



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

INTRODUCTION

As set out in the Discussion Paper, proposals have been developed to modernise Aboriginal heritage management in Western Australia. The reform proposals seek to give Aboriginal people in Western Australia a much greater role in decisions that affect their heritage and focus the processes on agreement making that avoids or minimises impact on their heritage rather than the current emphasis on whether a place meets centrally applied criteria to 'qualify' as an Aboriginal heritage site under the current Act. A modern system of indigenous heritage management must be based on local input from the owners of the heritage as to what is important to them, but it must also be straightforward for the rest of the community and industry to engage with, otherwise heritage can be lost through accidental or heedless destruction. The proposals may be brought into effect by legislation, regulation and policy and have been designed with the reality of the economic foundation, native title rights and interests and the geography of Western Australia in mind.

This document is part of the range of supporting materials that have been prepared to assist consideration of the proposals. These are available on the Department of Planning, Lands and Heritage website <https://www.dplh.wa.gov.au/aha-review>.

HOW TO SUBMIT YOUR VIEWS

There are several ways to make a written submission:

Online: www.dplh.wa.gov.au

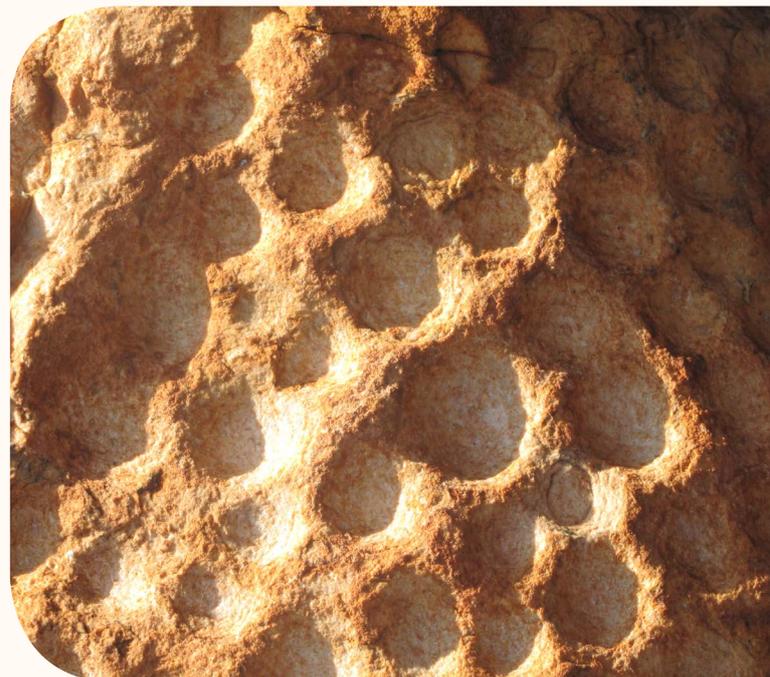
Email: AHAreview@dplh.wa.gov.au

Post: Assistant Director General,
Heritage Services
Department of Planning, Lands
and Heritage
Locked bag 2506
Perth WA 6001

Phone for enquiries: (08) 6551 8002

As with the first Phase of the Consultation Process, all feedback will be published on the Department's website

All written submissions must be received by 31 May 2019.



Proposal 1

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

DESIRED OUTCOME:

The legislation to protect Aboriginal cultural heritage reflects developments in best practice in heritage management and the rights of Aboriginal people under national and international law.

ISSUES:

- The current Act is 47 years old and does not reflect developments in the legal rights and expectations of Aboriginal people or contemporary standards of heritage management.
- Previous amendments have resulted in ambiguity rather than clarity, which has contributed to the difficulties of administration of legislation that was principally concerned with the acquisition and management of artefacts, rather than the heritage of a living culture.

PROPOSAL

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

Key Points:

Proposed objects of a new Act:

1. Recognise the central role of Aboriginal cultural heritage to thriving Aboriginal communities, current and future.
2. Provide for the culturally appropriate identification and documentation of Aboriginal heritage places and objects, including their tangible and intangible aspects.
3. Provide a clear framework for the protection, conservation and management of Aboriginal cultural heritage, which informs land use and development decisions that respect Aboriginal heritage.
4. Promote the appreciation of Western Australia's Aboriginal heritage so that the whole community values its preservation.

RATIONALE:

- The weight of feedback suggested that the extent of amendments necessary to correct the problems in the current legislation means that developing an entirely new Act would be more effective than attempting further amendments of the current Act.

QUESTIONS:

Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?

