



Kimberley Land Council

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Review of the *Aboriginal Heritage Act 1972* (WA)

Kimberley Land Council Submission

Introduction

On 13 March 2018, Hon. Ben Wyatt MLA, Minister for Aboriginal Affairs (**Minister**) announced a review of the *Aboriginal Heritage Act 1972* (**Review**). The stated aim of the Review is to modernise the AHA so as to be respectful of Aboriginal people and ensure that their heritage is recognised, protected and celebrated by all Western Australians. The Minister aims to have the amended legislation passed by both houses of Parliament by the end of 2020.

Kimberley Land Council

The Kimberley Land Council (**KLC**) was formed in 1978 by Kimberley Aboriginal people as a political land rights organisation. Today, the KLC has grown to become the peak Indigenous body in the Kimberley region working with Aboriginal people to secure native title recognition, conduct conservation and land management activities and develop cultural business enterprises. The KLC is a Native Title Representative Body for the Kimberley Region under section 203AD of the *Native Title Act 1993* (Cth). Given the subject matter of the Review, and the KLC's membership prerogative, the KLC is particularly well placed to make submissions in relation to the Review.

Scope of these submissions

These submissions are not intended to be comprehensive in scope; they are intended to provide a high-level introductory response to some of the questions raised in the Minister's March 2018 Consultation Paper. The KLC intends to make further and more detailed submissions on the issues of greatest concern to the KLC's constituents during subsequent rounds of consultation.

Overview of the *Aboriginal Heritage Act 1972* (AHA) as the current Aboriginal heritage protection scheme in Western Australia

1. The purpose of the AHA is to make provision for the preservation of, on behalf of the community, places and objects of significance to Aboriginal persons. It seeks to do this firstly by providing a definition in Part II of the AHA of the places, sites and objects to which the AHA applies (whether or not those sites are registered under the AHA).

2. Part IV of the AHA provides that all people (with the exception of Aboriginal people if their laws and customs require otherwise) must report the existence of any sites, places and objects to which the AHA might reasonably apply.
3. Part III of the AHA requires the Minister, through the Registrar of Aboriginal Sites and the Aboriginal Cultural Material Committee (**ACMC**), to record any Aboriginal sites. The ACMC is tasked under Part V of the AHA with evaluating on behalf of the community the importance of sites, places and objects and to recommend to the Minister whether or not those sites should be registered under the AHA.
4. Part IV of the AHA provides that it is an offence to affect (for example, damage, remove, alter or conceal) an Aboriginal site, however, a defence against prosecution under Part VII of the AHA is a lack of knowledge or reasonable expectation of knowledge of a site. Where the existence of an Aboriginal site is known, Part IV provides that a landowner (including any tenement holder) may apply to the ACMC for the consent of the Minister to affect (for example, damage, remove, alter or conceal) an Aboriginal site. Finally, Part IV provides that sites of outstanding importance may be recommended by the ACMC as protected areas.

Recommendation for substantive reform to the Aboriginal heritage protection scheme in Western Australia

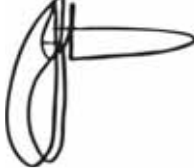
5. The KLC calls for substantive reform to the Western Australian Aboriginal heritage protection scheme to ensure protection principals and processes align with Aboriginal traditional beliefs and custom, international standards, and certain elements of federal and state heritage legislation.
6. The AHA, being from a pre-native title and pre-racial discrimination legislation era, is fundamentally flawed and should be repealed and replaced, rather than amended piecemeal.
7. The new heritage legislation should address the following:
 - a. The overriding purpose of the legislation should be the protection of Aboriginal sites for the benefit of Aboriginal people, rather than the destruction of sites based on the interests of the “community” at large;
 - b. Significance of sites should be assessed by reference to Aboriginal traditional beliefs and customs, and not require any additional Western criteria such as consideration of academic or aesthetic values;
 - c. The new heritage legislation should explicitly add the notion of “sites **and areas**” being protected;
 - d. The new heritage legislation should incorporate the following principles in the United Nations Declaration of Rights of Indigenous People should be incorporated:
 - i. Article 11, which provides that Indigenous peoples have the right to practice and revitalise their cultural traditions and customs, including the right to maintain and protect archaeological and historical sites and artefacts;

- ii. Article 12, which provides that Indigenous peoples have the right to maintain, protect, and have access in privacy to their religious and cultural sites, and the right to use and control their ceremonial objects;
 - iii. Article 19, which provides that States should consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them; and
 - iv. Article 31, which provides that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. This article also provides that States should, in conjunction with Indigenous people, take effective measures to recognise and protect the exercise of these rights.
- e. All traditional owners (those who can show a connection to country) that may be affected should be guaranteed meaningful consultation, and a formal, if not a determinative decision-making role in the process of determining any Aboriginal sites, protected areas and whether consent to affect those sites (for example, damage, destroy, conceal or alter) should be recommended;
 - f. The present inadequate and biased process arising out of Part IV of the Act (section 18 applications) that enables applicants to seek reviews of decisions but which does not afford the same right to Aboriginal people, should be addressed. Affected members of the relevant Aboriginal community should have standing to appeal site assessments, and applications to disturb, to an appropriate Tribunal or Court;
 - g. The classes of people who can apply to have sites destroyed under section 18 needs to be reviewed as it is presently too wide – for example, section 18 provides that holders of permits to explore can apply to destroy sites;
 - h. Enforcement of the provisions of the AHA and prosecution of offences is virtually non-existent and needs to be addressed in the new legislation. Penalties should be consistent with the *Heritage of Western Australia Act 1990* (WA). A key, long-term failure of the current AHA has been underfunding to the relevant government departments which have historically had the responsibility for the management and enforcement of the AHA
 - i. The defence of “did not know” should be removed or restricted to exceptional cases – miners, developers, government and other professional entities should be expected to be aware that Aboriginal heritage is always a matter that needs to be addressed in any significant activity. ;
 - j. The new heritage legislation should specifically deal with the issue of the cumulative effects of multiple development on sites particularly along significant waterways like the Fitzroy River;
 - k. The new heritage legislation should include a section that sets out specific measures for management or co-management of heritage sites/places and areas. Binding *Cultural Heritage Management Plans* should be required for identified sites. Depending on the land owners/developer (miner/mine site,

pastoralist, native title holders, etc.), such plans would vary in complexity and requirements;

- l. The new heritage legislation should include provision for funded Aboriginal Ranger groups operating with Registered Native Title Body Corporates (RNTBCs) to act as heritage monitors/officers, with powers to enforce the new heritage legislation.
- m. The continuing role of the ACMC needs to be reviewed. It is inappropriate under traditional law and custom for anyone other than the traditional owners of country to be making statements about the cultural values that attach to sites and areas in that country. Using the network of determined native title holders and their RNTBCs to provide assessments and recommendations to government would be an effective and efficient alternative which would align with the principles in the United Nations Declaration of Rights of Indigenous People.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tyrone Garstone'. The signature is stylized with a large, looped initial 'T' and a long, horizontal stroke extending to the right.

Tyrone Garstone
Acting Chief Executive Officer
Kimberley Land Council