



**AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS INC**

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Mr Vaughan Davies  
Assistant Director General, Heritage Services  
Department of Planning, Lands and Heritage  
Locked Bag 2506  
Perth WA 6001  
via email: [AHAreview@dph.wa.gov.au](mailto:AHAreview@dph.wa.gov.au)

30 May 2019

Dear Mr Davies,

**Submission on the Review of the *Aboriginal Heritage Act 1972* Consultation Paper (Stage 2, March 2019)**

Please find attached a submission by the Australian Association of Consulting Archaeologists Incorporated (AACAI) on the Review of the *Aboriginal Heritage Act 1972* Discussion Paper (Stage 2, March 2019).

The Australian Association of Consulting Archaeologists (AACAI) is a national representative body for professionals working in all fields of contract and public archaeology. AACAI promotes professional standards and strong ethics in archaeological and heritage practice, advocates for heritage protection, and aims to bring recognition of, and respect to, our profession. AACAI is the peak professional body for archaeological consultants in Western Australia. Its members hold a wealth of knowledge and have a vast array of experience in heritage matters.

AACAI advocates for legislative change that is balanced and reasonable, acknowledges Aboriginal rights and custodianship, considers all stakeholder parties, and celebrates and recognises the importance of its cultural heritage.

This submission on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (Stage 2, March 2019) has been prepared by the Western Australian Chapter of Australian Association of Consulting Archaeologists Incorporated (AACAI). It has been endorsed by the AACAI National Executive Committee. AACAI is the largest body representing consulting archaeologists in Australia.

If you would like any further clarification or require further detail, please contact the AACAI WA Chapter Secretary JJ McDermott by email ([jagemcdermott2@gmail.com](mailto:jagemcdermott2@gmail.com)) or phone 0458 608 786.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Jo Thomson". The signature is cursive and fluid.

Jo Thomson  
AACAI WA Chair

A handwritten signature in black ink, appearing to read "Andrew J M Costello". The signature is stylized and cursive.

Andrew J M Costello  
AACAI President



**Australian Association of Consulting  
Archaeologists Incorporated (AACAI)**

**Stage 2 Submission on the 'Review of the *Aboriginal Heritage Act 1972*:  
Proposals for new legislation to recognise, protect and celebrate Western  
Australia's Aboriginal heritage' Consultation Paper (March 2019)**

This submission on the *Review of the Aboriginal Heritage Act 1972 Consultation Paper* (Stage 2, March 2019) has been prepared by the Western Australian Chapter of Australian Association of Consulting Archaeologists Incorporated (AACAI). It has been endorsed by the AACAI National Executive Committee. AACAI is the largest body representing consulting archaeologists in Australia. Its mission is to uphold professional practice and ethics and support its members. It also supports stakeholders in heritage.

**Proposal 1 – Repeal the *Aboriginal Heritage Act 1972* and deliver new  
Aboriginal heritage legislation**

*Repeal the Aboriginal Heritage Act 1972 and replace it with modern legislation,  
regulations and policies.*

AACAI fully supports the repeal of the existing *Aboriginal Heritage Act 1972* and the delivery of new Aboriginal heritage legislation, regulations and policies. AACAI advocates for legislative change that acknowledges Aboriginal rights and custodianship, considers all stakeholders, and recognises and celebrates cultural heritage.

*Will the proposal deliver the desired outcome of Aboriginal cultural heritage legislation that reflects developments in best practice in heritage management and the rights of Aboriginal people under national and international law?*

The proposal will achieve the desired outcome, *provided* that the new legislation, regulations and policies:

- acknowledge that Aboriginal heritage is dynamic and belongs to living cultures;
- focus on the conservation and management of Aboriginal heritage, not solely its protection;
- recognise the human rights of Aboriginal people;
- make Aboriginal people the primary decision-makers about their heritage;
- align with comparable guidelines and procedures found in other intersecting legislation such as the *Native Title Act 1993*, the *WA Environmental Protection Act 1986*, the *Environmental Protection and Biodiversity Conservation Act 1999*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Protection of Movable Cultural Heritage Act 1986*.

- are based on a combination of Aboriginal worldviews and modern principles of heritage management;
- provide for the management of Aboriginal heritage by Aboriginal peoples; and
- recognise that Aboriginal heritage at local, regional and state-wide levels is an important asset to the State and should be carefully recorded, celebrated and promoted to the wider public.

The new legislation will only be successful if it sets out a clear framework for the various components of Aboriginal heritage and well-defined processes to identify, assess relative heritage significance, and determine appropriate conservation strategies.

The success of the new legislation will also be determined by the State Government's sincerity and commitment to delivering the best outcomes for Aboriginal heritage on an on-going, non-partisan basis, and is not influenced materially by election cycles and changes of government. This includes ensuring that the processes are fully supported, resourced and funded on a long-term basis.

## **Proposal 2 – Update definitions and scope of new Aboriginal heritage legislation**

*Extend the scope of what is covered by new legislation to include ancestral remains, places that are cultural landscapes and place-based intangible heritage. It is not proposed to extend the definitions in the new legislation to include intellectual property rights.*

AACAI supports the broadening of the scope of the new Aboriginal heritage legislation to include protection, preservation and management for ancestral remains, cultural landscapes and place-based intangible heritage. We also welcome the intent to adopt a new definition of 'place' that is aligned with the Australia ICOMOS Burra Charter and will include 'tangible and intangible dimensions'. There is much to gain in embracing heritage values and their management within cultural contexts.

