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SUBMISSION BY THE SOCIAL RESPONSIBILITIES COMMISSION OF THE ANGLICAN DIOCESE OF PERTH.

Thank you for the invitation to members of the community to provide feedback and submissions on the review of the WA Aboriginal Heritage Act (AHA).

I make this submission on behalf of the Anglican Social Responsibilities Commission ("the SRC") of the Anglican Diocese of Perth (which stretches from Perth into Morawa in the north and east to the wheatbelt and the Goldfields).

The SRC is established by church statute as a commission by the Anglican Diocese of Perth to initiate and facilitate education and advocacy in the community and Anglican parishes, schools and agencies. Any comments from the SRC represent only the views of the SRC and not the Anglican Diocese of Perth.
In all our work we aim to provide a Christian perspective and a theological basis for our approaches and actions. It is from this basis that we believe it is vital to make a submission as a member of the Western Australian community on such an important area as the protection of Aboriginal heritage.

We make these submissions about broad principles which should be adopted in Aboriginal Heritage legislation and will leave the technical questions about the amendments to the legislation to others.

The need to protect Aboriginal heritage.

The SRC, and indeed the Diocese of Perth through its Synods, has a long history of support for the protection of Aboriginal heritage especially sacred places. Around Australia, there are all-too-common stories of destruction of Aboriginal sacred places and objects and misunderstandings of Indigenous culture. These instances often arise when the Aboriginal spiritualities pose an obstacle to specific developments. The principles and values involved in the clashes between sacred and profane, God and mammon, are ones that ring alarm bells for all people of faith.

A failure to protect the spirituality of Aboriginal people has ramifications for all people of faith who value the sacredness of God's earth. In any balancing between the economic benefits of development on the one hand and spirituality, dignity and culture on the other, it is vital that a short-sighted approach of favouring quick financial return does not prevail. A failure to place great value on the spirituality and culture of Aboriginal people is akin to the devaluing of all religions and cultures represented in Australia. It is therefore vital that people who value spirituality and God's creation should be informed of the issues and work to

build a community where holiness and faith matter and are not always secondary to economic development.

The AHA should build in a mechanism for realistic protection of areas and objects of cultural heritage that are not able to be simply overridden by concerns for economic or political benefits. This may be outlined in criteria to be considered and weighed in any decision-making process.

Chance to overhaul and modernise the legislation.

We note that while it was ground-breaking when first introduced in 1972, the AHA now lags far behind the modern generation of such legislation, particularly the 2006 Victorian and 2003 Queensland Acts. It was produced in an era where Aboriginal heritage was viewed with a “museum” mentality and indeed it was the Trustees of the Museum who held many of the roles under the AHA.

Since 1972, we have seen concepts and laws surrounding racial discrimination, native title, Indigenous rights, cultural heritage principles and the like develop substantially. There is now a good opportunity to overhaul the legislation and produce a new and culturally appropriate AHA.

UN Declaration

The AHA should be consistent with the principles of the UN Declaration on the Rights of Indigenous Peoples which Australia agreed in 2009 to support. For example, the following Articles of the Declaration are particularly pertinent:

Article 11:

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12:

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned

Article 18:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19:

States shall 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.

Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 31:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

The Act should have objects, purposes and a long title that makes it a clear that the overarching aim is to protect Aboriginal heritage for the benefit of Aboriginal people.

Some confusion has been caused by the AHA stating that it is for the benefit of the community, with no specific mention of the benefit for the Aboriginal people whose heritage it is. It should be made clear that Aboriginal people have primary rights and benefits under the AHA in relation to the heritage values and their protection.

We note that the modern pieces of Aboriginal heritage legislation (such as in Queensland, Victoria and the draft NSW Act) includes objects of the statutes as recognising that Aboriginal cultural heritage belongs to Aboriginal people and establishing a legislative framework that reflects Aboriginal peoples' responsibility for and authority over their Aboriginal cultural heritage. Such statements need to be included in any AHA.

Areas and objects to be protected should be those of significance to Aboriginal people and should not be defined by Eurocentric or scientific categories.

The current s5 wording of the AHA manifests a concern for the places and objects that are of appeal to the scientific community, with its emphasis on places where objects are placed or what is of importance to the Aboriginal Cultural Materials Committee. Places of ethnographic significance to Aboriginal people that are not marked by archaeological objects are limited to “sacred, ritual or ceremonial sites”. The protected areas should extend to places that are of cultural significance as is common in modern pieces of legislation so that people are not forced to fit such areas into narrowly-described categories.

Further, the concept of protecting only discrete sites can give the impression that such sites must be small and specific to particular features. However, to Aboriginal communities, often larger landscapes or areas like mountain ranges, rivers and songlines are of significance and cannot be assessed in discrete sections. General heritage concepts have expanded to cover cultural landscapes where the whole area or complex is greater than the sum of its individual parts. Most of the modern heritage legislation has also moved to refer to more widely defined “areas” rather than “sites”.

In any model of Aboriginal heritage legislation, it is vital to recognise that we are dealing with what is of significance to the traditional owners of the land or objects. Sacredness and significance should be understood in accordance with Aboriginal culture and understandings. It should not be read narrowly or in an ethnocentric manner. One of the problems of the current AHA is that it concentrates on the physical aspects and damage to places or objects rather than to the spiritual and cultural significance of the place or object. Sometimes the sacredness of the area may require people to stay away from it or not even view it: physical damage is not the only serious kind of damage.

