

ABORIGINAL HERITAGE ACT REVIEW
DISCUSSION PAPER
ANTICIPATED QUESTIONS WITH ANSWERS

General

Q: The Discussion Paper talks about ‘celebrating’ Aboriginal cultural heritage. What does that actually mean?

A: Aboriginal culture is the oldest continuing living culture in the world. Aboriginal cultural heritage is globally recognised as being of immense value, not just to Aboriginal people but to the understanding of human history. The cultural knowledge, practices and ways of being that are fundamental to the resilience of the first peoples of Australia, known to have been in Western Australia for at least 40,000 years, should be respected and celebrated.

Celebrating Aboriginal cultural heritage is a part of helping non-Aboriginal Australians to appreciate the importance of Country to Aboriginal people and their cultural responsibility to care for it. Caring for Country is much more than the sound environmental management that has contributed to the longevity of Aboriginal people. It is, as one Elder explained, spiritual and integral to the well-being of Aboriginal communities.

The impact of European settlement on Aboriginal people through massacres, disease and removal from traditional lands are not causes for celebration and are not widely understood by the broader community. An important function of the new Aboriginal Heritage Council will be to promote public understanding of that history and its effects on Aboriginal cultural heritage.

Q: What is a Knowledge Holder?

A: A Knowledge Holder is someone who is acknowledged by their community as having cultural authority for heritage in their Country - men for men’s places and women for women’s places. In some cases, it will be the people who are Native Title Claimants or Holders but this may not always be the case.

Q: Why does a Local Aboriginal Heritage Service have to be 100% Aboriginal?

The Local Aboriginal Heritage Services are integral to ensuring that the right people speak for Country. In order to do this, every Local Aboriginal Heritage Service must have broad community networks, confidence and support, so they must be corporations set up by, and for, Aboriginal people. Each Local Aboriginal Heritage Service may also grow to become an organisation that needs to employ people to carry out its business and Aboriginal people

from within the community will be best placed to take up and benefit from these opportunities.

Q: Why won't it be required by law that all members of the Aboriginal Heritage Council must be Aboriginal?

A: It is expected, and intended, that the Aboriginal Heritage Council will be comprised of all Aboriginal people with skills and experience in relevant disciplines. It is proposed that the Aboriginal Heritage Council have nine members, including the Chair, who have skills and experience in one or more of the following:

- heritage management
- conservation and interpretation
- anthropology
- archaeology
- history
- land use planning and development
- board governance and administrative decision making

Skills, knowledge, experience and Aboriginality will all be criteria in the appointment process. The proposals stop short of making it a statutory requirement in case there is a time when no Aboriginal person with the required skills is available, or willing, to be appointed. For example, if at some point in the future there is no Aboriginal person with suitable archaeology qualifications and experience who is willing or able to become a member of the Council, then a non-Aboriginal archaeologist could be appointed. The law will require that the Chair of the Council is an Aboriginal person.

Q: What is a tiered assessment process?

A: Not all land use proposals have the same kind of impacts on heritage places but this is not recognised under the current Act. This means that land use proposals designed to protect Aboriginal heritage places are treated in the same way as proposals that will cause heritage to be destroyed.

The focus of the new system will be on tiered assessments of proposed land uses based on the extent to which the proposal will impact Aboriginal heritage in the area. These tiers will range from no formal assessment through to full formal assessment, with the proponent potentially being required to undertake further work, prior to a decision being made. A land use proposal that will have little or no impact on heritage will attract a more streamlined approval process as a result. An activity that will destroy Aboriginal heritage will still require the approval of the Minister for Aboriginal Affairs to proceed. A land use proposal will be referred to the Aboriginal Heritage Council, through the Department of Planning, Lands and

Heritage, for assessment as to whether or not it will require formal approval. The outcome of this assessment may be one of the following:

1. *Insufficient information provided*

The proposal will be returned to the proponent with advice about what further information is required before it can be resubmitted for consideration.

2. *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.

3. *Sufficient information provided – proposal assessed and advice given by the department and/or conditions imposed (land use proposal approved to proceed in accordance with the advice and/or conditions).*

This might apply to a project to undertake a land or heritage management activity that will have a positive and beneficial outcome, but will have a very minor effect on a heritage place that needs to be managed. The advice/conditions will specify what the proponent needs to do to avoid, or appropriately manage, those effects.