We believe, however, that there is still an over-emphasis on places (sites), objects and the facilitation of land development. The new legislation must acknowledge the living and dynamic nature of Aboriginal heritage and have the scope to focus on the conservation and prevention of permanent and material harm to Aboriginal heritage. The scope should be further extended to include non place-bound intangible heritage including language, song, dance, artistic traditions, ecological knowledge and traditional land management practises, stories and Song lines.

The inclusion of ancestral remains is a very important addition, and we believe that the new legislation should provide for the repatriation and restitution of ancestral remains and secret or sacred objects.

*Will the proposal deliver the desired outcome of having legislation that protects Aboriginal cultural heritage and is sensitive to the culture it is designed to protect and therefore, be more effective and trusted by Aboriginal people?*

To meet the desired outcomes of this proposal, it is crucial that not only the definition of Aboriginal heritage, but also the processes for conserving, protecting and preserving it are

clear, transparent and unambiguous, and based on Aboriginal worldviews. The Act's legislation, regulations and guidelines must demonstrably sustain the intended outcomes.

AACAI recommends the inclusion of a more sophisticated and detailed definition of Aboriginal heritage, which acknowledges its complexity, richness, diversity and dynamism. Such a definition must be in line with Aboriginal peoples' concepts of Country, culture and heritage. A vision of heritage that incorporates tangible and intangible aspects on a landscape scale would achieve this outcome. Some of these aspects include, but are not limited to:

- places of spiritual, ritual or contemporary significance to Aboriginal people
- sacred or ritual objects;
- places or objects of ethnographic significance;
- places or objects of anthropological significance;
- places or objects of archaeological significance;
- men's sacred sites;
- women's sacred sites;
- women's birthing sites;
- burial places;
- standing stones and other stone arrangements;
- resource procurement areas;
- hunting and camping places;
- culturally modified trees;
- waterscapes;
- Dreaming trails;
- Song lines;
- language, song, stories and dance;
- artistic traditions;
- underwater (marine and lacustrine) sites;
- built environment such as contact sites and missions; and
- subsurface archaeology.

AACAI further recommends that the terms and measures of 'significance' and 'importance' are not used to qualify Aboriginal heritage. Anything definable as 'heritage' is automatically of value and significance. However, Aboriginal heritage values, landscapes, places and objects can be significant to people and groups of people at an individual, regional, state, national or even international levels (see Australia ICOMOS Burra Charter 2013).

The new legislation must also protect Aboriginal burials, skeletal and ancestral remains, and provide for their management through regulations and clear guidelines. We strongly recommend that a mandate for the repatriation and restitution of these remains, and other cultural materials, be clearly set out in the legislation. This mandate should provide that ancestral remains be returned to the appropriate Aboriginal group. We also advise that Aboriginal ancestral remains are managed carefully in consultation with descendent or other relevant Aboriginal groups, as cultural funerary practices can vary from region to region across the state.

## Proposal 3 (A) – Local Aboriginal Heritage Services

*Provide for the appointment of Local Aboriginal Heritage Services to:*

- *ensure the right people to speak for particular areas of country and related cultural heritage are identified;*
- *make agreements regarding Aboriginal heritage management and land use proposals in their geographic area of responsibility.*

AACAI applauds the State Government's recognition of the need for increased involvement and decision-making by Aboriginal people managing their heritage. However, AACAI finds Proposal 3 (A) to be quite problematic and we outline several major issues with the proposal below.

### **Issue 1: Identifying who has the right to speak for country**

A significant issue relates to how the 'right people to speak for particular areas of country and related cultural heritage' will be determined, and who will actually have the power and right to decide this.

Identifying a legitimate process to recognise the 'right people' is problematic. There is division in some Aboriginal groups as to who speaks for or is responsible for different places, materials or cultural roles, at different times or places. Further, heritage is dynamic and belongs to communities. Consequently the 'right people' is not fixed indefinitely. There may also be disagreements over differences between those who are 'knowledge holders' and those who are 'native title holders'; as well as between 'cultural knowledge and experience' versus 'native title rights and interests'. Distinguishing 'knowledge holders' from 'native title holders' as separate entities could lead to unnecessary conflict; and similarly, issues between 'cultural knowledge and experience' and 'native title rights and interests' cannot be resolved from an external perspective.

Under Native Title, Aboriginal Representative Bodies and Prescribed Body Corporates (PBCs) are established to provide a forum through which communities and families manage disputes about heritage knowledge, ownership and values. They provide a representative system through which an Aboriginal group can elect or select appropriate participants for heritage work. On occasions where Aboriginal people do not align with representative bodies or PBCs, it is necessary to proceed carefully. It should always be an Aboriginal-led and controlled process. It is important to remember that Aboriginal communities manage their own affairs through collective decision-making. We do not believe it is productive to interfere with established Aboriginal decision-making processes.

In contrast, under the Local Aboriginal Heritage Services (LAHS) proposal as currently formulated, the State becomes the ultimate authority for determining who are the 'right people to speak for country'. The State also prescribes the scope and rules by which any LAHS must function and 'approves' agreements. There is no mechanism for Aboriginal people to dispute the decisions of a LAHS. The LAHS may potentially override the legal rights of Native Title holders to decide on and manage their own heritage. Whether intended or not, this proposal suggests a paternalistic approach to heritage management, and is also potentially an area of legal contestation. Therefore, it does not meet best practice guidelines. The LAHS adds another layer of State bureaucracy to an already complex space.

## **Issue 2: State oversight of agreements**

A second problematic issue, related to the first, centres on the State's role and its proposed oversight of agreements. This part of the proposal also proposes to take final decision-making over agreements out of Aboriginal groups' hands. Rather than 'approving' agreements, the new legislation should facilitate and assist Aboriginal groups by offering advice, skills development opportunities and resourcing to allow groups to strengthen and streamline agreements themselves. Further comment on agreement making is provided under Proposal 7 below.

