ASWA therefore welcomes the Government's inclusive and consultative reform agenda.

ASWA agrees that to qualify for listing on the Directory, hosted by the Department, Heritage Professionals should be required to show transparent evidence of relevant qualifications and experience in anthropology or a cognate discipline (e.g., sociology). ASWA also accepts that the Department ought to accept information received from a person not on the Directory if it meets the required standard as stipulated by the AHC or as set out in regulations to the new Act. ASWA agrees that regulations to the new Act may address the matter of information standards. ASWA welcomes the opportunity to participate in policy discussions which may inform the establishment of regulations relating to information standards, professional qualifications, community consultation, CHMPs and heritage investigations.



The Anthropological Society of Western Australia

ASWA also agrees that the Department ought to advise on what studies and standards it requires in order to progress decisions about the future management of heritage at the locations of proposed land use applications. However, ASWA also stresses that the relevant qualifications and experience that are expected of Heritage Professionals, should also be expected of Departmental staff.

ASWA welcomes the proposal that peak professional bodies will work with the Department to develop guidelines and standards of service and that these will be endorsed by the proposed the Aboriginal Heritage Council. In addition to ASWA, it is recommended that the Department also consults with the Australian Anthropological Society and such bodies as the Centre for Native Title Anthropology (ANU), as well as the relevant archaeological professional bodies. ASWA welcomes, as part of the process of inclusion and consultation, the Department's recent establishment of the Heritage Practitioners Reference Group as an important first step in the process of cooperation.

ASWA believes that the proposals outlined in this section will help deliver the desired outcomes of improved outcomes for Aboriginal heritage; the elimination by market selection of substandard consultants and ensure that there is no regulatory burden. However, ASWA is of the view that a degree of adaptability is required on the part of all of those involved to ensure that the desired outcomes are achieved and that ongoing review and enforcement will be required.



The Anthropological Society of Western Australia

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

- a) Rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register to reflect the proposed shift of emphasis from 'sites' to the revised scope of the legislation.**
- b) The Aboriginal Heritage Council will set and regulate reporting standards and improve the accuracy and utility of the register as a mechanism for Aboriginal people to record their heritage and as a land-use planning tool.**

ASWA agrees with the proposal to rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register. This reflects the broader scope of heritage considered by the new Act, inclusive of the statutory recognition of plans for the management of Aboriginal heritage.

The premise of having an Aboriginal Heritage Register is that the State of WA is providing for rules and obligations, defined in legislation and regulation, to apply to the heritage registered. The principle that all Aboriginal heritage has prima facie value for the State regardless of registration is complimented by the principle that, upon registration, an evaluation of the value of the Aboriginal heritage is to be conducted in order for the Aboriginal heritage to continue to receive the State's protection.

Therefore, regardless of what is to be defined as Aboriginal Heritage the assessment regime will determine which Aboriginal heritage will receive the State's on-going protection. The proposals related to Proposal 4 do not describe or address the assessment regime to be implemented in the on-going day to day administration of the Register. The proposals related to Proposal 4 do not provide for the regulation of the Department's assessment process and practice. Failure to address this matter perpetuates the core problem of the Register, that of trust.

The proposals related to Proposal 4 suggest that reporting standards will be established and regulated via the AHC. ASWA supports reporting standards, but is concerned that



The Anthropological Society of Western Australia

the mere presentation of “up-to-standard information” about Aboriginal heritage is insufficient if the assessment regime is opaque, or is poorly conceived and administered.

ASWA notes the reference to information about Aboriginal Heritage, which is reported to the Department, not being entered on to the Register if it does not meet minimum information standards. This suggests that Aboriginal Heritage may exist, which by virtue of its reportage to the Department, is known to the State, but due to perceived issues with the adequacy of information, would not receive the protection of the State as it would not ‘qualify’ for registration. ASWA is concerned that this requirement to satisfy information requirements appears contrary to the policy principle of protection regardless of registration.

The regulations that set out the assessment regime will need to remove these policy ambiguities and opportunities for selective variations in Departmental practice in order that the Register is a trusted instrument for the management of Aboriginal heritage and culture in the State.

