Government of **Western Australia**
Department of **Communities**

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Our ref: 2018/5212

Mr Graeme Gammie
Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage

Via email: AHAreview@dplh.wa.gov.au

Dear ~~Mr Gammie~~ Graeme

REVIEW OF THE ABORIGINAL HERITAGE ACT 1972

Thank you for your letter dated 9 March 2018 regarding the *Aboriginal Heritage Act 1972*. Please find attached the Department of Communities' response.

In its capacity as a service provider, the Department has compiled submissions based on feedback from the Housing division and the Regional Service Reform Unit. This feedback is twofold; the first being operational feedback from the Housing divisions' interaction with the Act in the course of delivering housing in regional Western Australia. The second is based on consultation feedback the Regional Service Reform Unit received throughout its rigorous engagement with Aboriginal communities in Western Australia since September 2016.

I trust this information will assist with the first phase of consultations. If you have any further queries, please contact Ms Tanya Steinbeck, Executive Director, Reform and Transformation, at the Department of Communities on 6552 8070 or at tanya.steinbeck@communities.wa.gov.au

We look forward to contributing to further consultation as part of the review.

Yours sincerely

Grahame Searle
Director General

4 May 2018

Att.

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Government of **Western Australia**
Department of **Communities**

Responses to the Review of the *Aboriginal Heritage Act 1972* Consultation Paper

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

The long title should include the words "effective" and "recognition, protection and preservation..." as below:

> An Act to make *effective* provision for the *recognition, protection and 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.

2. 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?

The Aboriginal Cultural Material Committee (the Committee) already provides an appropriate list of people to consult, however there are practical difficulties in contacting those parties. The Department of Communities suggests that a non-exhaustive list of parties to be consulted regarding Aboriginal heritage places and proposals be included in the legislation, much like the *Native Title Act 1993* (NTA) (sections 24BD, 24CA and 24DA), and allow traditional owners to be contacted directly rather than through Native Title Representative Bodies (NTRBs).

The Department suggests that this list includes: traditional owners, honorary wardens (wardens), residents of the land, native title representative bodies, prescribed bodies corporate, local governments, and any other parties with interests in the land/objects.

The Department would also like to draw attention to the lack of information sharing between NTRBs with heritage site information and the Housing division. Notwithstanding that certain information cannot be shared with specific persons for cultural reasons, the Department welcomes any process that will expedite information sharing in this area.

The Act should provide for direct engagement with traditional owners where native title determinations have been made/an Indigenous Land Use Agreement (ILUA) is in place. Where there is not a native title determination or ILUA, the NTRB should be the first point of contact for activities on sites.

Furthermore, local engagement with traditional owners will encourage the creation of community jobs for heritage surveys, and lead to a better working relationship with Aboriginal communities for future activities on land.

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

The appointment of honorary wardens has been rarely exercised, however it is an opportunity for a direct contact person that is informed on heritage matters to deliver current information and engage with community.

The Department suggests that wardens be nominated by the native title holders and appointed by the Committee in all areas where native title determinations have been made. Due to cultural sensitivity, it is recommended that a female and male warden be nominated for each determination area.

Alternatively, wardens could be appointed for finite periods of time where development is occurring and on the ground engagement is required.

The wardens' powers should be extended and should have the ability to escalate any matter to the Committee or the Minister.

4. 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?

The roles of the Registrar and the Minister are made clear but these roles are not always fulfilled in a way that effectively meets the objectives of the Act. Assessments of Aboriginal heritage places or objects for preservation are best achieved when they conform to the criteria in the Act and are recorded on the Register.

Currently, the Act has only identified four specific positions in the Committee [three ex-officio members in section 29 and the Chairman in section 28(5)]. This leaves membership of the Committee vague both in number and role – these should be specified in Part V of the Act.

As the Committee's role involves making decisions on Aboriginal heritage, the Department suggests that a fixed number of members should be of Aboriginal descent from within the state. In addition to this, the quorum should have at least 50 percent Aboriginal members.