## **Issue 3: Lack of detail on LAHS**

A further issue with Proposal 3 (A) relates to the lack of detail around the role, make-up and accountabilities of the LAHS'. For example, what constitutes a 'local' service? How will local assessments function within a centralised Register? There is also some contradiction within the Discussion Paper, flow-charts, and supporting documentation as to the decision-making accountabilities of the LAHS. It is unclear what authority a LAHS will have in decisions on land-use approvals.

## **Issue 4: Potential conflicts of interest**

The proposal neither explicitly addresses issues of potential conflicts of interest in the decision-making process, nor the means by which they are satisfactorily resolved. The proposal fails to recognise the need to separate the process of site assessment and registration from those relating to land use decisions. As highlighted by Veth et al (2019), 'undertaking these processes together often results in the reduction of both tangible and intangible values' (<https://nit.com.au/embracing-the-values-of-aboriginal-heritage-in-reforms-to-the-wa-act/>). We do not think the current proposal adequately resolves this key issue.

## **Issue 5: Resourcing and funding of LAHS**

A critical issue concerns the provision of necessary and initial significant funding and access to resources. There appears to be an assumption that PBCs have established incomes from heritage surveys. This is manifestly impossible in many parts of the state, and there is a significant inequity in access to income and funding opportunities between regions and groups. Even where there is regular income from heritage surveys, it is unclear that such income can finance a new level of administration entirely.

Proposal 3 (A) also transfers additional responsibilities to PBCs on top of their existing role. We have real concerns about the capacity of PBCs or LAHS to respond to these new requirements. Veth et al (2019) succinctly summarise the situation:

...the fact remains that most Aboriginal corporations are under increasing pressure to engage with, and perform rapidly to, complex heritage compliance frameworks linked to industry production cycles (such as sub-divisions, road easements and mine expansions). Overall they are still not adequately resourced to consistently succeed within this space with this power asymmetry being a legacy of 'beneficiary catch-up'.

The new responsibilities being placed in the hands of the LAHS, which will include dealing with Register legacy issues, preparation of registration information (standards are not yet specified) and constant industry requests, are substantial. As a PBC or representative group managing the LAHS will almost certainly already be addressing a host of other matters such as cultural activities, community development,

governance, and land access, this aspect of the reform requires careful thought. Many PBCs do not have sufficient income or staff resources to maintain a LAHS – there may be some capacity in industry-intensive agreement areas (such as the Pilbara), although even in these regions PBC structures and processes are sometimes still in development. The LAHS will therefore require long-term government support and funding to ensure their ongoing capacity and success...

#### **Issue 6: Existing problems will be devolved from DPLH to LAHS**

We are also concerned about the potential devolving of existing issues to the LAHS', such as the backlog of site assessments and other Register legacy issues. If it is expected that the LAHS' will resolve these problems, they must be provided with sufficient long-term funding and resourcing to facilitate this. If not, the proposal will result in a dysfunctional heritage process.

*Will the proposal deliver the desired outcome?*

- *Active involvement of traditional owners and knowledge holders in decision making and management of heritage matters in particular areas of country that they have connection to and cultural responsibility for.*
- *Consultation and agreement making processes with Aboriginal people are culturally appropriate, transparent and provide more certainty for land users.*

AACAI does not believe Proposal 3 (A) will deliver the desired outcomes in its current form.

The LAHS concept must be substantially redesigned to ensure the process is Aboriginal-led, representative, includes a procedural fairness process, and allows access for all parties to dispute resolution mechanism. Issues of feasibility, governance structures and auditing should also be taken into account. We recommend that alternate models be workshopped and developed in collaboration with Aboriginal groups, PBCs, Aboriginal Representative Bodies and other interested parties. The set-up of current organisations, such as The Budadee Foundation, an Aboriginal organisation for Palyku people established under the Western Australian National Trust, could provide some inspiration (<http://www.budadee.org.au/>).

There is an essential need for any LAHS model to include procedural fairness processes and an appellant and dispute resolution mechanism, see our recommendation for a *Heritage Appeals Tribunal* under Proposal 7.

The provision of ongoing and long-term support, resourcing and funding is **critical** to the success of new Aboriginal heritage legislation. One of the primary reasons for the current *Aboriginal Heritage Act* being viewed as inadequate is the lack of resourcing and funding of the administering Department. The State Government must ensure that this deficiency is not transferred to the LAHS.

State support should not, however, be in the form of decision-making, approvals or the micro-management of Aboriginal groups. Rather, it must be in the form of skills and capacity building programs, training, resourcing and direct funding. Transitioning to LAHSs will need to be viewed and managed as a **staged process** and will need to be resourced and funded as such. There should also be a long-term commitment to resourcing and supporting the ongoing development and maintenance of the Aboriginal Heritage Register.



Our main concern is that Proposal 3 (A) potentially sets LAHS' up to fail in the absence of sufficient and culturally-appropriate support, resourcing and funding. This would be disastrous for not only Aboriginal heritage and Aboriginal communities, but for all Western Australia.

### **Proposal 3 (B) – Aboriginal Heritage Council**

- *Establish an Aboriginal Heritage Council (AHC) as the central body providing advice and strategic oversight of the Aboriginal heritage system.*
- *Abolish the Aboriginal Cultural Material Committee.*

As highlighted in our Stage 1 submission on the AHA Review, AACAI supports the abolition of the Aboriginal Cultural Material Committee (ACMC) on the grounds that it has been inadequately resourced and remunerated, lacks appropriate expertise and questionably combines the two processes of site evaluation and decisions over land use.