ASWA recommends that the new Act establish clear provisions regulating the assessment regime for the registration Aboriginal heritage and CHMPs. ASWA also recommends that all assessments for registered Aboriginal heritage are publicly available. Such regulations should require that the Department publish its reasons for the inclusion or exclusion on the Aboriginal Heritage Register the heritage referred to it.

ASWA understands that the current process for registering information about Aboriginal heritage involves three primary steps.

1. Data is collected and recorded at location, generally by parties other than Departmental officers and then reported to the Department.



The Anthropological Society of Western Australia

2. The Department receives the reported information and undertakes a data entry process, including selecting which elements of the information reported are to be added to the electronic version of the register, which information is to be kept as hard copy and which spatial information is to accompany the information.
3. The Department then applies its own information management policies, eg, relating to confidentiality and/or gender, to govern public access to the information.

At each step in this data entry process the Department takes decisions critical to the information provided and acts as a third, possibly “unseen”, hand in the final version of the information “registered”.

The Department should refrain as much as is possible from acting as a third hand in the registration of Aboriginal heritage information. The Department should focus its resources and activities on assessment of information, not on the internal creation of information provided/reported by external parties.

The functionality of the Aboriginal Heritage Register should enable direct data entry (ie, on-line) by anyone seeking to report Aboriginal heritage. The existence of an information standard for Aboriginal heritage should provide sufficient clarity about the type and character of information required to enable direct data entry. The functionality should enable the Department to assess the information submitted, request further information or clarification as appropriate and enable spatial information tools to accompany submitted information. Upon agreement that the reported information meets the information standard set by the AHC, the Department can then assess the merit/value of the Aboriginal heritage.

The provision of such functionality should be the focus of the Department’s continuous improvement programme to the Register. The provision of such functionality should



The Anthropological Society of Western Australia

enable the registration of Aboriginal heritage to be distributed and not tied to the availability of Departmental resources. Of course, the Department will always be able to undertake registration activities and provide a paper based registration service for anyone who is unable to use the direct data entry options.

ASWA recommends that the Aboriginal Heritage Register be established to enable distributed data entry, with appropriate functionality to enable the reporting of Aboriginal heritage to meet agreed information standards. ASWA also recommends that the Department actively seek to transfer the registration activity to those reporting Aboriginal heritage, and re-focus its activities on assessment of its value under the new Act.



The Anthropological Society of Western Australia

5: Introduce a referral mechanism to facilitate tiered assessments of proposed land-uses

- a) Introduce a referral mechanism to facilitate tiered assessments of proposed land-uses, with early advice (non-binding) provided by the Department or Aboriginal Heritage Council on standards of consultation and / or research necessary to support the approvals process for a development.
- b) Non-compliance with standards of consultation or documentation will result in the application not being accepted and the clock will stop on any agreed timeline until correct documents are submitted.
- c) A 'call in power' will ensure that proposals that should have been referred, but have not been, can be assessed.

ASWA supports the proposal to introduce a referral mechanism to facilitate tiered assessments of proposed land-uses, backed up by determined standards of consultation research and documentation and a 'call in power'.

ASWA accepts that this proposal seeks to streamline approvals processes that are unlikely to be contested or problematic, cutting out a level of burdensome bureaucracy and overcome the limitations of the current Act which does not for proposed land uses that will have a low impact on heritage. ASWA agrees that best practice is to focus on avoiding and minimising impact on heritage wherever possible. As a result, advice on how land use proponents can achieve this is needed earlier in the project planning cycle. This advice needs to be based on the known or predicted Aboriginal heritage values of the land and the nature of the proposed land use. It is therefore crucial if such a referral system is to work that the Department be adequately staffed and resourced and that staff have the necessary skills and competence to assess the known or predicted Aboriginal heritage values of the land.

Although ASWA acknowledges a need for a more stream-lined process, there are risks in this proposal. ASWA hopes, for example, that the proposed risk-based and tiered assessment of land use proposals does not lead to the situation evident with the current 'Heritage Risk Assessment Matrix' in the Department's 'Cultural Heritage Due



The Anthropological Society of Western Australia

Diligence Guidelines' which has the effect of obviating the need for proponents to undertake adequate heritage assessments.