4. *Sufficient information provided - further assessment and approval required*

In this circumstance, the information provided in regard to the proposed activity, the heritage places it intersects with, the views of the relevant Aboriginal community, and any required mitigation strategies, is sufficient that the proposal can be both assessed and progressed for approval in the one action by being:

- i. referred to the Aboriginal Heritage Council for a permit where impacts are unavoidable but minor; or
- ii. referred to the Minister for a permit where impacts are unavoidable and major (or a State Significant project is involved). Major impacts would include complete destruction of any heritage place, or partial impacts on many heritage places.

5. *Information provided indicates impacts to heritage are likely but further information is required*

This might apply:

- if there is insufficient information known about the Aboriginal heritage of an area to be certain about impacts a proposal will cause;
- where the proponent has not yet canvassed the views of local Aboriginal Knowledge Holders on the proposal; or

- where the department/Aboriginal Heritage Council specifies what information is required, the standard(s) that must be met and the format for reporting results.

6. *Information provided and assessed but the proposal is unlikely to be approved*

This might apply where the likely heritage impacts are such that there can be no effective mitigation and the benefits of the land use proposal are not sufficient to warrant the anticipated impact on heritage that the land use would cause. The proponent may still attempt to modify and resubmit the proposal (and will have avenues for review) but there is a low likelihood of approval being gained.

Assessments will be binding but the process of how decisions are made will be able to be reviewed.

Q: What will happen to the information on the current Register of Aboriginal Places and Objects?

A: For a place to be included on the new Aboriginal Heritage Register, it will need to meet standards of information set by the Aboriginal Heritage Council, which will include location and a statement of importance to Aboriginal people. It is reasonable to assume that currently registered sites will meet the criteria and automatically transfer across.

Lodged and Stored Data places that include a statement of importance to Aboriginal people that meets the standards of information set by the Aboriginal Heritage Council will automatically transfer across.

Where a Lodged or Stored Data place does not meet the standards of information required by the Aboriginal Heritage Council for inclusion on the Aboriginal Heritage Register, it will not be included in the Register until that information is provided.

A place determined to be 'Not a Site' as a consequence of a determination under the *Aboriginal Heritage Act 1972* (and which has not been encompassed in an approval issued under that Act) may require additional information to be given if the Knowledge Holders want it to be included in the new Aboriginal Heritage Register.

Aboriginal people

Q: I am an Elder of my community but not a Native Title Holder. Will I be consulted on cultural heritage matters in my local area?

A: Yes, if you are a Knowledge Holder for that heritage place or object. It is the job of the Local Aboriginal Heritage Service – or the department where no Local Aboriginal Heritage Service is operational, to make sure that the right people with cultural authority are asked to speak for Country and the heritage in it. You do not have to have proved your connection

to Country through the Native Title process to be consulted on Aboriginal cultural heritage matters.

Q: The people with Native Title rights have said that a place isn't important to them, but it is to my community. Do I have a say?

A: Yes, if you are known in your community as a Knowledge Holder of that place then you are entitled to be consulted about activities that could impact that heritage. Even if the Native Title holders say it's not important to them and have entered into an agreement that allows the place to be impacted, you must be consulted. What you say will be passed onto the Aboriginal Heritage Council and the Minister for Aboriginal Affairs when they are considering land use proposals that will negatively impact that heritage. Local Aboriginal Heritage Services must identify the right people to speak for heritage in their area. If a Local Aboriginal Heritage Service consistently fails to do this (or deliberately excludes people who should be consulted), the Aboriginal Heritage Council will have the power to de-register it.

Q: How do I set up a Local Aboriginal Heritage Service?

A: To apply to become a Local Aboriginal Heritage Service, your organisation will need to:

- be incorporated under the *Corporations, Aboriginal and Torres Strait Islander Act 2006* (Cth) (CATSI Act)
- be 100% Aboriginal
- complete an application form and provide details of your ability to provide the services of a Local Aboriginal Heritage Service to the standard required by the Aboriginal Heritage Council
- meet the requirements that will be set out by the Aboriginal Heritage Council on an ongoing basis

Q: How will Local Aboriginal Heritage Services be funded?