A newly appointed Aboriginal Heritage Council (AHC), however, must be much more than a refashioned ACMC if the proposal is to deliver the desired outcomes. It should be an independent or semi-autonomous body with a robust governance system.

Its members must include Aboriginal people with cultural authority and appropriately qualified practitioners with skills in cultural heritage including, but not limited to, archaeology, anthropology, history, cultural geography and heritage management. These skills and competencies must be well represented amongst the AHC membership. Where specialist roles have been identified, there should be consequences for not filling those roles. AHC members' qualifications should be subject to the same scrutiny as heritage consultants and specialists. Professional members should have a minimum of a Bachelors degree with honours, and several years of experience in the relevant field, but should also be given access to skills development opportunities.

The AHC should be given the ability to establish sub-committees and co-opt professional assistance. Given the previous experiences of the ACMC and the anticipated workload, the AHC must be sustained and enriched with highly qualified professionals, and other people with a high level of capabilities able to employ their skills, to ensure efficiency and effectiveness in their decision-making and outcome management. The AHC must be employed on a full-time basis.

We support the mandate of the AHC to set standards. We think that is essential for the AHC to set up a sub-committee or panel of experts to assist with setting standards and guidelines, which includes Aboriginal people and peak anthropological, archaeological and heritage bodies. We also strongly encourage the inclusion of Western Australian-based heritage professionals in the AHC, as there is ample high-level professional expertise available within this state to assist.

*Will the proposal deliver the desired outcomes?*

- *The system for the protection, conservation and management of Aboriginal heritage benefits from the strategic oversight and advice of people who are highly skilled and experienced in Aboriginal heritage management.*

This outcome will only be achieved if the AHC has appropriately qualified and experienced members including anthropologists and archaeologists. We recommend that the AHC establish and refer to an ongoing external sub-committee or panel of experts to give advice to the AHC.

- *Aboriginal heritage is respected and valued by the non-Aboriginal community.*

This outcome will only be achieved if the AHC are mandated with a high level of transparent authority and appropriately resourced to promote and celebrate Aboriginal heritage.

- *Aboriginal people have a greater say in the operational and strategic decisions that affect their heritage.*

AACAI agree that Aboriginal people should have a greater say in the operational and strategic decisions that affect their heritage, but this outcome will only be achieved if appropriate processes and procedures are built into the AHC's operation to facilitate an increased representation and participation by Aboriginal people. The AHC must include more than one Aboriginal person.

- *Equitable agreements between land users and Aboriginal people at a local level are encouraged and best practice recognised.*

Whilst encouraging equitable agreements between Aboriginal people and land users, the AHC should have a role in facilitating, but not vetting agreements. A more useful approach is for the AHC to rely on a sub-committee structure to develop guidelines and templates and guide the development of heritage protocols inclusion in land use and access agreements.

- *System reliance on the Minister as the sole decision maker on all land use proposals is reduced.*

We support a reduced reliance on the Minister as the sole decision maker and would prefer to see the responsibility removed from the Minister and placed in the hands of a *Heritage Appeals Tribunal*, as outlined in Proposal 7 below.

*If no, why not and what changes would you suggest and why?*

In addition to the above suggested changes, we encourage the setting of clear business rules for the AHC via regulations, including the regular audit of the AHC activities and decisions. This is essential to sustain transparent compliance with AHC governance responsibilities.

### Proposal 3 (C) – the Minister’s Role

*The Minister retains overall accountability and decision-making powers for the Aboriginal heritage system in Western Australia, but may delegate certain decisions and functions to the Aboriginal Heritage Council.*

AACAI supports the continuation of Ministerial oversight and approval for land use proposals that involve major impacts to Aboriginal Heritage. However, we do caution against Ministerial decisions being the final say in the matter and as such, we advocate for an independent body such as a *Heritage Appeals Tribunal* to make the final decisions instead, see Proposal 7 below.

We support the delegation of decision-making by the Minister. This will reduce the overall burden on the Minister and will ensure that more attention can be given to proposals that involve major impacts to Aboriginal Heritage. It is still of the utmost importance that the Minister continues to take advice from the AHC, which should have clear guidelines around adequately qualified membership (both cultural and scientific) and adequate support (see Proposal 3 (B) above).

*Will the proposal deliver the desired outcome?*

- *The Minister, who is accountable for an effective Aboriginal heritage management system, can focus on the effective and efficient running of the system.*
- *The system is not clogged with matters on which the parties agree and where heritage is not impacted.*
- *Ministerial intervention is available but reserved for contentious matters and those where the project is of State Significance or is likely to have a significant impact on Aboriginal heritage.*
- *All stakeholders are confident in an Aboriginal heritage system that is fair, effective, efficient and respects Aboriginal people, their culture and their heritage.*

AACAI strongly advocates that the Minister will make his reasons for decisions public, as this leads to increased transparency. This should also be a practice maintained by the AHC. Transparency regarding the decision-making process is incredibly important to restore faith in the legislative process.

We also applaud the ability of the Minister to issue ‘Stop Work Orders’ when Aboriginal cultural heritage is threatened by unauthorised land use activities.

*If no, why not and what changes would you suggest and why?*

One major issue that is not addressed by the proposal concerns the ability for stakeholders, primarily Aboriginal custodians, to appeal a Minister's decision. In a State whose economy is heavily dependent upon mining and resource development, with a strong and well-funded pro-mining lobby, it is important that the Minister is seen to be above the influence of powerful interest groups. In conflicts over land use, the scale of financial return generated by mining or other development has previously led to the perception that mining or infrastructure development is always of greater benefit to the general community than Aboriginal heritage. This leads to a flawed decision-making process as has been illustrated in numerous examples such as the Swan River Brewery, Marandoo, Yakabindie, Rottnest, Broome, James Price Point, Yinjibarndi, Lake Yindarlgooda, Marapikurrinya Yintha (Port Hedland), Beelihar Wetland and more recently, the Eliwana Railway Project.