Proposal 2

Update definitions and scope of new Aboriginal heritage legislation

DESIRED OUTCOME:

The legislation to protect Aboriginal cultural heritage is sensitive to the culture it is designed to protect and therefore, more effective and trusted by Aboriginal people.

ISSUES:

- The current Act does not adequately reflect Aboriginal cultural heritage, which is intrinsically connected to the lands of their ancestors and links between places that are culturally significant in Aboriginal Law can extend over vast areas of country.
- The concepts of cultural landscapes and intangible heritage are not adequately catered for.
- There are no provisions to care appropriately for ancestral remains.
- Many Aboriginal people wanted the Act to cover their intellectual property in their art, stories, songs and medicines to prevent the culturally inappropriate exploitation of their heritage.

PROPOSAL

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.

Key Points:

1. Adopt a new definition of 'place' that is aligned with the *Australia ICOMOS Burra Charter*¹ (and explanatory and practice notes), which includes 'tangible and intangible dimensions':

"Place has a broad scope and includes natural and cultural features. Place can be large or small: for example, a memorial, a tree, an individual building or group of buildings, the location of an historical event, an urban area or town, a cultural landscape, a garden, an industrial plant, a shipwreck, a site with in situ remains,

¹ The *Australia ICOMOS Burra Charter* is widely accepted as the Australian Standard for the identification, recognition and conservation of heritage places. It is used in all Australian jurisdictions to guide heritage policies and processes.

a stone arrangement, a road or travel route, a community meeting place, a site with spiritual or religious connections...

Places may have a range of values for different individuals or groups”.²

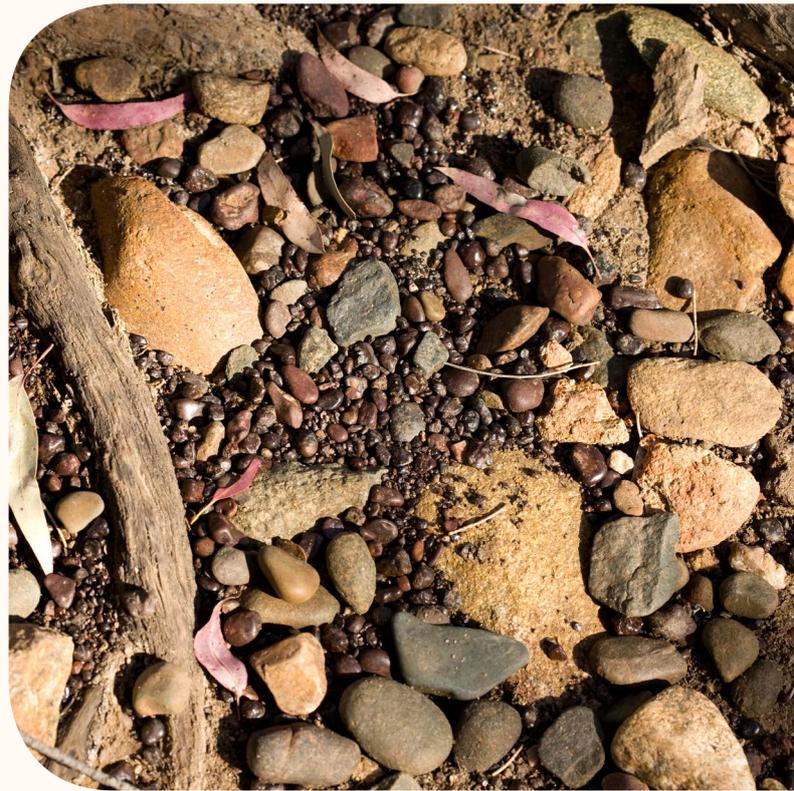
2. Carry forward the protection of all Aboriginal cultural heritage places and objects, whether registered or not, consistent with the current Act.
3. Continue to protect Aboriginal objects consistent with the current Act.
4. Include culturally appropriate procedures to deal with ancestral remains.

RATIONALE:

- The current concept of an Aboriginal site in the current Act is incompatible with how Aboriginal people practice their culture and the landscape-scale heritage management that has become best practice.
- The artificial limitations on places that Aboriginal people consider important were successfully challenged in *Robinson v Fielding* [2015] WASC 108 and a definition in keeping with this decision should be adopted.
- Intellectual property rights are the remit of Commonwealth legislation.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?



² Explanatory Note to Definition of Place, Burra Charter 2013

Proposal 3(A)

Local Aboriginal Heritage Services

DESIRED OUTCOMES:

- 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.

