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HISTORY COUNCIL OF WESTERN AUSTRALIA SUBMISSION REVIEW OF ABORIGINAL HERITAGE ACT 1972

The History Council of Western Australia is the peak body for historians in this state. We are among the interested professional groups that include archaeologists, anthropologists and heritage professionals who wish to see Western Australia's Aboriginal Heritage Act (1972) revised and if necessary rewritten to provide better and wider ranging protection for Aboriginal heritage in general.

We have viewed with considerable concern the attempts to revise the Aboriginal Heritage Act (AHA) in recent years, which in our view came close to rendering the legislation irrelevant, and hence we welcome the opportunity to offer our views on how the Act might be improved.

We note that this is the first stage of community consultation and will address the questions in the March 2018 Consultation Paper, in which we have particular knowledge.

Q1. Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?

Long title: An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.

Is it necessary to include a long title? We note that the Victorian *Aboriginal Heritage Act 2006* (incorporating amendments to 2017) does not. Its purposes are spelt out in Part 1 of the Act.

Q2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?

We believe that it is essential that the relevant Traditional Owners be consulted about their heritage places and that local community committees be established. We agree that these should potentially draw on 'determined native title holders; registered native title claimants; persons named as informants on Aboriginal site recording forms held in the Register; and any other Aboriginal people who can demonstrate relevant cultural knowledge in a particular area' as suggested.

We are concerned about the question of who should comprise the parties responsible for bringing matters requiring consideration under the AHA to the attention of the Aboriginal Cultural Material Committee (ACMC) and ultimately the Minister.

Aboriginal people from throughout the State have been selected since 1972 on the basis of traditional knowledge and relationship to country, to take part in heritage surveys, usually with anthropologists, archaeologists and/or historians who collate and write the reports involved for consideration by the ACMC, on behalf of government or private clients whose development interests may involve seeking clearances under various sections of the Act.

One example of the selection process for such surveys is through the Noongar Standard Heritage Agreement (NSHA), which was negotiated by the South West Aboriginal Land and Sea Council (SWALSC), the Noongar Agreements Groups and the State Government "to ensure compliance with the Aboriginal Heritage Act and Regulations where a planned land-use activity may impact an Aboriginal site". By its own definition, the NSHA provides:

- "a uniform and efficient approach to the conduct of Aboriginal heritage surveys
- streamlined land approvals in compliance with the Aboriginal Heritage Act 1972 and Aboriginal Heritage Regulations 1974;
- consistency with the WA Government's Aboriginal Heritage Due Diligence Guidelines
- all parties with a clear, timetabled framework about their various obligations
- [and] a process to ensure the submission of relevant site and Aboriginal object information for inclusion on the Register of places and objects - available via the Aboriginal Heritage Inquiry System."

In practice, however, we are reliably informed, by an experienced anthropological consultant, that:

'Essentially how it now works is that whoever is at the SWALSC working party meetings self-select themselves when survey requests come across the table, despite knowledge and connections. Anthropological advice and historical precedent play no part in this as SWALSC staff are bound to take direction from these working parties.

If a list of the working party representatives was obtained under F(reedom) O(f) I(nformation) and compared against lists sent out by SWALSC it would show that most people selected, or at least their close friends and immediate kin, sit on these groups. It has nothing to do with knowledge or being an informant for sites.

DPLH [Department of Planning, Lands and Heritage, with responsibility for Aboriginal heritage] informants are rarely selected ... Also, membership of these boards seems to fail the test of having a direct link to an apical [ancestor] ... the state has tried to make SWALSC the one-stop-shop where they are supposed to be an ethical body that determines heritage based upon research, however it is very obvious it's based upon political position only, corruption by the big man in the village syndrome.'

This situation could be rectified — as with prosecutions under the Act — by an expression of will; what needs to be done, as the consultant says, is simply for real selection guidelines involving genuine knowledge of country to be set in place — and followed — by government and land council officials.

If land councils continue to be used, the same guidelines should be in place for all land councils in Western Australia, as well as for Aboriginal members of the ACMC charged with assessing AHA matters relating to their own traditional country, to remove any question of conflict of interest.

If local committees with a direct link to the ACMC were established and a representative from the relevant local committee was responsible for taking development applications back to their local committee for discussion and comment, the problems referred to above may be avoided.

Q3. To what extent has the provision to appoint honorary wardens been effective and how can it be improved?

We are concerned that in the entire state, there are currently only two registered wardens and that they are severely under resourced. We note that in the past there were many more wardens. Their numbers may have been reduced because of the ministerial level of power they are given under the existing act. This level of authority may not have been appropriate.

There are Aboriginal ranger programmes throughout the state and this could provide a model for change, providing that rangers were provided with sufficient authority and resources to protect, monitor and manage Aboriginal heritage.

Q4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?

Our concerns include the function and working of the Aboriginal Cultural Material Committee (ACMC), which was originally comprised of Aboriginal and expert members such as qualified and experienced anthropologists, archaeologists and historians, with a departmental head as chair. They would meet each month and make recommendations to the Minister for Aboriginal Affairs as to whether sites potentially endangered by development proposals could be damaged or destroyed.