To counter this, we suggest that Ministerial discretion must be replaced by a civil procedure or external independent arbitration commission where a judge hears all interested parties and there is equal access to rights of appeal. If this is not possible then some mechanism for appeal by Aboriginal groups is still required.

We also recommend that the advice given by the AHC must be given sufficient weight to ensure that it is not politically inexpedient for the Minister to ignore it. This would minimise the issue of political oversight on these decisions. It would also ensure that decisions are always informed by Aboriginal people and qualified professionals.

### **Proposal 3 (D) – the role of the Department of Planning, Lands and Heritage**

*The Department of Planning, Lands and Heritage remains responsible for the day to day operation of the Act.*

*Will the proposal deliver the desired outcome, that the department supports the Minister and Aboriginal Heritage Council in:*

- *the strategic oversight of the Aboriginal heritage system;*
- *undertaking strategic and operational policy development and capacity building in the system;*
- *ensuring timely and efficient performance of the functions of Local Aboriginal Heritage Services where no such service exists; and*
- *maintaining the register as a reliable source of data on Aboriginal heritage and actively enforcing the provisions of the Act.*

*If no, why not and what changes would you suggest and why?*

We note that the role and mandate of DPLH will be expanded and diversified under the new legislation to include education and promotion, supporting LAHS' and taking on the role of LAHS' in regions where no Aboriginal organisations have been appointed, and assisting with agreement negotiations.

It is therefore imperative that DPLH receive increased funding and resourcing, and have the necessary levels of expertise and skills, to ensure that they have the capacity to undertake the role. As highlighted in our Stage 1 submission, many of the issues noted in previous reviews, reforms and inquests have arisen because the administering department was inappropriately resourced and insufficiently staffed with people with experience, knowledge and qualifications to undertake the work. The desired outcomes will not be achieved unless the issue of funding and expertise are addressed.

AACAI also encourages the involvement of Departmental heritage staff in the publicised promotion of Aboriginal culture and heritage. Staff need to engage and collaborate more with peak bodies such as AACAI, as well as the relevant academic institutions, and of course Aboriginal groups. AACAI believe that the publication of frequent newsletters and an annual monograph focusing on collaborative work between the Department, Aboriginal custodians and heritage practitioners can contribute greatly to the promotion and celebration of the vast Aboriginal cultural heritage in Western Australia.

### **Proposal 3 (E) – Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards**

*Aid people needing to engage a Heritage Professional with appropriate qualifications and experience, and promote higher standards by publishing on the Department's website a public Directory of Heritage Professionals and the standards required for heritage investigations, community consultation and reporting of heritage information.*

*Will the proposal deliver the desired outcomes?*

- *Improved outcomes for Aboriginal heritage.*
- *Elimination by market selection of substandard consultants.*
- *No regulatory burden.*

This proposal is directly relevant to AACAI, who are the peak body for archaeologists working in Aboriginal heritage in Western Australia. Our organisation strongly advocates for and promotes professional standards and strong ethics in archaeological and heritage practice. We believe that appropriate experience and qualifications increases heritage protection and positive outcomes for both proponents and Aboriginal groups.

We agree that having a Directory to provide a starting place for finding adequately qualified heritage practitioners will improve standards. How such a directory would be developed and maintained does require clarification, as discussed below.

We strongly support the development of a set of standards and guidelines for different types of heritage work. We also strongly agree that the Department should refuse to accept material submitted which does not meet the requirement of these established standards. By demanding higher quality of work the Department will ensure that heritage practitioners who have provided work below a minimum standard would not be commissioned again. Such guidelines will improve the quality and outcomes of heritage work, increase transparency and give all parties certainty.

*If no, why not and what changes would you suggest and why?*

The proposed Directory of Heritage Professionals as set out in the Discussion Paper requires clarification. While developing and maintaining the Directory, the Department should be mindful of an individual's privacy. Not all information provided to the government should be made public. It would be more appropriate for certain details to be provided on request. It should be up to the individual in consultation with the Department to decide what material is included on the public listing. The Directory should also be developed with the aim of allowing companies and sole traders to be listed.

We recommend that as part of this accreditation, heritage practitioners are encouraged to be members of incorporated professional organisations such as ours. Potential full members of AACAI are already required to provide extensive documentation showing the appropriate level of skill and expertise in their membership application. AACAI applies a strict, competency-based membership review process and we require our members to adhere to our Code of Ethics and Consulting with Aboriginal Communities Policy. All applications are assessed by three independent reviewers (see <https://www.aacai.com.au/membership/become-a-member/>). AACAI also has a formal complaints and disciplinary process.

We suggest that, as in Victoria, the Department consider applicants for the Directory who are already members of AACAI as qualified for listing de facto, since these archaeologists have already demonstrated their professional qualifications and expertise to a rigorous standard and are required to adhere to AACAI's professional standards. Similar standing should be afforded to anthropologists who are members of the Anthropological Society of Western Australia (ASWA). The Department should liaise with AACAI and ASWA for verification purposes. This model will ensure the appropriate vetting of heritage practitioners and would help reduce the burden on the Department.