ISSUES:

- Under the current Act, Aboriginal people do not have any direct role in decision-making about their cultural heritage and there is no mandate to consult or involve Aboriginal custodians in any decisions about activities that may affect their cultural heritage.
- Consultation and decision-making processes do not always result in the right people speaking for Country.
- Land use projects can experience delays, additional costs and become unviable due to uncertainty about the consultation process.

PROPOSAL

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.

Key Points:

1. The local Aboriginal community determines who the right people to speak for the relevant cultural heritage are and what is important to them.
2. Provides a first point of contact for proponents seeking advice on heritage matters in a particular area.
3. Undertakes or co-ordinates surveys and management of Aboriginal heritage.
4. Consults with other Local Aboriginal Heritage Services where heritage values extend beyond their area of responsibility.
5. May provide updates to the Register.

6. May make agreements regarding Aboriginal heritage and the management of heritage matters in the context of land use proposals with land users (which may be subject to endorsement by the Aboriginal Heritage Council and, in some circumstances, the Minister).
7. May give advice (when sought) to the Aboriginal Heritage Council on the acceptability of all land use proposals in their area of responsibility, whether subject to an agreement or not.
8. Time frames and standards will apply to the advice and services provided.
9. The Aboriginal Heritage Council will be responsible for appointment and performance monitoring.
10. It is anticipated that Prescribed Bodies Corporate will apply to become a Local Aboriginal Heritage Service.
11. Requirements for Local Aboriginal Heritage Services:
 - a. Be 100 per cent Aboriginal-owned.
 - b. Have genuine connection with the area it proposes to represent (including through member and Board composition).
 - c. Have demonstrable support from a broad constituency of the Aboriginal people within, and 'cultural authority' over, the area it proposes to represent.
 - d. Be incorporated under either the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) or Corporations Law.
 - e. Have rules that are consistent with the requirements imposed on Prescribed Bodies Corporate, especially in terms of obligations to consult on certain decisions.
 - f. Have demonstrable capacity to undertake the functions required of it and maintain appropriate standards of good corporate governance.

12. There is no compulsion for a community to establish a Local Aboriginal Heritage Service.
13. In areas where there is no Local Aboriginal Heritage Service, the Department of Planning, Lands and Heritage will perform the above functions.

RATIONALE:

- Enables the right people to speak for Country, promotes culturally appropriate consultation, and facilitates agreement making focused on best practice heritage outcomes.
- While a centrally-held and administered list of people who can speak for particular locations may provide more apparent certainty that the right people will be consulted, a list is only useful when regularly maintained and, on its own, will not achieve the goal of encouraging more engagement and agreement making or ensuring standards and timeframes are met.
- Fully devolved decision-making to local Aboriginal people, as in the Victorian model, is unlikely to be supported by a significant proportion of land users, who consider the absence of Ministerial decision-making in contentious land use proposals would create a risk to future investment.
- Heritage management agreements made with or through Local Aboriginal Heritage Services that do not have a significant impact on Aboriginal heritage or involve State Significant projects may be fast-tracked through the approvals process.

QUESTIONS:

Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?

Proposal 3(B)

Aboriginal Heritage Council

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.
- Aboriginal heritage is respected and valued by the non-Aboriginal community.
- Aboriginal people have a greater say in the operational and strategic decisions that affect their heritage.
- Equitable agreements between land users and Aboriginal people at a local level are encouraged and best practice recognised.
- System reliance on the Minister as the sole decision maker on all land use proposals is reduced.

ISSUES:

- Unlike historic heritage, Aboriginal heritage does not benefit from a statutory body empowered to provide expert strategic advice and oversight to ensure Aboriginal heritage is protected, managed, conserved and its value promoted.
- The lack of understanding among non-Aboriginal Australians of Aboriginal heritage leads to a lack of value, which can contribute to its destruction.
- The current Act does not recognise the heritage outcomes of agreements made between Aboriginal people and land users. A mechanism is needed to allow developments that avoid or minimise impact on Aboriginal heritage to proceed with minimal further regulation where equitable negotiations have resulted in agreement with the relevant Aboriginal people.
- The current regulatory framework has allowed heritage to be 'traded away' in some agreements where the bargaining positions of the parties is unequal, resulting in poor heritage outcomes for future generations.
- The current model requires that the Minister adjudicate all land use decisions that may impact Aboriginal heritage. In a state the size of Western Australia, which is economically dependent on efficient access to land by the resources sector, this is highly inefficient.