The Committee should have a formal requirement for engagement with traditional owners where native title determinations have been made or where ILUAs have been established.

The Committee should have its name changed from Aboriginal Cultural Material Committee to Aboriginal Cultural Heritage Committee to reflect its purpose and functions.

5. 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?

For the sake of expediting registration processes, the Act should consider the registration of a series of Aboriginal heritage sites (e.g. songlines).

Otherwise, the Department is satisfied with section 5.

6. Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?

The Department is satisfied that objects are adequately described in the Act.

7. Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?

The Department is satisfied that Protected Areas are the best way to deal with sites of outstanding importance, however the process for the management of the sites can be improved. The Act should articulate the ways in which the sites are actively being protected.

8. Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?

In the past, the management of Ancestral Remains was addressed through operational procedures such as Memoranda of Understanding or other appropriate agreements.

In 2009, a Memorandum of Understanding was an effective method of managing Ancestral Remains that were discovered in the Midwest Gascoyne region between the then Department of Aboriginal Affairs, the WA Police and Yamatji Marlpa Aboriginal Corporation.

The Department understands that the regulation of similar agreements may be an opportunity for the Act to oversee judicial process in such agreements. However, any process implemented should not be burdened by the bureaucracy of requiring approval from the Committee; the Act should replicate the *Native Title Act 1993* in relation to ILUAs, and provide guidelines for agreements, which require approval from the Registrar to be ratified.

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

The Department recognises that not all Aboriginal sites hold the same level of importance in Aboriginal culture, and that not all activities on Aboriginal sites will have the same impact on the site. Therefore, the Department suggests that the Act incorporate a process for identifying where an Aboriginal site fits within a matrix. Based on that decision, different processes are used for different sites and activities proposed on them. The Due Diligence Guidelines (Guidelines) are helpful in identifying the different risks associated with activities (as released by

the Department of the Premier and Cabinet and the former Department of Aboriginal Affairs).

For example, a site that is of low importance should not need the Committee's approval for an activity that will have a minimal impact. Instead, the process for approval to undertake activities on the site could be undertaken within the Department of Planning, Lands and Heritage (DPLH). However, a site that is of high importance, and a proposed activity that will have a high impact on the land, should be referred to the Committee for approval.

The Department recommends the following criteria for activities that require consent/authorisation:

- Any activities that potentially cause a physical impact upon an Aboriginal heritage site (e.g. mining, prospecting etc.)
- Any activities that involve the movement of persons onto an Aboriginal heritage site (e.g. tourism activities)

10. 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)?

The Department has found that the Guidelines have been an effective planning tool for assessing the risk of any activity impacting an Aboriginal heritage site. The Guidelines have allowed for a greater understanding of Aboriginal heritage obligations and assisted in the shift away from undertaking a heritage survey in each instance, instead utilising heritage surveys as one of a number of risk mitigation strategies. This has effectively reduced unnecessary costs to proponents while protecting Aboriginal heritage sites.

The Department recommends the following options be included in the criteria within the Act:

- What is the nature of the activity?
- Will this activity cause significant permanent and/or irreversible damage the site?
- Is there opportunity to move the site/artefacts and/or undertake any site reparation activity?
- Is this site still actively used by Aboriginal people?
- What benefits (social and financial) will be realised by this activity?
- Does the activity restrict access to the site?

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

The Department understands that impact can be difficult to quantify. Nevertheless, the use of a risk matrix in the Guidelines is effective in assessing the likely impact on Aboriginal heritage sites. Such a tool could be expanded to include criteria specific to non-physical sites.

Furthermore, initial advice should be sought from wardens and engagement with traditional owners.

The Department would also like to draw attention to the recent native title decision, *Northern Territory of Australia v Griffiths* [2017] FCAFC 106, where non-economic loss in relation to native title interests were quantified. A High Court decision is forthcoming, and this could be a guide on quantifying non-physical elements/impact on sacred sites.

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

From a planning and development perspective, obtaining consent from traditional owners through DPLH in facilitating section 18 processes via the Committee and Minister has been accessible and effective.