We are concerned that the composition of the ACMC has changed and no longer includes any members chosen for their disciplinary expertise.

A principal complaint about the ACMC we understand however, has been that its Aboriginal members have come from throughout the State; this has led inevitably to Noongar people from the south-west, for example, being asked to decide on projects outside their home country in areas such as the Pilbara, and vice versa.

We understand this could have been at least partly revised by in effect localising Aboriginal committee member deliberations to projects and sites within their own areas. If local committees were established to report to the ACMC as required the problem might also be overcome. Instead what has happened gradually is that the ACMC itself has been side-lined and its membership diminished in expert terms.

Discussions with people involved in Western Australian Aboriginal heritage matters indicate that there is considerable room for improvement; it is not, and never has been, fair to Aboriginal members of the ACMC to be asked to consider matters concerning places outside their own traditional country, even with expert professional assistance.

Q5. Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

Section 5 does not adequately cover intangible heritage, as discussed later. Even the name of the ACMC emphasises material culture. Oral traditions, language, performing arts, storylines, dreaming tracks, trading routes, cultural landscapes and environmental knowledge should also be protected under the Act, as they are in Commonwealth and Victorian state legislation.

Q9. What sort of activities that may affect an Aboriginal site should require consent or authorisation?

All activities by non-Aboriginal people that may affect an Aboriginal site should require consent and authorisation.

Q10. What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?

This should be determined by the level of significance attached to a particular place or site and the extent of intrusion or damage to a site. The Act should include a definition of 'significance' including values and criteria. We note that the Burra Charter can provide guidance.

Q11. How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?

The mechanisms and processes in place in Commonwealth and Victorian State Heritage legislation may provide useful guidance in dealing with intangible heritage.

Q12. Who should provide consent or authorisation for proposals that will affect Aboriginal sites?

Ideally Aboriginal heritage should be accorded a level of significance. Decisions regarding heritage that is considered to be of local significance should be devolved to the local level, and that of regional and state significance decided by ACMC, with representation from relevant local groups. The ACMC should provide consent or authorisation of proposals that will affect Aboriginal heritage.

Q13. To what extent is the current section 18 application process effective and how can it be improved?

Unfortunately, Section 18 applications have become heavily politicised and we are concerned that Ministerial approval of Section 18 applications has resulted in considerable damage to listed Aboriginal sites, whether through incremental change or damage or wholesale destruction. Some sites are of such outstanding significance that they should be beyond the authority of any Minister. On the other hand, there are occasions when development on sites of lesser significance may be appropriate if they are managed sensitively to minimise intrusion and damage. This should be spelt out in the Act by introducing levels of significance.

Q15. Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?

The existing legislation made it an offence to damage an Aboriginal site, even if unregistered or unlisted. But while a number of offences have occurred over the years, there have been few if any prosecutions — partly because of the 12-month statute of limitations applying to the legislation, but mostly because of a lack of will among bureaucrats and politicians.

We consider that such prosecutions should be launched as a matter of course whenever violations of the Act are detected.

Q16. Are the current penalties under the Act adequate? If not, how can they be improved?

One of our major concerns is with the question of penalties for offences under the Act. The penalties stated in the Act are totally inadequate and should be substantially increased.

They should at least have parity with those proposed in the *WA Heritage Bill 2017*, in which damage to a Registered Place will attract a fine of \$1,000,000 and contravention of a protection order will attract one year's imprisonment.

Major fines under the AHA, however, could be proportionate, that is, they could be defined as a proportion of company profits. The penalties under the AHA should include imprisonment, so that they are seen as a genuine deterrent.

Q18. Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?

The criteria for assessment of significance are not sufficient. The existing Act does not provide for levels of significance. It treats all sites and objects as the same rather than considering their local, regional or even state significance. These should be defined.

At present the act considers sites and objects. It should recognise Aboriginal heritage in all forms, including intangible heritage, which would include the intangible values in Aboriginal culture such as oral traditions, language, performing arts, storylines, dreaming tracks, trading routes, cultural landscapes and environmental knowledge.

Both the Commonwealth *Aboriginal Torres Strait and Islander Heritage Protection Act* and the Victorian *Aboriginal Heritage Act 2006* s79B, provide models.

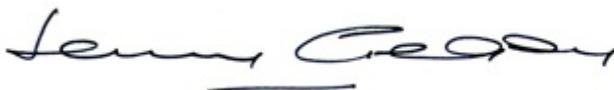
Q19. What should be the steps to report, nominate, assess, enter, amend or remove an entry from the Register

We are of the firm view that nothing should be amended or removed from the Register except after extensive consultation with the relevant Indigenous community.

In conclusion, it has long been the History Council's policy that ultimately the WA Government should take a holistic approach to heritage. Hence, the revision of the AHA should move towards parity and consistency with the *WA Heritage Bill 2017* currently before parliament. To do otherwise seems to deny that Aboriginal heritage is part of Western Australian heritage.

Thank you for the opportunity to express our views on these important matters.

Yours sincerely



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