PROPOSAL

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

Key Points:

1. Aboriginal Chair and a further eight members appointed by the Minister on the basis of skills and experience relevant to Aboriginal heritage; non-statutory criteria in the selection process will be used to ensure suitably qualified Aboriginal people are appointed and promote gender balance.
2. Strategic focus, not regionally representative.
3. Sets standards for services provided by Local Aboriginal Heritage Services (LAHS) and Heritage Professionals.
4. Oversight of the Aboriginal Heritage Register.
5. Makes decisions on land use proposals that could affect Aboriginal heritage if the proposals:
 - a. demonstrate a neutral or positive impact on heritage; or
 - b. demonstrate a low impact on heritage or that mitigation actions will result in a low impact on heritage;
 - c. are accepted by the relevant Aboriginal people; and
 - d. do not relate to a project of State Significance.
6. Provides advice to the Minister where a land use proposal will have a significant negative impact on Aboriginal heritage or involve a project of State Significance. Advice to be:
 - a. The AHC's assessment of the evidence of importance of the heritage to the relevant Aboriginal people or its potential scientific value.
 - b. The AHC's level of satisfaction that all reasonable attempts have been made to mitigate damage to important heritage.
7. Ensures consultation and any related agreement-making processes have been conducted in good faith.
8. Refers land use proposals to the Minister where there are disputes that cannot be resolved by the parties and/or are contentious.
9. Provides a central point of advice to other decision-making authorities whose decisions could impact Aboriginal heritage.
10. Promotes Aboriginal heritage and assist in ensuring that Aboriginal heritage in Western Australia is respected, maintained and managed in accordance with best practice.
11. Aboriginal Cultural Material Committee will be abolished.
12. As the Aboriginal Heritage Council will assume responsibility for the Aboriginal Heritage Register, it is not proposed to carry forward the statutory function of Registrar of Aboriginal Sites into the new legislation.

RATIONALE:

- Compares with Heritage Council of Western Australia.
- Brings strategic capability and system oversight to Aboriginal heritage protection.

- Creates a statutory body with responsibility for promotion of the value of Aboriginal heritage.
- Encourages agreement-making at a local level, rather than an adversarial approach. Where Aboriginal people and land users reach an agreement that has a significant impact on Aboriginal heritage, those outcomes should be reviewed by an independent body (the AHC) to safeguard intergenerational equity.
- Enables the Minister to focus on decisions that are contentious or of State Significance.
- The ACMC's primary function has been the evaluation of Aboriginal heritage to provide recommendations to the Minister in the context of land use applications. As the proposed system relies on the views and evidence of Aboriginal people (or the scientific community) that an object or place has heritage value, and proposed land uses will be reviewed by the Aboriginal Heritage Council, this function is no longer required.



QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?

Proposal 3(C)

The Minister's Role

DESIRED OUTCOMES:

- 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.

ISSUES:

- Aboriginal people do not accept that the State owns their heritage.
- Some believe there is a conflict of interest inherent in a Minister of the State who is responsible for Aboriginal affairs also being part of a government that needs to permit land use projects for the economic benefit of the State, which could affect or destroy Aboriginal heritage.
- For many Aboriginal people, the objection to a person or body that makes decisions about their country without cultural authority extends to the Minister.
- Currently all land use decisions that could impact Aboriginal heritage are subject to the same level of scrutiny and require Ministerial consent. This was highlighted by the resources industry as a contributory factor in administrative backlogs.
- While many stakeholders suggested the Minister should no longer have any role in decisions concerning land use, there was an equally strong view from industry that Ministerial oversight and decision making was needed to ensure confidence in the system. This is seen as important for continued investment and success in industry.
- The prevalence of agreements entered into by Aboriginal people who have succumbed to financial pressure and effectively traded away their right to object to the destruction of their heritage was highlighted as an issue. In the interests of intergenerational equity, decisions that result in significant damage or loss of Aboriginal heritage should be subject to review by a person or body that is accountable for its protection.

PROPOSAL

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.

Key Points:

The proposed functions of the Minister are:

1. The Minister may delegate decision-making to the Aboriginal Heritage Council in respect of land use proposals that may impact on Aboriginal heritage values where such proposals:
 - a. demonstrate a neutral or positive impact on Aboriginal heritage; or
 - b. demonstrate a low impact on heritage or where mitigation actions will result in a low impact on heritage; or
 - c. are acceptable to the relevant Local Aboriginal Heritage Service; and
 - d. do not involve projects deemed to be of State Significance.
2. Receive advice from the Aboriginal Heritage Council on land use proposals that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance (irrespective of whether the heritage impacts are likely to be significant or not).
3. Make decisions on land use proposals (and agreed outcomes relating to them) that may have significant impact on Aboriginal heritage values or involve projects deemed to be of State Significance.

