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Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 74 79
Cloisters Square PO WA 6850
AHAreview@dplh.wa.gov.au

Curtin University – comments on the Review of the Aboriginal Heritage Act 1972 Consultation Paper

Thank-you for the opportunity to provide initial comments and feedback on the Review of the Aboriginal Heritage Act 1972 Consultation Paper. Curtin fully supports the introduction of new Aboriginal heritage legislation into the Western Australian Parliament to ensure that Aboriginal places, objects and culture are protected. We look forward to the next stage of the review as it progresses towards the preparation of a new Aboriginal Heritage Amendment Bill.

Our comments and feedback to questions are below. We would be happy to provide further information on any of these points.

Purpose of the Act

It is recommended that the amended Act explicitly require that Aboriginal people are consulted regarding cultural heritage matters. Any new Aboriginal heritage legislation should clearly recognise Aboriginal people and groups in their traditional role as “custodians” of places to be recognised and protected under the legislation. The importance of “the land” and “places” in Aboriginal culture and identity cannot be over-emphasised.

It is only appropriate that the particular Aboriginal group or groups who identify with a particular place or area of land be among the first consulted in regard to recognition of that place or area and in a definitive list/statutory Aboriginal heritage register of Aboriginal people who should be consulted for an area, site or decision. Moreover, those same people should also be among the first consulted with respect to any proposals to approve the use of that place or land for any purpose other than those uses customarily made of it by the traditional custodians. The use of the term “*any other*” tends to take from Aboriginal people their right to protect Aboriginal heritage and opens to “others” to own Aboriginal cultural knowledge regarding heritage. Under the current legislation, Aboriginal people are afforded no more of a “stakeholder” status than any other people or groups in the state, including historical societies, the National Trust, archaeologists, etc. While these stakeholders should be involved in the consultation process, the views of the traditional custodians of the place or land under consideration should be of prime importance, alongside the views of the landowner. Sharing cultural knowledge is different to owning cultural knowledge and the amended Act should clearly state that Aboriginal people are the custodians of cultural knowledge.

It is also important to retain separate legislation for Aboriginal and non-Aboriginal heritage places. Every state in Australia and the Northern Territory currently has separate legislation for Aboriginal heritage places and non-Aboriginal heritage places.

The discourse of heritage in Australia revolves around a document known as the Burra Charter, adopted in 1979 by Australia’s chapter of the worldwide International Council on Monuments and Sites, or ICOMOS. The Burra Charter seeks to define what is meant by “heritage” and how best to recognise and conserve it. The Burra Charter was itself adapted from an earlier charter, the Venice Charter of 1964, adopted at a meeting of architects, craftsmen and others involved in conserving and restoring Europe’s rich legacy of buildings and structures dating back to pre-Roman times. “Heritage” and everything we think or say about it today is a purely European construct. Surely, it is far more disrespectful to Aboriginal culture to try to squeeze the endlessly rich and varied Aboriginal concepts of place, and the role of place in defining identity and the sacred, that have evolved over tens of thousands of years, into an imported half-century old European concept primarily concerned with conserving old buildings.

An Aboriginal heritage act should ignore the Burra Charter and instead focus on what Aboriginal people want to recognise and conserve, rather than what Europeans insist is important. Interestingly, WA’s current *Aboriginal Heritage Act 1972* is the first legislation in any Australian jurisdiction to attempt to recognise and protect places of cultural heritage significance. In 1972 there was no Burra Charter. Australia ICOMOS did not come into being until 1976. A new Aboriginal heritage act should retain and perhaps expand on this distinction from the European concept of “heritage”.

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 appears adequate as it is inclusive of original custodians and their descendants in regards to the practice of passing on cultural knowledge and practices for protecting Aboriginal heritage for future generations.

Roles under the Act

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 purpose of the Aboriginal Heritage Due Diligence Guidelines (*Department of Aboriginal Affairs, Department of Premier and Cabinet, 2013*) is to assist land users in understanding their obligations under the Heritage Act and how their activities could adversely impact Aboriginal Heritage. Many Land Councils, for example the South West Land Council, already operate in consultation with Aboriginal Traditional Owners with reference to these Guidelines. The amended Act does not necessarily have to stand alone, and can refer to other Policies and Guidelines that would streamline processes for consulting and engaging with Aboriginal people and thus further serve to assure that operations across policies are seamless.

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

Clearer requirements on the appointment of honorary wardens are needed. Specific information on how appointments are made, what function or role the honorary warden has and the relationship of the role of the honorary warden with the role of the Aboriginal Cultural Material Committee needs to be specified. The Aboriginal Cultural Material Committee should be comprised of Aboriginal people from a range of communities and chosen through community consultation. Appointments to key roles such as honorary wardens should ensure equal representation of Aboriginal people across all language group areas with criteria for selection clearly stated.

