



Department of
**Local Government, Sport
and Cultural Industries**

Enquiries Mel Walley-Stack
Phone 08 6552 1452
Email Melanie.walley-
 stack@dlgsc.wa.gov.au

Ms Gail McGowan
Director General
Department of Planning, Lands and Heritage
Locked Bag 2506
PERTH WA 6000

Dear Ms McGowan

Gail

Discussion paper – Review of the *Aboriginal Heritage Act 1972* – Phase Two

Thank you for the opportunity to provide comment on the Discussion paper for phase two consultations on the *Review of the Aboriginal Heritage Act 1972*.

The Department of Local Government, Sport and Cultural Industries (DLGSC) has reviewed the Discussion paper and provides feedback attached (**Attachment 1**).

For further information please contact Ms Mel Walley-Stack on melanie.walley-stack@dlgsc.wa.gov.au or phone (08) 6552 1452.

Yours sincerely

Duncan Ord OAM
Director General

27 May 2019

Department of Planning, Lands and Heritage Received	
Scanned	12 JUN 2019
Attachments	<input type="checkbox"/>
Scan QA	<input type="checkbox"/>
Doc No.	<input type="checkbox"/>
File No.	DP/13/00772

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G McGOWAN

Gordon Stephenson House, 140 William Street
PO Box 8349 Perth Business Centre, WA 6849
Telephone (08) 6552 7300
Email info@dlgsc.wa.gov.au
Web www.dlgsc.wa.gov.au

Department of Local Government, Sport and Cultural Industries
Feedback on Phase Two Consultations on the
Review of the *Aboriginal Heritage Act 1972* (AHA)

The Department of Local Government, Sport and Cultural Industries (DLGSC) is broadly supportive in principle of the reforms outlined in the discussion paper, however we would welcome more information on how the reforms will operate in practice.

It is suggested that further information is provided to all stakeholders to provide clarity on the proposed changes including providing an outline of the structure, roles and responsibilities of each governing body (proposal 3a to 3d) and a diagram/infographic demonstrating how the different bodies interrelate, workflow functions and an explanation of what decisions are ultimately up to each governing body.

Ref	Proposal	Response	Comments
1	Repeal the AHA and deliver new Aboriginal heritage legislation	Supported	The AHA predates the Native Title act 1993 and hence creates un-necessary ambiguities in relation to consultation on heritage matters.
2	Update definitions and scope of new Aboriginal heritage legislation	Supported	The new act needs to reflect a more contemporary view of Aboriginal heritage values and go beyond a focus on sites.
3a	Local Aboriginal Heritage Services (AHS)	Supported in principle	<p>The Department supports the decentralisation of decision making and empowering local Aboriginal people to provide their voice on their cultural heritage, however, failure to adequately implement this proposal could result in division in local Aboriginal communities. Further consideration needs to be given to:</p> <ul style="list-style-type: none"> - what will the mechanism look like that ensures 'the right people to speak for Country' and who decides the mechanism; - where multiple Prescribed Bodies Corporate's (PBC) exist in a region, what mechanisms will be put in place to select an organisation to act as the local AHS; - what process will the Department follow where native title rights have not been determined, where contention exists on the most appropriate people to consult, or where lack of consensus exists regarding decisions;