4. Have due regard to the social and cultural effects of the land use proposal and the views of the relevant Aboriginal people and the public interest as part of the decision-making process.
5. Publish reasons for decisions.
6. Support the Aboriginal Heritage Council's Aboriginal heritage promotion activities as appropriate.
7. Issue a stop work order in cases where Aboriginal cultural heritage is threatened by unauthorised land use activities.

RATIONALE:

- The proposed model of decision-making represents a significant shift from the current system, where Aboriginal people have no formal role, to one where Aboriginal people determine whether a place is important to them and are free to enter into heritage management agreements that either enhance the cultural value or establish ways in which impacts are limited.
- Retaining Ministerial decision-making for projects of State Significance and where a land use proposal may result in significant damage to Aboriginal heritage and requiring the rationale for decisions to be published will:
 - ensure transparency and enable the public to hold the decision maker to account
 - mitigate the risk of Aboriginal heritage being traded away as a result of unequal bargaining positions.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?

Proposal 3(D)

The role of the Department of Planning, Lands and Heritage

DESIRED OUTCOMES:

- 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.

ISSUES:

- The strong view across all stakeholder groups that the department has inadequate resources in terms of numbers and qualifications of staff.
- Over time, the resources available have largely become focussed on coordinating procedural fairness processes and reformatting reports from heritage consultants so that the ACMC can consider section 18 requests to impact potential sites. This has resulted in large backlogs of sites to be assessed, a fragmented approach to policy development and low numbers of enforcement actions.



PROPOSAL

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

Key Points:

The proposed functions of the department are:

1. Provide secretariat and other support to the Aboriginal Heritage Council.
2. Provide operational advice to the Minister responsible for any new Aboriginal Heritage legislation.
3. Provide capacity building to Local Aboriginal Heritage Services.
4. Perform the role of a Local Aboriginal Heritage Service for areas where no suitable body exists or has been nominated to take on these functions.
5. Receive reports of Aboriginal heritage places and objects for inclusion on the Aboriginal Heritage Register.
6. Physically maintain the Aboriginal Heritage Register.
7. Support the Aboriginal Heritage Council in the development of policies and procedures to fulfil its responsibilities.
8. Provide or facilitate the provision of financial and technical assistance or other Aboriginal heritage management and conservation incentives.
9. Manage the Directory of Heritage Professionals.

10. Facilitate research and investigations relating to Western Australia's Aboriginal heritage.
11. Investigate alleged breaches of the Aboriginal Heritage Act (including of conditions attached to any permits issued in respect of land use proposals).
12. Assist in the prosecution of breaches where sufficient evidence has been collected.

RATIONALE:

The role of the public service in Aboriginal heritage should be to provide strategic support and advice to the government and properly constituted decision-making bodies, and regulating that system. In case of market or system failure, government resources should be available to ensure that those who rely on the system can continue to operate effectively.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?

Proposal 3(E)

Heritage Professionals – aiding selection of those with appropriate qualifications and experience and improving standards

DESIRED OUTCOMES:

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

ISSUES:

- Variable quality of outputs and advice from people acting as consultants in Aboriginal heritage, which has created uncertainty, unnecessary costs and poor outcomes for Aboriginal heritage.
- Aboriginal people and land users are vulnerable to poor practices of some in an unregulated profession, particularly during periods of high demand associated with periods of high economic activity.

PROPOSAL

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.

Key Points:

1. To be entered on the Directory, Heritage Professionals will be required to evidence their relevant qualifications and experience. This will be published to enable users to make informed choices of appropriate professionals.
2. Aboriginal people and land use proponents will be encouraged to select from the Directory, but the department will accept information received from a person not on the Directory if it meets the required standard.



3. In response to a land use proposal, the department will advise what studies and standards are required.
4. Materials that do not meet the standards set by the Aboriginal Heritage Council will not be accepted and the proponent notified that the 'clock has been stopped' on approvals processes until the appropriate standard has been met by the Heritage Professional.
5. The department will work with peak bodies to develop guidelines and standards of service for endorsement by the Aboriginal Heritage Council.
6. Inclusion in the Directory does not constitute an endorsement or warranty in respect of any services delivered by a Heritage Professional.