However, the Department recognises that the importance and significance of Aboriginal sites are not uniform – therefore, different processes should be in place for sites of differing significance; traditional owners must always give consent, however additional consent should be obtained by either DPLH, the Registrar, the Committee or the Minister.

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

For planning and development activities, the section 18 application process is protracted and cumbersome. The section 18 process is burdensome as potential sites first require assessment against section 5 criteria prior to a section 18 recommendation by the Committee. Reducing the backlog of section 5 applications will ensure that the current section 18 process is more efficient.

The onus should be placed on the applicant to provide information.

14. What provisions could be included in an amended Act to ensure the long-term protection of Aboriginal sites where alternative statutory arrangements do not apply?

The Department suggests that the Act provide for Traditional Use Agreements of land so that traditional owners can use the land, manage the natural resources, and monitor human activities on the land.

The Department would like to draw attention to the Great Barrier Reef Marine Park Authority's best practice model that regulates the traditional use of the land

and waters within the Great Barrier Reef Marine Park. The Department recommends that Traditional Use of Marine Resources Agreements be used as a basis for the aforementioned Traditional Use Agreements, where traditional owners can make provision for:

- Sustainable management practices;
- Roles in complying with laws;
- Roles in monitoring site condition; and
- Roles in monitoring and enforcement of human activities.

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

The Department recommends that the Act extend the limitation period for prosecutions, to allow for the gathering of information on any offence. Enforcement powers should also be given to wardens to affect immediate removal or halt of activities effecting Aboriginal sites.

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

The Department recommends that the penalties in the Act should be of the same degree as like penalties in the *Heritage of Western Australia Act 1990*.

Some or all of the revenue from paid penalties should contribute to the management of Aboriginal sites.

17. Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?

The Department has had difficulty with the lack of information where the disclosure of that information is against customary laws and protocols. When planning for projects in areas where there may be a heritage site, section 7(1)(b) of the Act reduces the ability to effectively plan projects in a way that Aboriginal Heritage sites will not be impacted.

However, the Department understands that there are cultural protocols for sharing sensitive information – usually preventing the disclosure of the location of these sites. As such, the Department suggests that site polygons of a reasonable size are used for these sites.

Section 7(1)(b) should be removed, allowing site polygons to be listed on the Register, and compulsory due diligence on any land to discover heritage sites through engagement with the traditional owners. In this case, the defence would not be required.

18. 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 significant of a site?

The Department is satisfied that the criteria is adequate.

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

The current steps for assessing a site against section 5 criteria are appropriate, however the application of these steps is inefficient. This is evident by the state (currency) of the Register, where the amount of 'Other Heritage Places' and those with a 'Lodged' status is encountered frequently across the State. Without further assessment of these sites (or submission of section 18 application) uncertainties remain, resulting in a heightened risk of unknowingly impacting a heritage site and unnecessary mitigation costs.

Additionally, the Registrar's policy to 'buffer' site locations with site polygons several fold larger than the actual area where section 5 applies, makes these entries ineffective from a planning perspective and leads to further communication with the DPLH for simple matters of whether a known site will be impacted by a development.

As indicated above, site polygons are useful in identifying the general area of heritage sites where the location cannot be shared because of customary laws and protocols.

20. What do you think is missing from the Act?

In 2012, the former Department of Housing gave submissions for a review of the Act conducted by the former Department of Indigenous Affairs. The Department continues to support the former proposals from that review as listed below:

1. Proposal 5: Enable the Department to levy fees and recover costs for surveys and other services: 'The Authority supports a fee for service approach whilst ensuring that Aboriginal people are not required to pay fees to protect their own heritage.'
2. Proposal 6: Remove risk that section 18 consents may be technically invalid because of the definition of "the owner of any land"
3. Proposal 7: Investigate options to amend the *Aboriginal Heritage Act 1972* and the *Environmental Protection Act 1986* to streamline decisions about Aboriginal heritage

21. What sections, if any, do you think should be removed from the amended Act and why?

The Department refers to the above submissions and has no further comment.