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			<ul style="list-style-type: none"> - what locally based support (from Government) will be provided to assist AHS bodies with administrative processes, - what constitutes 'cultural authority' over an area and who determines this – community or government; - in significant heritage sites such as Moore River or Rottnest which have historical connections for many Aboriginal people and families, how will 'the right people to speak' be ascertained; - what mechanism will Aboriginal people have to lodge grievances or to register claims outside of the local AHS process; - are the schedule of fees set at a local level or by DPLH.
3b	Aboriginal Heritage Council (AHC)	Supported in principle	<p>The Department considers that system oversight and oversight of the Aboriginal Heritage Register are responsibilities that should sit with DPLH.</p> <p>Further consideration needs to be given to:</p> <ul style="list-style-type: none"> - what is the selection criteria for appointment to the AHC; - how will the Department ensure suitably qualified Aboriginal people with cultural knowledge are appointed as a priority, and will this be given equal weighting to people with experience in disciplines such as anthropology and archaeology; - although the AHC is not intended to be representative a mix of members is required with experience in metropolitan, regional and remote heritage; - does the AHC determine its 'strategic focus' independent of government input.
3c	The Minister's role	Supported	The Department agrees that the Minister's reasons for decisions should be published.
3d	The role of the Department of Planning, Lands and Heritage (DPLH)	Supported in principle	<p>To ensure adequate support is provided to local AHS consideration should be given to us of regional office structures that support the provision of local heritage services.</p> <p>Further information is required on:</p> <ul style="list-style-type: none"> - in an area where no local body exists, or in circumstances where a local AHS does not perform its functions, what mechanisms will DPLH put in place to ensure the appropriate people are adequately consulted.

3e	Heritage Professionals	Supported in principle	The Department considers this proposal needs more clarification, noting that inclusion in the directory is not compulsory, does not constitute an endorsement or warranty, and does not result in the regulation of fees.
4	<p>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.</p> <p>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.</p>	<p>Supported</p> <p>Supported in principle</p>	<p>Part a - no comment.</p> <p>Part b -</p> <p>Many community members are hesitant to register known sites, further information is required on:</p> <ul style="list-style-type: none"> - how sacred / restricted information is managed, recorded and publicly displayed in the register; - transparency is required in the event that sites are deregistered, including publishing the reasons behind this and providing the Aboriginal community with the opportunity to publish their reasoning on the significance of sites in response; - mechanisms to bolster legacy / older records are required, in order to protect and preserve heritage.
5	<p>(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.</p> <p>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.</p> <p>c) A 'call in power' will ensure that proposals that should have been</p>	Further information required	To make a fully informed decision stakeholders would benefit from a graphical document illustrating how the referrals, decisions and approvals flow between each tier and what constitutes/determines neutral, low and high impacts in risk based assessments. At what point are proposals formally assessed, and is the local AHS or DPLH the first point of contact for all proposals?

	referred, but have not been, can be assessed.		
6	<p>Encourage and recognise agreement making</p> <p>a) Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land use proponents.</p> <p>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.</p>	Supported in principle	The level of detail provided in the discussion paper is limited. It would assist if minimum standards, dependent on the nature of the activity were included.
7	<p>Transparency and Appeals</p> <p>a) Reasons for decisions are to be published.</p> <p>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.</p> <p>c) Retain the State Administrative Tribunal as the primary review body.</p>	Supported in principle	<p>What mechanisms will be implemented to ensure 'the right people' are consulted on decisions, and receive notice of those decisions (as per comments 3a)</p> <p>21 day written objection period – if a formal challenge is required to be lodged in this timeframe (with legitimate reasoning behind an objection), more time might need to be afforded to the community to be able to gather information and respond appropriately.</p>
8	<p>A modernised enforcement regime</p> <p>a) Create a modern enforcement regime by ensuring offences and penalties are brought into line with the <i>Heritage Act 2018</i> and other modern statutes.</p>	Supported	<p>Penalties must be clearly specified in the Act through regulation powers.</p> <p>Requirements need to be implemented for proponents to clearly and fully brief contractors to limit 'ignorance' as a defence.</p>

	<p>b) The statutory limitation period is extended to 5 years.</p> <p>c) Conducting compliance inspections and proceedings will be the responsibility of the DPLH</p>		
9	<p>Protected Areas</p> <p>a) It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation.</p> <p>b) A new regulation will be created to authorise specific management activities by the relevant Aboriginal people.</p>	Supported in principle	<p>The Department supports the authorisation of access to Aboriginal custodians at the time of declaration of a Protected Area.</p> <p>Consideration should be given for including Aboriginal cultural consultation within Planning legislation to deal with impacts on culturally significant landscape to avoid such consideration being left to the approvals stage of development rather than being considered earlier in the Planning phase where avoidance of impact is more likely to be achieved through agreement.</p>