A: Initially, it is likely that Local Aboriginal Heritage Services will be established by Aboriginal organisations that are already recognised, such as Prescribed Bodies Corporate. Many of these organisations have income streams that specifically support their heritage protection activities.

Local Aboriginal Heritage Services will also be able to charge a fee for providing a service or advice in relation to land use proposals. However, it is intended that funding will be provided to help with start-up costs. This will be means tested to ensure any available money is distributed fairly. More detail on funding mechanisms and amounts will be provided in the next phase of consultation.

Q: Why should the Minister have the final say about agreements we have made that allow our heritage to be impacted – if we don't mind, why should the Minister get involved?

A: There is a history of Aboriginal people being pressured into agreements that stop them from objecting when a land user wants to destroy their heritage. To be fair to future generations, agreement processes that result in heritage being damaged should be checked by someone independent, who is responsible to the public for the decisions they make. It is proposed that the Minister for Aboriginal Affairs will have the final say on whether or not to allow heritage to be destroyed, even if the Aboriginal people concerned have agreed to it. The Minister must take into account the views of the Aboriginal people concerned and the recommendation of the Aboriginal Heritage Council. The Aboriginal Heritage Council will tell the Minister whether they think the process to reach agreement has been fair. Any financial arrangements Aboriginal people have agreed on is solely a matter for them and will not be a factor in the Aboriginal Heritage Council's assessment or the Minister's decision. The Minister must publish reasons for the decision he or she makes.

Q: I am an Aboriginal person who does not agree with a proposed activity. Can I appeal against the Minister's decision to approve the activity?

A: If you are recognised as a Knowledge Holder or a member of the Local Aboriginal Heritage Service for the affected area, then you will have the right to appeal the Minister's decision to allow the proposed activity. If you are not, then the right of appeal will not automatically extend to you, even if you are an Aboriginal person.

Q: Our stories, songs, art and knowledge of bush foods and medicines are an important part of Aboriginal cultural heritage – why does the new Act not protect these aspects?

A: The proposed new Act will specifically protect aspects of intangible heritage that are linked to places, such as song lines, Dreaming tracks and locations where Dreaming events occurred, or places that have been traditionally used to gather food or resources used for traditional purposes. The intellectual property in arts, technology and science falls under Commonwealth laws and, as such, will not be covered by this State legislation.

Other land-users

Q: Will there be a published register of people who can speak for Country?

A: Local Aboriginal Heritage Services will have responsibility for identifying the right people to speak for Country within their areas of responsibility. Where there is a Local Aboriginal Heritage Service, it is a land user's first contact point to establish who to speak to about their particular project but if there is no operational Local Aboriginal Heritage Service in the area, the department will coordinate the consultation.

A Local Aboriginal Heritage Service may choose to publish a list of people who can speak for particular areas but it is not proposed to make such lists mandatory because of the difficulty of making sure they are kept up-to-date.

Q: What happens if there is no LAHS in the area that I want to conduct an activity in?

A: The department will carry out the functions that a Local Aboriginal Heritage Service would perform and charge a benchmark rate for doing so (otherwise proponents in areas where there is no Local Aboriginal Heritage Service will have an unfair cost advantage). However, the department will not conduct heritage surveys on behalf of land users.

Q: What if my relationship with the local Aboriginal people is already broken down and I can't reach an agreement on how to proceed, either regarding heritage matters generally or my particular activity?

A: You will need to first demonstrate that you have made all reasonable efforts to negotiate in good faith terms for either a heritage process agreement or your proposed activity with the Local Aboriginal Heritage Service. Where there is no Local Aboriginal Heritage Service, the department will assist in negotiations with the Knowledge Holder(s) for the area identified for the proposed activity. If agreement cannot be reached, application may still be made to the Aboriginal Heritage Council, and ultimately the Minister for Aboriginal Affairs, for the land use activity to be approved. The Aboriginal Heritage Council and the Minister will consider the proposed activity and carefully review the documented attempts at negotiation before considering the application to impact heritage.

Q: How will I know if I can do an activity if I don't know the significance of the heritage in the location?