7. The department will not engage in disputes between Heritage Professionals and their clients.
8. Fees will not be regulated and will remain open to market fluctuations, which is consistent with other professional service providers (geologists, lawyers, accountants, etc.) and national competition policy.

RATIONALE:

- The Directory will make it easier for Local Aboriginal Heritage Services and proponents to find and engage professionals that have appropriate qualifications and experience for the work they need completed.
- Improvements in outcomes will be gained without the regulatory burden and costs associated with compulsory registration of accredited professionals.
- Giving clear guidance on the standards expected and rejecting materials that fail to meet those standards will shift the focus of activity towards outcomes rather than process.
- This approach is consistent with other States.

QUESTIONS:

**Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?**

Proposal 4

Retain the current form and function of the register of Aboriginal places and objects but rename it the Aboriginal Heritage Register

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.

ISSUES:

- Typically, heritage registers and lists only include those places that have been assessed by a relevant body (e.g., the Heritage Council) as worthy of protection. Aboriginal heritage is protected whether it is registered or not.
- The register is inaccurate and not trusted by Aboriginal people who sometimes prefer to keep their most important places away from the process of registration. This can result in uncertainty for land users and destruction of heritage.
- The value of the register as an indicator of where heritage is located, so that it can be avoided, or impacts managed, has been diminished in recent years by the practice of having the Aboriginal Cultural Material Committee assess sites against the criteria in section 5 before they can be registered. There is now a significant backlog of sites lodged on an 'interim register', awaiting assessment by the ACMC.

PROPOSAL

- a) 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.
- b) 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.

Key Points:

1. The register will be renamed the Aboriginal Heritage Register.
2. Aboriginal heritage will continue to be protected whether it is registered or not.
3. Heritage professionals will be required to provide reports that meet the reporting standards set by the Aboriginal Heritage Council.
4. Reports from non-heritage professionals may be entered onto the register, providing minimum information standards are met to identify and locate the heritage place or object and their associated stories.
5. The register will show the level of confidence in accuracy of information.
6. Local Aboriginal Heritage Services will be encouraged to update and improve information for their areas of responsibility.

7. There will be standardised language and methods of spatial reporting.
8. Use of predictive modelling to highlight areas of likely Aboriginal heritage sensitivity to aid risk assessments.

RATIONALE:

As the current Act affords protection to Aboriginal heritage, whether it is registered or not, there should be no requirement for a place to be assessed by a central body in order for it to be recorded on the register. If a place need only be identified as culturally important to Aboriginal people (or have scientific value) to be registered, the only test for registration is that sufficient evidence is provided as to the location and why the place is important (not just a statement that it 'is important'). By clarifying this point, the large backlog of places to be assessed is removed as a perceived obstacle to land use. The system can then focus on improving the utility of the database as a planning tool that aids risk based decision-making but, more importantly, is a useful repository of heritage information for Aboriginal people.

QUESTIONS:

Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?

Proposal 5

Introduce a referral mechanism to facilitate tiered assessments of proposed land uses

DESIRED OUTCOMES:

- Land use proposals are designed to co-exist with Aboriginal heritage places wherever possible.
- Approvals for low impact activities can be streamlined.
- Reduced risk and cost for land use proponents through early referrals and advice.

ISSUES:

- The current Act focuses on assessment of places against criteria that are inconsistent with a living culture and presents a binary choice – protect or allow impact, which often results in destruction to heritage.
- Approval to destroy an Aboriginal heritage site is often sought late in the land use proposal process when alternatives that could have mitigated loss or damage to heritage are no longer viable.
- The current Act does not adequately provide for proposed land uses that will have a low impact on heritage.
- Best practice suggests the focus should be on avoiding and minimising impact where possible. Advice on how land use proponents can achieve this is needed earlier in the project planning cycle.

PROPOSAL

- a) 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.
- b) 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.
- c) A 'call in power' will ensure that proposals that should have been referred, but have not been, can be assessed.

Key Points:

The land use proposals approvals system will:

1. Provide for a formal referral mechanism to both a government and Local Aboriginal Heritage Services for land use proposals for advice on the Aboriginal heritage implications of the proposal and appropriate level of assessment (where a land user does not voluntarily adopt the highest level).
2. Provide for a tiered assessment of land use proposals that is dependent upon the known or predicted Aboriginal heritage values of the land and the nature of the proposed land use (e.g. the degree of impact to the land that the proposal is likely to cause).
3. Consents to undertake an activity or range of activities will run with the land provided 'new' land users propose the same activity or range of activities.
4. Provide a 'call in' power for proposals that ought to have been referred but were not.
5. Provide that a land user may voluntarily adopt the highest tier of assessment, particularly where this reflects agreements made with the relevant Local Aboriginal Heritage Service (s) or other relevant Aboriginal party.
6. Set and enforce the standards for research, consultation and reporting to be undertaken for each level of assessment.
7. Provide that reasons for decisions on the acceptability of land use proposals are given by the relevant decision maker.
8. Provide that all parties to a decision regarding the acceptability of land use proposals that impact on Aboriginal heritage values have the right to appeal.