ASWA recognises that the present system essentially presents a binary choice between protection and impact. However, it is also noted that there has been enormous inconsistency in the manner in which the importance and significance of places and objects have been evaluated by the Department and the ACMC over the years. ASWA further notes that on the ground many varied solutions are worked out between local Aboriginal groups and proponents, including avoidance and the promotion of heritage values.

Each level of assessment needs to have the appropriate standards of research, consultation and reporting. However, it is important that the setting of standards is not just the prerogative of the Department but also set in consultation with the LAHS which is aware of local conditions and needs. The setting of standards for assessment must also take into consideration the cultural landscape of an area and not just what might be contained on the register at any given time. Please note the matters addressed in relation to Proposal 4 are applicable in relation to this matter.

ASWA agrees that consents to undertake an activity or range of activities will run with the land provided 'new' land users propose the same activity or range of activities. ASWA also agrees that the heritage knowledge related to the land also run with the land, for example, there should be a mandatory requirement for heritage surveys on a land parcel or mining tenement to become the property of the new owner upon transfer of the land parcel or mining tenement. However, it is suggested that there ought to be time limits associated with the transfer of land parcels and associated heritage consents. It needs to be recognised that heritage is not static; changes to landscape or the heritage inventory in an area, clearly have a cumulative effect on 'the known or predicted



The Anthropological Society of Western Australia

Aboriginal heritage values of the land'. Depending on the location and general land use, a period of five years would seem to be a reasonable timeframe.

ASWA agrees with the propositions that non-compliance with standards of consultation or documentation ought to result in an application for land use not being accepted and the clock will stop on any agreed timeline until correct documents are submitted and with the notion of a 'call in power' to ensure that proposals that should have been referred, but have not been, can be assessed.



The Anthropological Society of Western Australia

6: Encourage and recognise agreement making

- a) Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land-use proponents.
- b) The Aboriginal Heritage Council will consider and, if appropriate, ratify agreements where land-users wish to rely on an agreement to expedite approvals under the new Act.

ASWA welcomes the proposal to encourage and recognise agreement making between Aboriginal parties, such as the new LAHS and land users. Agreements do provide an opportunity to land use requirements without damaging Aboriginal heritage. Though the existing AHA does not recognise such agreements, there are many instances where local agreements are working successfully to protect, preserve and promote heritage. The negotiation of such agreements, which often include exclusion zones around places of importance and significance, in part reflect Aboriginal groups' disenchantment with, and alienation from the AHA which has largely provided for the destruction of sites. Agreements also have been negotiated as part of *Native Title Act 1993* requirements.

It is important to ensure that such agreements that may be negotiated do not negate the provisions of the new Act or other legislation, such as the Native Title Act.

While it is important to have a mechanism to enable land users to rely on an existing agreement, and agreed heritage outcomes arising from it, to expedite approvals under the new Act it is also important to ensure that existing agreements may meet the standards required by the new Act. Provisions should be made to review existing agreements that might be referred for consideration and statutory recognition under the new Act. Consequently, the AHC needs to be adequately resourced to review and ratify agreements that might be referred to it once the new Act becomes operational. Provision ought to be made to review and ratify all new local agreements.



The Anthropological Society of Western Australia

7: Transparency and Appeals

- a) Reasons for decisions are to be published.
- b) Land-users and Aboriginal people whose legal rights and interests are adversely affected by a decision will have the same rights of review and appeal.
- c) Retain the State Administrative Tribunal as the primary review body.

ASWA whole heartedly supports Proposal 7. These changes are long overdue as ASWA understands that around 2006 the ACMC made formal recommendations to the Department for its decisions to be published. The current system does not recognise Aboriginal people rights and interests in land in relation to the decisions of the ACMC and Minister. Procedural equity and transparency are essential for the efficient workings of the heritage system. In this regard the publication of the reasons for decisions is also essential. As it proposed that strict timelines are to be imposed on reviews and appeals it is vital the LAHS are adequately resourced to meet the timelines.