A: Land users will be required to refer all land use proposals that may have an impact on Aboriginal heritage, no matter what level of significance might have been formerly given to that heritage. Activities that are designed in such a way as to have little or no impact on the heritage of the area, regardless of its level of significance, will have a faster pathway to a formal approval.

You will also be able to seek advice from the department and talk to the relevant Local Aboriginal Heritage Service(s) about your particular land use proposal. If you are able to reach agreement with the relevant Aboriginal people about where and how your activity will be undertaken to avoid or minimize harm to heritage places, this will be taken into consideration in the approvals process.

Q: How do I know if the activity I want to do will be considered 'low impact'?

A: The Aboriginal Heritage Council will develop guidelines to help you assess if what you want to do might be classified as low impact before you get too far along in the planning process. You will also be able to seek advice from the department and talk to the relevant Local Aboriginal Heritage Service(s) about your particular land use proposal. When you have developed your proposal, you can refer it to the Aboriginal Heritage Council for a determination on what 'tier' your project will be assessed under. Once you have this binding assessment, you will know whether your proposed activity is considered to be low impact or not.

Q: I have discovered what appears to be Aboriginal artefacts, but the local Knowledge Holders/ Local Aboriginal Heritage Service don't know anything about them and don't think they are important. Can I just go ahead with my proposed activity that will destroy them?

A: No. All Aboriginal heritage is protected under the new Act until the Minister for Aboriginal Affairs gives approval that it can be destroyed (this is also the situation under the current Act). The objects may have scientific value that will still need to be assessed. The Aboriginal Heritage Council will consider the impact your proposed land use will have on the artefacts and make a recommendation to the Minister based on the scientific value of the artefacts and the views of the local Aboriginal people.

Q: If cultural landscapes are going to be protected, how will I be able to get access to the land I need – the new system is going to lock up large areas of land and prevent any activity?

A: The new system will adopt a definition of heritage place similar to that in the Burra Charter, which includes the tangible and intangible values of a place and how these are connected to form a cultural landscape. Although cultural landscapes in Aboriginal culture can cover huge areas of land, this does not preclude other activity on the land. The new system focuses on assessing the activity not the heritage, and whether an activity can proceed in a certain area, and on what conditions.

Q: I have rights in a property that will now be part of a cultural landscape? What does that mean and will it affect the value of the land?

A: A cultural landscape is just a collection of heritage places in the landscape that are connected in some clear way (for example, by a single mythology). This does not mean that entire landscapes will be 'locked up': activities that do not detract from the value of the landscape can still occur. Where impacts on the landscape are unavoidable, there will still be a process to assess the impacts. If they are considered to be acceptable in the circumstances, permission will be given for them to proceed. This is similar to the way the

current *Aboriginal Heritage Act 1972* works. Since this Act has not had a noticeable effect on property values since 1972, it is not anticipated that the new Act will either.

Q: If the Minister for Aboriginal Affairs has to approve all proposals that negatively impact Aboriginal heritage, isn't that just creating a big bottleneck further along in the process than the current front-end bottleneck of site assessment?

A: The new system encourages land users to plan their projects around heritage so they can use the land in a way that either avoids or causes minimal impact to heritage.

Where it is clear there will be no impact, proponents can 'self-assess'; although proposals can be referred for assessment to confirm this judgement (or in the case that it appears the proponent was wrong in their assessment).

Proposals designed to result in minimal impacts will not need to go to the Minister and can be endorsed by the Aboriginal Heritage Council. Consequently, there should be fewer applications (similar to the current Section 18 Notice) entering the system. This will allow available resources to deal with proposals that cannot be designed to avoid major heritage impacts.

Q: The new system relies on respectful relationships, but in my area there are regular disputes between local Aboriginal groups, so how am I supposed to get an agreement with any certainty?

A: A Local Aboriginal Heritage Service recognised for an area will be bound by standards and oversight of how it identifies and selects the right people to speak for Country, and resolves disputes between different people who claim to speak for Country.

The department will have a dedicated team to perform the same function in areas where no fully operational Local Aboriginal Heritage Service exists. It will also have an experienced senior officer to help facilitate consultation and agreement making processes. Ultimately, the Aboriginal Heritage Council and the Minister for Aboriginal Affairs will still be able to consider the proposal for the requested activity even where negotiations have been conducted in good faith but have not come to a successful resolution or conclusion.