The focus on improving professional standards must also be extended to, and include, the professional development and up-skilling of Department staff and AHC members. Staff who are appropriately qualified will be better positioned to judge whether work submitted by consultants is high quality or deficient. We recommend that there is a sufficient level of professionally trained and experienced staff in DPLH and on the AHC and who have deep knowledge and experience in Aboriginal heritage management. Skills should extend beyond the 'approvals process' and include management in conservation and the education and promotion of heritage to the wider public. Making site assessments and decisions that can determine the fate of Aboriginal heritage is a weighty task, particularly as the outcomes can affect the wellbeing of Aboriginal custodians and communities. As noted above, the people who are responsible for these assessments and decisions must have adequate experience, knowledge and qualifications (including cultural qualification). The current skills gap within the Department needs to be addressed as a matter of urgency.

The Discussion Paper (Proposal 2) makes explicit reference to the Australia ICOMOS Burra Charter (2013). The Burra Charter is a set of principles that outline a nationally accepted best practice standard for cultural heritage management that have already been adopted by the Heritage Councils of Queensland, NSW, Victoria and Tasmania. Heritage practitioners harmonise their assessments with the Charter, professional codes of ethics and the primary status of Indigenous custodians. The Burra Charter should be drawn upon during the drafting of any standards or guidelines as this will improve the quality and reliability of heritage information (Veth et al 2019).

#### **Proposal 4 – Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register**

- *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.*
- *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.*

AACAI agrees with the proposal to rename the Register of Aboriginal Places and Objects to the Aboriginal Heritage Register. We also support the retention of the Register as an information repository, rather than just a list of registered places with associated assessment materials. The Register should be an essential management tool, managed as a priority.

We further support the inclusion of a wider range of heritage values in the Register; however, we note that the practical challenge of representing intangible place-based heritage in terms of spatial boundaries will need to be worked through. We recommend that Cultural Heritage Management Plans be incorporated as an essential management tool.

AACAI supports the proposal for the AHC to set and regulate reporting standards. This will improve the consistency, accuracy and usefulness of the Register. We strongly recommend that these standards are developed in consultation with Aboriginal people and heritage practitioners.

*Will the proposal deliver the desired outcomes?*

- *Improved accuracy of records and information on Aboriginal heritage.*
- *The State's database of Aboriginal heritage is a trusted source of information that is captured and managed in a culturally appropriate way.*
- *Increased utility of the register as a record of heritage and planning tool.*

*If no, why not and what changes would you suggest and why?*

The desired outcomes will not be achieved solely through changing the name and scope of the Register. The Register requires a significant upgrade to ensure its accuracy, reliability and utility as a heritage management tool. The extensive backlog of site assessments also must be addressed. Under the current Register structure, this will require a substantial investment of resources and funding to achieve the desired outcomes. We urge the Government to commit to this as a priority, regardless of whether new legislation is passed.

An alternative solution to the site assessment backlog is to alter the structure of the Register and to remove the 'Other Heritage Places' category. If all sites are protected under the new legislation, then the default assumption is that any reported place, providing it meets the minimum standards of reporting and documentation, is regarded as a place to which the Act applies. Thus the only time that a site assessment will arise is where there is a genuine conflict of land use. Any current Other Heritage Place should therefore be considered a site under the Act unless or until demonstrated not to be. The only issue then is whether there are grounds for considering the site significant enough to be preserved and how that decision is made.

We also recommend that the Register include a category to identify if sites, places or objects have been destroyed or impacted or have not. This is important for a number of reasons. It streamlines the assessment process by focusing any necessary work on existing heritage places. It also ensures increased accuracy in place assessments by providing an accurate baseline for comparison. For example, if an artefact scatter is the last one remaining in a region, then its significance will increase compared to if it were located in a region with a high number of artefact scatters. The inclusion of such a category is important in building a regional database of sites as a tool for planning, regional analyses and predictive modelling.

Regular auditing of the Register is also an important ongoing management tool.

We recommend that the AHC be accountable for ensuring that:

- the level of professional proficiency of staff responsible for auditing and maintaining the Register is adequate within the Department;
- regular audits are undertaken of the Register, to sustain its accuracy and maintain standards; and

- regular audits of staff activities relating to consultant reporting requirements.

We further recommend that the AHC appoint a sub-committee with Aboriginal people, heritage professionals and information technology specialists to focus on Register development.

## **Proposal 5 – Introduce a referral mechanism to facilitate tiered assessments of proposed land uses**

*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. 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. A ‘call in power’ will ensure that proposals that should have been referred, but have not been, can be assessed.*

*Will the proposal deliver the desired outcome of (a) land use proposals that are designed to co-exist with Aboriginal heritage places wherever possible, (b) approvals for low impact activities that are streamlined, and (c) reduced risk and cost for land use proponents through early referral and advice?*

### *(a) Land use proposals and Aboriginal heritage*

It is vital that processes for managing impacts on Aboriginal heritage are transparent, efficient and provide certainty for all parties. It is expected that in accordance with Proposals 3 (B) and 3 (D), a high standard of professionalism and integrity with respect to managing Aboriginal heritage is maintained under the advisory functions of this proposal.

It is imperative that all activities that may have the potential to deleteriously impact the heritage values of an Aboriginal landscape or place require consent and authorisation.

The nature of Aboriginal heritage is vast and its values will determine what kinds of activities are compatible with a particular landscape or place. Moreover, vast tracts of the State have neither been surveyed nor assessed in a suitably assiduous manner. It is difficult and inadvisable to have strict criteria against which to evaluate an activity, as the effects and conditions will be place-specific. These criteria should be determined by the relevant Aboriginal custodians and groups (or through the relevant LAHS as detailed in Proposal 3 (A)).