Sacredness and other forms of significance need to be determined by the people within that culture and belief system. It would be most inappropriate for those who do not fully understand the system to be making decisions on what is correct or orthodox. In this regard, decisions about whether a place is a sacred area or object needs to be determined and assessed by the relevant Aboriginal group for whom the site is sacred.

There are well-known cases where Indigenous spiritual values and beliefs have been called into question and derided in the process, in ways that would be considered most inappropriate and disrespectful if applied to the "mainstream" religious faiths. Much has been made of divisions in the beliefs of different groups of Aboriginal people as if this casts doubts on the existence or authenticity of the faith. Naturally if the mirror was turned on the many differing Christian interpretations the same tests would be failed as well.

It should also be made clear in any definitions that Aboriginal cultural significance and heritage is vibrant and living, not something frozen in time. Similarly, areas of significance are not only those who were of significance in the past but where culture continues. The late Vine Deloria, Sioux academic, aptly commented that restricting sacred locations to places historically visited is to imply that God is dead. He lamented that a court will protect a religion if it shows every symptom of being dead, but will severely restrict it if it appears to be alive. (In Vine Deloria, 'Sacred Lands and Religious Freedoms' in James Treat (ed.), *For This Land: Writings on Religion in America* (Routledge, 1999)).

As a result, heritage assessment and assessment of what damages or desecrates such heritage significance and what are the best ways to minimise the damage must all be determined by the Aboriginal people whose laws and customs, culture and beliefs govern such significance.

Legislation should ensure that decisions about areas and objects of significance should be decided by the people whose heritage they are.

As a result of the matters raised above, the legislation must build in protections where decisions about whether there is an area of significance, or what would amount to damage or desecration of that significance, have to come from the relevant Aboriginal people.

Applications for permits or consents to carry out activities that may impact on the values and significance of areas of cultural significance should be decided not by government boards or a Minister but by the relevant Traditional Owners and custodians of the relevant areas or objects.

It would therefore be appropriate to have a system akin to that in Victoria where cultural heritage permits are made to and decided upon by local Registered Aboriginal Parties rather than by a Minister or by committees made up of people from different traditions, or worse, are not Aboriginal. Such bodies should be the body to whom applications for permits to impact heritage are made and who can make decisions on them. In this way the people whose heritage it is are the people who decide on the significance of areas and objects and what may be permissible, what impacts or what are the best ways to minimise damage. These are the bodies who should be empowered to grant permits to allow such damage.

There could be an overarching all-Aboriginal body made up of representatives from the different regions. Such a body could oversee and provide guidelines and processes for the registration of traditional owner

groups for each area. It may also act in relation to areas where there is no registered local body. Most of the modern pieces of legislation have such a body and ensure that its membership is wholly Indigenous. It would be useful to include a provision, as the draft NSW Bill does, that the body is not subject to the Minister's direction.

There should at very least be a requirement that requires notice to and consultation with the Traditional Owners and custodians with knowledge of particular areas and the cultural heritage in the area, before any permit to damage or interfere with heritage is given. Such people should also be expressly stated to have rights of procedural fairness in any decision-making body in relation to any land, objects or heritage to be affected.

Often Aboriginal people need to go to the specific location of proposed activities in order to know exactly what is being spoken of and to assess significance and potential damage. This may require a process of surveys which need to be included as appropriate methods of consultation because in the absence of such statutory requirements, proponents have sometimes refused to facilitate surveys to enable proper information and consultation.

All of the processes could be subject to appeals by proponents and by Aboriginal people but such appeals should be to an independent body like the State Administrative Tribunal, not governed by purely political considerations. The relevant Aboriginal people should be given notice and have the opportunity to participate in any such appeals if brought by other parties.

Intangible heritage.

Modern legislation also includes protection for intangible heritage and intellectual property, for example, the Victorian legislation and draft NSW Bill. Such matters such as stories, songs, rituals, designs, ecological knowledge and the like should be able to be protected from exploitation, especially commercial use. This should also be protected in an AHA.

Repatriation of heritage objects and ancestral remains to the Traditional Owners.

There should be a statement of intent to do facilitate the transfer of heritage object and ancestral remains these back to the people who are the rightful owners and people so that such things are kept and treated in accordance with laws and customs. Again, modern Aboriginal heritage legislation has provisions for such repatriation.

Also, ancestral human remains should be described as that rather than having to be protected as "objects".

Cultural confidentiality and restrictions should be protected.

The process of protection of heritage should not require people to breach their cultural rules in order to save their culture. There must be provisions which enable cultural restrictions on disclosure about places and objects of significance to be adhered to, in limiting requirements to report on areas of significance and in applications to prevent permits or consents to damage or impact such areas.

Funding and enforcement powers and rights.

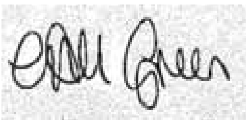
Part of the difficulty resulting in the lack of protection of Aboriginal heritage is the lack of proper resources for policing and enforcing breaches of the AHA. There needs to be adequate funding for Aboriginal corporations given roles and responsibilities under the AHA, as well as rangers and government enforcement officers. It makes a mockery of protective mechanisms if inadequate funding is provided to make them work.

Rights must also be given to Aboriginal organisations to take proceedings to protect their heritage and seek compensation for damage.

Powers must also be given to officials to enforce protection such as prosecution, stop work orders, remediation orders and the like. Again, many of the modern 21st century statutes do provide such powers.

We would be pleased to answer any more questions about these submissions or other matters.
The SRC is committed to educating members of the Anglican Church about the need to protect Aboriginal heritage and will be making this submission available to them.

Yours sincerely,



Reverend Lorna Green,
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