RATIONALE:

- A referral process will support risk-based and tiered assessment of land use proposals whilst encouraging agreed outcomes between land users and the relevant Local Aboriginal Heritage Service. This will reduce regulatory burden.
- It will ensure that potential heritage values are identified early in land use planning, thereby ensuring Aboriginal heritage protection is incorporated to the greatest extent possible and investment is not delayed by the late identification of potential constraints.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?



Proposal 6

Encourage and recognise agreement making

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.

ISSUES:

- The current system can be adversarial and relies on the Minister to adjudicate on all land use proposals.
- Opportunities to meet the land use requirements without damaging Aboriginal heritage can be missed.
- The current Act does not recognise agreements between land users and Aboriginal people that are likely to have been negotiated as part of compliance with *Native Title Act 1993* requirements. This can create additional costs and uncertainty, which could potentially be avoided.
- A mechanism is needed to enable land users to rely on an existing agreement, and agreed heritage outcomes arising from it, to expedite approvals under the new Aboriginal Heritage Act. However, these agreements may not meet the standards required by the new Act.



PROPOSAL

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

Key Points:

1. The Aboriginal Heritage Council will not ratify an agreement if they consider the process by which it was negotiated was inequitable.
2. To be ratified, an agreement must not authorise the destruction of Aboriginal heritage without the need for formal approvals under the new legislation. Parties will not be able to entirely contract out of the new Act.
3. If a proponent presents an agreement for ratification that pre-dates the establishment of the relevant Local Aboriginal Heritage Service(s), the Aboriginal Heritage Council may (at its discretion) seek advice from any Local Aboriginal Heritage Service(s) covering the agreement area as to its current suitability.
4. Proponents may also make agreements with Local Aboriginal Heritage Services regarding various matters under the new Act (costs, timeframes etc)

5. The Aboriginal Heritage Council will not be empowered to impose its view on the commercial terms of agreements negotiated in good faith by the respective parties.

RATIONALE:

- Best practice heritage management agreements are founded on positive relationships and can result in better heritage outcomes than an adversarial approach that goes straight to an application to destroy heritage.
- Since the *Native Title Act 1993* came into operation there has been a growing number of Indigenous Land Use Agreements and other mechanisms by which heritage outcomes have been agreed between Aboriginal people and land users. Wherever possible these should be recognised, but not all will meet the standards required by the new Act and may not have been arrived at through an equitable negotiation process.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?

Proposal 7

Transparency and Appeals

DESIRED OUTCOMES:

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

ISSUES:

- In making decisions about land use applications that impact Aboriginal heritage, the Minister is required to have regard to the general interest of the community, but is not required to publish reasons for a decision. Concerns are held by Aboriginal people that a failure to publish reasons for decisions and a lack of a right of appeal gives rise to a perception that Ministerial decisions favour the economic interests of the general community over the protection of Aboriginal heritage.
- Aboriginal people do not have the same rights (or any) of appeal against a decision to authorise land use that affects their heritage.
- Industry representatives also commented on the lack of transparency of decision making in the current system.

PROPOSAL

- a) Reasons for decisions are to be published.
- b) 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.
- c) Retain the State Administrative Tribunal as the primary review body.

Key Points:

1. Reasons for decisions by the relevant decision-maker will be published at key decision-making stages (referral/standards setting and land use proposal assessment), enabling affected parties to seek review of these decisions.
2. Aboriginal people and land users whose legal rights and interests are affected by the decision-maker's actions will have the same rights of review and appeal if they are aggrieved by a decision on a proposed land use, or other administrative decisions.
3. Review mechanisms will be subject to statutory timeframes and available to those who are the acknowledged knowledge holders, native title holders or claimants, or have any other legal interest in the relevant land.

4. Participants in the consultation process on a land use proposal will be notified of the recommendations to be considered by the AHC and may lodge a written objection to the recommendation within 21 days of receiving notice of the recommendation. The department will be required to ensure procedural fairness is afforded to all parties and provide details of objections to the AHC, which must be considered by the AHC before making a recommendation to the Minister on a land use proposal. The Minister will be provided with details of stakeholder consultation processes and copies of submissions but will not hear appeals directly.
5. The State Administrative Tribunal will be retained as the primary review body for any person whose legal rights and interests are negatively affected by a decision by the Minister.