The proposal for a tiered assessment of land uses within an Aboriginal heritage place is unclear. While robust systems have been designed for archaeological heritage elsewhere, the proposal does not lead the reader to the conclusion that a similar scheme is envisioned. Nor does the proposal seem to acknowledge the full range of Aboriginal heritage found across the state. A best practice tiered assessment system needs to inspire confidence and trust among Aboriginal communities, land-use developers, professional heritage specialists and the public. Therefore, the tiered system must be framed in a transparent and understandable manner. It must rely on accurate and thorough heritage records about known heritage places and the techniques used to discover them. Finally, the system must



incorporate an agreed, common sense approach to conserving the State's Aboriginal heritage.

The proposal states that 'proponents will be required to take steps to identify whether their land use proposals will negatively impact on Aboriginal heritage' and this will require a 'risk assessment...based on information contained in the Aboriginal Heritage Register, additional information the proponent has collected through previous studies they have undertaken or through processes embodied in an Aboriginal Heritage agreement, which may set out a range of agreed activities.' AACAI believes that the first step in the 'risk assessment' process for any impacts to Aboriginal heritage must be to consult with the relevant Local Aboriginal Heritage Service body.

Any 'risk assessment' guidance documents stemming from this proposed process need to be clear and unambiguous. The proposed referral mechanism needs to be modelled carefully and must acknowledge the diverse character of Aboriginal heritage across the state.

A model that is akin to the referral process for a proposal to the Environmental Protection Authority under Section 38 of the Western Australian *Environmental Protection Act 1986* may be useful. The focus on mitigation and the identification of residual impacts should be incorporated into a similar referral mechanism for Aboriginal heritage. AACAI envisions that such a mechanism requires consultation with relevant Local Aboriginal Heritage Service bodies, as well as advice from specialist and qualified cultural heritage practitioners (as per Proposal 3 (E)).

Additionally, impacts to sacred landscapes or places with no physical elements can be assessed through a process akin to social impact assessments. Such an assessment needs to articulate: (1) the specific values, access and cultural protocols associated with the place; (2) permissible activities; and (3) cultural and spiritual ramifications for the custodians and host community if the place was to be impacted or protocols contravened. The levels of risk to the custodians, host communities, associated Aboriginal groups and proponents should then be weighed up through a social impact assessment. This assessment should be undertaken by the relevant LAHS with the assistance of specialist and qualified cultural heritage practitioners.

***(b) Approvals for low impact activities***

Unfortunately, this part of the proposal is confusing. If the new legislation is to provide for land use approvals for low impact activities within an Aboriginal landscape or place, then there must be detailed and clear guidance on what constitutes low (or minimal) impact activities. This is not addressed anywhere in the proposals, beyond the following statement in the 'Anticipated questions with answers' document:

*'Sufficient information provided – no need for further assessment and no conditions imposed (land use proposal approved)*

The type of proposals this might apply to might be a project that involves renovation of an existing structure that is within a heritage place but will not cause additional impacts to the place, or a proposal that is designed to stabilise or remediate a heritage place.'

It is not clear whether the so-called 'streamlined approval process' results in a formal (and lasting) approval from the AHC. Currently many low impact projects do not require State

Government referral or advice, and management actions are determined between the proponent and the relevant Aboriginal group. The proposed role of the department and/or the new AHC needs to be clarified in this process.

AACAI believes that low impact to the values of an Aboriginal landscape or place still constitutes an impact, and therefore requires consultation, mitigation and ongoing management. Any approval for low impact activities on Aboriginal heritage must have regard to the wishes of Aboriginal people and custodians, and be accountable to Aboriginal custodians and the wider community.

### *(c) Early referral and advice*

All developments and planning projects should incorporate Aboriginal heritage management protocols from the outset of planning so that impacts can be minimised in a cost-effective manner. The proposed call for early referral and advice in the process is welcomed, but it must be mandated. We also call for the criteria relating to the proposed tiered assessment process and guidance for the level of advice provided at each stage to have more thorough and professional input.

Additionally, large-scale development or infrastructure projects that will impact upon Aboriginal heritage need to be scrutinised more vigorously by the public. We recommend that proponents whose projects are over a certain dollar value and that will impact upon Aboriginal heritage should pay a percentage of funds into a public education/community benefit that can be drawn on by affected communities for cultural heritage projects.

## **Proposal 6 – Encourage and recognise agreement making**

- *Encourage and recognise agreement making between Local Aboriginal Heritage Services or other relevant Aboriginal body and land use proponents.*
- *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.*

Whilst AACAI supports the concept of encouraging best practice approaches in agreement making with regards to heritage outcomes, we question the appropriateness of State oversight and ratification of the agreement making process.

We see several issues with regards to this proposal.

### **Issue 1: No alignment with existing Native Title legal arrangements**

The proposal to ratify agreements has paternalistic overtones. As highlighted above, this proposal does not align with existing legal arrangements under Native Title. Additionally, the proposal for the AHC and LAHS' to ratify pre-existing agreements is problematic. Many agreements can take years of negotiation and if an agreement is not ratified and requires re-negotiation then this can significantly impact on outcomes for both Aboriginal groups and proponents.

### **Issue 2: Lack of detail about agreement information standards**

The AHC will be empowered to set the standard of information and form for ratification and submission to the Minister – what are these standards, and can the standards be realistically achieved? These all need to be addressed before this proposal is accepted. If these

standards are expected, what funding will there be for PBCs to be able to meet these new standards?

### **Issue 3: No appeals mechanism**

If there is disagreement over the AHC's ratification or non-ratification of an agreement, what is the process to challenge this decision? According to the proposal, once PBCs make an agreement with the LAHSs, they essentially have no choice but to follow those agreements and "do not attempt to contract out of its operation". So how are they able to challenge these agreements?