ASWA agrees that the State Administrative Tribunal (SAT) ought to be retained as the primary review body. However, ASWA recommends that the SAT, where appropriate, be able to formally co-opt the expertise of persons who have accredited heritage qualifications and experience. ASWA also recommends that the SAT be able to co-opt suitable persons to address Aboriginal knowledge and gender matters in culturally appropriate decision making processes. ASWA would also like to see a formal mediation process introduced where there are disagreements between Aboriginal groups and proponents with a view to resolving issues that might have to go to the SAT on appeal. Such a service ought to include heritage professionals, legal experts, mediation specialists and experienced Aboriginal representatives, independent of any party to the conflict and the Department.

ASWA believes that the proposals outlined above will greatly ameliorate the present situation, where Aboriginal people feel alienated from heritage decision making.



The Anthropological Society of Western Australia

8: A Modernised Enforcement Regime

- a) Create a modern enforcement regime by ensuring offences and penalties are brought into line with the *Heritage Act 2018* and other modern statutes.
- b) The statutory limitation period is extended to 5 years.
- c) Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage.

ASWA supports the above proposals. The defence of ignorance in respect of proceedings for an offence against the AHA as detailed in s62 is highly anachronistic and inappropriate. This is particularly so when proponents' obligations in respect of Aboriginal heritage have for some years been integrated into development processes, such as town planning. Clearly there may still be circumstances where proponents have done 'everything reasonable' to inform themselves regarding heritage matters, in which case a defence of ignorance is reasonable. ASWA also supports increasing the limitations period to five years and the reinforcement that place need not be on the register for the offences to apply. ASWA also support the position that even if there is insufficient information about heritage reported to the State, the offences of the new Act apply.

ASWA also strongly supports the proposal to increase the penalties for offences against the Act, while maintaining current range of offences. There ought to be at least parity between penalties for damage to Aboriginal and historic heritage. We agree that courts should be able to:

- a. impose a fine of up to \$1 million, with a daily penalty of \$50,000, on a person found guilty of an offence;
- b. impose a fine of up to \$1 million and imprisonment for one year, with a daily penalty of \$50,000, on a person found guilty of contravening a stop work order made by the Minister for Aboriginal Affairs;



The Anthropological Society of Western Australia

- c. order a person to take specific measures to restore a place, or any specified land, feature, building or structure, or to return anything to the place, so that the place is restored to the state in which it was before the offence occurred;
- d. order compensation for the damage or loss of heritage, wholly or in part.

Aboriginal people frequently query why compensation for damage to significant places is not currently available. The provisions for compensation and restoration are welcome additions to the penalty provisions of the Act.

The proposal that restrictions on the development or use of land for a period of not more than ten years should apply to persons and corporations who have been convicted of an offence is, we believe, an important and effective addition to the armoury of heritage protection measures.

We agree that the concept of Honorary Wardens is anachronistic and ought not be carried into the new legislation. However, given the remoteness and inaccessibility of various parts of the State the Department should look for ways of working in cooperation with Aboriginal Ranger programs in conducting compliance inspections and proceedings.



The Anthropological Society of Western Australia

9: Protected Areas

- a) It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation.
- b) A new regulation will be created to authorise specific management activities by the relevant Aboriginal people.

It is generally recognised that the current system of Protected Areas does not work as they would seem to be subject to the same section 18 provisions as other areas of land. Additionally, the ongoing management of such areas has proved difficult under current arrangements.

ASWA agrees with the proposition that there is needed to recognise areas of outstanding Aboriginal heritage importance and afford them robust legislative and on-ground protection. However, any declaration of a Protected Area ought only to be done with the consent of the native title holders or custodians of the place. Declarations of Protected Areas should also be subject the statutory registration of a CHMP for the Area.

ASWA welcomes the development of provisions to declare areas of significance Protected Areas and to ensure their on-going management through appropriate regulations. The provision with the new Act of the statutory recognition of CHMPs, including a regime for breaches of CHMPs, will demonstrate the value of these places to the cultural heritage of the State.

Regulations should allow for the development of co-management arrangements with the relevant Aboriginal groups. We would also like to see provisions that ensure that once a place is determined to be a Protected Area its status should not be changed or its boundaries altered or portions excised other than by an Act of Parliament or on appeal to the SAT in addition to any consent being given by the Minister.