RATIONALE:

- Modern standards of procedural fairness must be reflected in new Aboriginal heritage legislation. This requires the incorporation of a fair system for decisions to be challenged by those whose legal rights and interests are affected.
- The proposed Local Aboriginal Heritage Services, which will be responsible for identifying the right Aboriginal people to provide input into decisions and receive notice of those decisions, will create a clear pathway for efficient and time-bound review processes.
- The system needs to be clear, not onerous or open-ended.

QUESTIONS:

Will the proposal deliver the desired outcome?
If no, why not and what changes would you suggest and why?



Proposal 8

A modernised enforcement regime

DESIRED OUTCOME:

The duty of care to avoid unauthorised damage to Aboriginal heritage is taken seriously.

ISSUES:

- The penalties under the current Act are inadequate as either punishment or deterrent.
- The fact that the penalties for damage to historic heritage are higher than where Aboriginal heritage is impacted also reinforces the perception that Aboriginal heritage is not considered important to the Western Australian community.
- The remoteness and inaccessibility of some Aboriginal places and the geographic scale of Western Australia means that the current statutory limitation period of twelve months in which to bring a prosecution for an offence is inadequate.
- The defence of ignorance is not considered appropriate as the Act has been in force since 1972.
- The concept of Honorary Wardens as enforcement officers is anachronistic and has fallen into disuse.

PROPOSAL

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

Key Points:

1. Maintain the current range of offences.
2. Limit the current 'ignorance' defence to circumstances in which the land use proponent has done everything 'reasonably practicable' to make themselves informed.
3. Increase the limitation period to five years.
4. Reinforce (for the avoidance of doubt) that a place need not be on the Aboriginal Heritage Register for the offences to apply.

5. Increase penalties to match those provided for in the *Heritage Act 2018*, which empower a court to:
 - a. impose a fine of up to \$1 million, with a daily penalty of \$50,000, on a person found guilty of an offence;
 - b. impose a fine of up to \$1 million and imprisonment for one year, with a daily penalty of \$50,000, on a person found guilty of contravening a stop work order made by the Minister for Aboriginal Affairs;
 - c. order a person to take specific measures to restore a place, or any specified land, feature, building or structure, or to return anything to the place, so that the place is restored to the state in which it was before the offence occurred;
 - d. order compensation for the damage or loss of heritage, wholly or in part.
6. If a person is convicted of an offence the Governor may order that, during a period of not more than 10 years, the subject land must not be developed or used, or may be used only for the purposes specified in the order.
7. Not carry forward Honorary Wardens in the new legislation.

RATIONALE:

- Equivalent offences and penalties to those applicable under the *Heritage Act 2018* are essential to reinforce the serious impact that damage to Aboriginal heritage has on the custodians of that heritage.
- Identification, investigation and gathering evidence for a prosecution of an offence in relation to Aboriginal heritage in Western Australia cannot reasonably be done in twelve months; a three-year period (which equates to State heritage legislation) is considered more appropriate.
- Honorary Wardens have not been appointed for many years as compliance inspections have been, and will continue to be, carried out by the department.
- The combined effect of the Minister's power to issue 'stop work orders', a three-year period to bring prosecutions, the removal of the defence of ignorance and higher penalties should result in a greater deterrent to offend.

QUESTIONS:

Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?

Proposal 9

Protected Areas

DESIRED OUTCOME:

The mechanism for recognising Aboriginal heritage places of outstanding importance is more flexible and allows for active management.

ISSUES:

- Currently, areas that have Protected Area status have restrictions as to access, which makes active management of heritage difficult.
- There are significant native title implications in declaring a Protected Area.

PROPOSAL

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

Key Points:

1. Existing Protected Areas will continue.
2. If an application is made to declare a new Protected Area, provision will be made in the new legislation for regulations capable of authorising specific management activities by the relevant Aboriginal people.

RATIONALE:

A mechanism is needed to recognise areas of outstanding Aboriginal heritage importance and afford them robust legislative and on-ground protection. The current regime restricts access and management, which has contrary outcomes. Should new Protected Areas be declared, ensuring legal access can be granted via regulation will ensure important places can be properly maintained.

QUESTIONS:

Will the proposal deliver the desired outcome? If no, why not and what changes would you suggest and why?



The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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