*Will the proposal deliver the desired outcomes?*

- *Aboriginal people have more opportunity to determine better outcomes for their heritage through agreements that focus on avoiding or minimising impacts on heritage.*
- *Better heritage outcomes are achieved through agreements that are based on respectful and positive relationships.*
- *New and existing agreements concerning heritage outcomes between relevant Aboriginal people and land users can be used to expedite land use assessments and permitting decisions if they meet certain requirements.*

*If no, why not and what changes would you suggest and why?*

AACAI recommend that an appeals process be incorporated into this proposal which sets up a mechanism for challenging the decisions of the LAHSs, the AHC and the Minister. There should also be a reasonable amount of time given after an agreement has been made for any appeals to be undertaken. PBCs must also retain the right to withdraw from agreements (with probable cause) that detrimentally affect their heritage, rights and welfare.

Rather than ratifying agreements, we suggest the role of the AHC should be to advise on agreements and provide support where requested. As it currently stands, there is no requirement for AHC members to have experience and skills in agreement making, negotiation, facilitation and mediation.

We suggest that a better approach would be to establish a *Heritage Appeals Tribunal* (see Proposal 7) to assist with the mediation of agreements. The AHC could then be tasked with the development of standardised guidelines and templates for the method and form of information required, in regards to the heritage components of agreements.

## Proposal 7 – Transparency and Appeals

- *Reasons for decisions are to be published.*
- *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.*
- *Retain the State Administrative Tribunal as the primary review body.*

*Will the proposal deliver the desired outcomes?*

- *All stakeholders in Aboriginal heritage have confidence in the administrative decisions that affect Aboriginal heritage.*
- *Rights of review and appeal are equitable.*

*If no, why not and what changes would you suggest and why?*

AACAI fully supports the publications of reasons for decisions as it will facilitate more transparent, fair and equitable heritage management. We also fully support the ability for all interested parties, particularly Aboriginal peoples, to hold the same rights of review and appeal. We consider that all parties should also be able to appeal a Minister's decision as part of this process.

AACAI **strongly advocate** for the establishment of a new review body, the *Heritage Appeals Tribunal*, in place of the State Administrative Tribunal, to arbitrate over cases involving disagreements over heritage assessments, agreements, management decisions and impacts to Aboriginal heritage.

This new body should be established to facilitate and mediate cases where heritage evaluations and assessments of sites, impacts, management decisions and agreements are contested and would benefit from arbitration. This body should have a mandate to hear and evaluate issues relating to the values, planned actions, potential land uses and impacts, and management options relating to Aboriginal heritage objects, sites, buildings and places. Ideally the Tribunal would be chaired by a senior and accredited heritage/legal planning specialist with mediation skills and international standing; or a senior Aboriginal facilitator with heritage and legal training, having cultural authority from their host community.

## Proposal 8 – A modernised enforcement regime

- *Create a modern enforcement regime by ensuring offences and penalties are brought into line with the Heritage Act 2018 and other modern statutes.*
- *The statutory limitation period is extended to 5 years.*
- *Conducting compliance inspections and proceedings will be the responsibility of the Department of Planning, Lands and Heritage.*

*Will the proposal deliver the desired outcome that the duty of care to avoid unauthorised damage to Aboriginal heritage is taken seriously? If no, why not and what changes would you suggest and why?*

AACAI strongly supports the strengthening of enforcement provisions and penalties in the new legislation and the extension of the statutory limitation period to a minimum of 5 years.

One of the primary reasons for the lack of prosecution of offences under the current *Aboriginal Heritage Act* is that the standard of proof equating to criminal evidence required is unreasonably high. We ask if it is feasible to lower the standard of proof to enable pro-active prosecutions and encourage compliance? If not feasible, then we call for more proactive monitoring, policing and education. We also believe that a defence of ignorance is no longer relevant or appropriate.

We consider that increased financial penalties alone, while a step in the right direction, are insufficient to discourage damage being done to Aboriginal heritage. We fully support the use of 'Stop Work Orders' and recommend that a removal of license clause be added for proponents that breach the new legislation. We see that the removal of a land use licence as providing a more pertinent incentive to comply with the legislation than financial penalties alone.

We also recommend the addition of a provision for a person convicted under the new legislation to compensate the affected Aboriginal custodians and to undertake remedial action on the condition that the works are undertaken, in consultation with and with the approval of the relevant Aboriginal people, so that further adverse effects on the site as a result of unauthorised or inappropriate remedial work are prevented.

One further recommended change is to make provision for Aboriginal Rangers to enforce the new legislation during on-ground management. Training must be provided for Aboriginal Rangers.

## **Proposal 9 – Protected Areas**

- *It is proposed that the existing Protected Areas and the ability to declare new ones will carry forward into new legislation.*
- *A new regulation will be created to authorise specific management activities by the relevant Aboriginal people.*

*Will the proposal deliver the desired outcome that the mechanism for recognising Aboriginal heritage places of outstanding importance is more flexible and allows for active management? If no, why not and what changes would you suggest and why?*

Whilst it is recognised that the current implementation of Protected Areas is not ideal, the new legislation should include some mechanism to enable the long-term and permanent protection of Aboriginal heritage of 'outstanding importance'. There should be clear threshold criteria in the new legislation and it must mandate for the allocation of funding for the active management of Protected Areas.

We also advocate for the development of a new, more transparent process through which Protected Areas are declared. Currently, any State Government Department can refuse or object to a declaration which then impedes a successful outcome.

We support the development of a new regulation for the management of Protected Areas. This regulation should set out the conditions under which a Protected Area may be accessed, including provision for access and use by the relevant Aboriginal custodians and communities. The regulations should also provide for the active management of Protected

Areas by Aboriginal custodians and mandate the development and implementation of a Cultural Heritage Management Plan for each Protected Area.