Q: Why do the new proposals not include full regulation and fee capping for heritage consultants?

A: The State does not regulate what fees can be charged in any other profession. The experience of other jurisdictions has shown that the comparatively high administration costs and regulatory burden on those heritage consultants who follow best practice far outweighs the benefits derived from a regime of full accreditation, registration and ongoing monitoring of service provision.

Fees of other service providers are not capped and attempting to cap fees for conducting surveys of heritage would unfairly target Aboriginal people. Such a proposal would arguably breach the *Racial Discrimination Act 1975* (Cth) and the National Competition Policy.

The Aboriginal Heritage Council will oversee the standards of service and conduct of Local Aboriginal Heritage Services, and will have the power to de-register any that consistently fail to meet published standards of service.

Q: Can a land owner challenge a decision that an area of their land has a heritage place on it?

A: No. The new system recognises that no-one should be able to tell an Aboriginal person that objects and places are not part of their cultural heritage, or that they are not important. Instead, the system allows Aboriginal people to provide sufficient information to describe why a place or object is important (taking into account cultural sensitivity) and where it is located. The information will be captured on the Aboriginal Heritage Register in a way that is culturally appropriate. In making a decision on whether to approve a land use that will impact or destroy the heritage, the Minister will consider the views of the heritage owners and the impact the destruction will have on them and weigh that up against the stated benefits that the land use will have for the broader community.

Q: What happens if the heritage consultant I hire doesn't do a good job or overcharges me?

A: This will remain a matter between you and the heritage consultant. However, because you will be issued with binding standards of research by the Aboriginal Heritage Council you will be in a better position to query the quality of the work, or the charges, of a particular heritage consultant. You can seek advice from the department if you are unsure whether or not reports you have received meet the standards.

Heritage consultants

Q: I am a heritage consultant, do I have to be registered or licensed to operate?

A: No. There is no proposal to formally register or license heritage consultants. However, a public directory of heritage professionals will be established by the Department of Planning, Lands and Heritage. Listing in the directory will be open to those with appropriate qualifications and experience. Applicants will be expected to substantiate claims made in their application and professional referees will be required to support claimed expertise in particular areas of practice. Listing in the directory will not be mandatory and being listed will not constitute an endorsement or recommendation from the department.

Q: I am a heritage consultant, will the Aboriginal Heritage Council tell me what fees I can charge?

A; No. However, your ability to charge top level fees will depend upon your capacity to meet the binding requirements set by the Aboriginal Heritage Council. Information and reports that do not meet these standards will not be accepted, and the reasons for non-acceptance will be communicated to proponents in a clear and transparent manner.

Q: I am a heritage consultant with years of experience, so why should I be told what investigations I should conduct by a central body? What happens if I disagree with those standards?

A: In the current system, where there is no central standard-setting body or clear requirements, heritage consultants apply what they individually deem to be appropriate levels of investigation, recording and reporting. This has resulted in inconsistency and inefficiency. To overcome this, the Aboriginal Heritage Council will set standards for the investigation, recording and reporting of Aboriginal heritage and will enforce compliance with these standards where necessary. Work submitted that does not meet these standards will not be accepted.

The level of investigation required has often been set by heritage agreements that have been made well in advance of the particular project whose impacts are being investigated. In the absence of an agreement, heritage consultants may decide what work is required (perhaps in consultation with other parties). This has led to inconsistent approaches between consultants and across various projects, making it difficult for the system to produce consistent approvals outcomes.

In the new system, heritage consultants will receive clear guidance on what is required through the project referral process. A referral will generate a binding level of assessment being attached to a project, which will specify what Aboriginal heritage investigations are to be completed in order to secure any eventual approvals. Where heritage agreements are in place that pre-date the new Act (and are ratified under it), these processes may be relied upon PROVIDED they meet or exceed the level of assessment outcome.

Q: What will happen to Section 18 applications that might already be in the system when the new Act comes in?

A: The new Act will take some time to come into full operation so processes will be in place to transition matters being considered under the 'old Act' into the framework of the new Act. This will be designed to cause the least disruption to projects.