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?*

As it currently stands, the roles and functions assigned under the Act may not be sufficiently clear or comprehensive enough to fulfil the objectives of the legislation to preserve Aboriginal Heritage places and objects. It would be important to also closely examine other processes that sit alongside the Heritage Act.

The amended Act should also strengthen the role of Aboriginal people in matters pertaining to their own Aboriginal Heritage. While authority for decision making rests with the Minister, it is important to ensure that the role of the Aboriginal Cultural Material Committee is central to providing meaningful responses to Aboriginal Heritage.

What is Protected?

A new Aboriginal Heritage Act should focus on places that are sacred to Aboriginal culture, tradition, mythology, cosmology and custom. The current Act's criteria for identifying and protecting Aboriginal places includes archaeological sites. While an archaeological site may occupy a place that is sacred to Aboriginal people, a site that is only sacred to archaeologists should not be protected under a new Aboriginal heritage act. The concept of "archaeology", like the concept of "heritage", is an imported European invention.

The current *Aboriginal Heritage Act 1972* also allows recognition and protection of places whose identity, location and even name may be known to and spoken of by only men or women of a particular group. This should be retained because this is an integral part of Aboriginal culture. The Burra Charter is silent on such matters.

The Aboriginal heritage legislation adopted by the Northern Territory is illustrative. The *Northern Territory Aboriginal Sacred Sites Act 2013* (the Sacred Sites Act) does not even use the word "heritage" to describe the places it seeks to

protect. The Sacred Sites Act allows the traditional Aboriginal custodians of a sacred site to apply to have the site registered under the Act, which confers on the site protections from destructive or otherwise incompatible uses. It may be useful to review the Northern Territory Aboriginal Sacred Site Act 2013 in updating the Aboriginal Heritage Act for Western Australia.

7. *Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?*
8. *Should the Act provide for the management of Aboriginal Ancestral (Skeletal) Remains? If so, what needs to be considered?*

This is a really important issue and needs review especially with regards to the offence for removing remains from where they are found. There is a responsibility to report ancestral remains which are found to the police in the first instance to assess the situation. Situations relating to return of ancestral remains from overseas also needs further clarification. Victoria and Queensland have separate Provisions that address the significance and importance of this issue to Aboriginal Heritage. It is suggested that the Provisions adopted in Victoria and Queensland be used to develop specific Provisions for Western Australia. Perhaps the WA Museum could assist in the description of appropriate processes regarding ancestral remains that could be streamlined and embedded into the Heritage Act on this point. This point may also link to Question 7 in regards to ways to deal with Aboriginal Sites of outstanding importance.

Protection and Enforcement

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

Questions 9 and 10 deal with Protection and Enforcement and relates also to Section 16, 18, 10 of the Act around authorisation and consent. It is interesting to note that recently there have been other provisions emerge (especially since the recent Noongar Standard Heritage Agreement was set up with the State under the South West Native Title Settlement - see also comments to Question 2 above). As mentioned above, it is important that other agreements and provisions in place that support Aboriginal heritage should run alongside the Aboriginal Heritage Act to assure that policies and operations are consistent in support Aboriginal heritage practices. It is also suggested that the Aboriginal Cultural Material Committee could be involved in this aspect of the Act.

11. *How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?*
12. *Who should provide consent or authorisation for proposals that will affect Aboriginal sites?*
13. *To what extent is the current section 18 application process effective and how can it be improved?*
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?*

Site Assessment and Registration are important and need to be clearly addressed in the amended Act. It may be that recently highlighted information regarding the ability for anyone who has knowledge of any object or place can now register a sacred site is ambiguous. Greater clarification on the criteria that the Committee uses to make their assessments is needed. More information about what will happen if a site is registered would also be helpful for people to make an informed decision about whether to register a site; for example if registration of a site will become public, it may be that it is better to keep the site secret.

Penalties

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

The enforcement provisions of the Act need to be strengthened, specifically section 62. In proceedings for an offence under the Act, section 62 provides a "special defence of lack of knowledge". Clearly this is inadequate if sites and objects are to be protected.

Other Parts of the Act

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

It would be useful to provide an opportunity for additional research to be done with regards to other parts of the Aboriginal Heritage Act concerning: disclosure of information against customary laws/protocols, which are localised issues. Criteria for assessing sacred sites are also a localised issue. Surveying or researching these two points may also help answer what's missing from the Act by looking at the Act from an Aboriginal perspective on what sections, if any, could be removed or amended.

In general the amendments to the Act will need to reflect respect towards First Australians and an authentic consultative process. The wording of the provisions of the Act need to be more prescriptive to ensure compliance in a way that protects Aboriginal interests.