

Aboriginal Cultural Heritage Bill 2020

To:
DEPARTMENT OF PLANNING, LANDS AND HERITAGE

Law Society Contact
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1. Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to the *Aboriginal Cultural Heritage Bill 2020 (WA) (Bill)*¹, which is intended to replace the *Aboriginal Cultural Heritage Act 1972 (WA) (Act)*².
- 1.3 The Law Society had previously made a submission to the (lapsed) *Aboriginal Heritage Bill 2014*.
- 1.4 The Law Society also made a submission on the Inquiry into the destruction of 46,000 caves at Juukan Gorge in Western Australia.³

2. Summary

- 2.1 As stated in the Department of Planning, Lands and Heritage Discussion paper:

*Although ground-breaking in its time, the Aboriginal Heritage Act 1972 (the Act) has been described as 'embarrassingly out of kilter' with modern standards of heritage management, but also and more importantly, the rights and reasonable expectations of Aboriginal people.*⁴
- 2.2 The Law Society considers the Bill as an improvement on the Act. The legislation captures the aspiration of including Aboriginal people in decision making about Aboriginal heritage. The Law Society is interested in legislative change that acknowledges Aboriginal rights and custodianship, considers all stakeholders, and recognises and celebrates cultural heritage.
- 2.3 However, the Law Society is concerned that the consultation draft released on 2 September requires thorough consideration by stakeholders and the consultation window provided by the Department of Planning, Lands and Heritage is short.
- 2.4 The Law Society considers that it would be unfortunate for legislation of such importance to be introduced into Parliament without being properly considered by stakeholders, especially the local Aboriginal organisations who under the Bill will be charged with carrying out substantive heritage management functions.

¹ *Aboriginal Cultural Heritage Bill 2020 (WA)*

² *Aboriginal Cultural Heritage Act 1972 (WA)*

³ <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Inquiry-into-the-Destruction-of-Caves-Juukan-Gorge-Western-Australia-C2.pdf>

⁴ Department of Planning, Lands and Heritage *Review of the Aboriginal Heritage Act 1972: Proposals For New Legislation To Recognise, Protect And Celebrate Western Australia's Aboriginal Heritage – Discussion Paper*
<https://lawsocietywa.sharepoint.com/policy/Indigenous%20Legal%20Issues%20Committee/2019MAR%20Discussion%20Paper%20Review%20of%20the%20Aboriginal%20Heritage%20Act%201972.pdf#search=aboriginal%20heritage%20act>

- 2.5 The Law Society considers the Bill an enormous opportunity to put in place a world leading cultural heritage management regime and time should be taken to ensure that the legislation is consistent with best practice national standards.
- 2.6 The Law Society's submission below questions some aspects of the draft bill and raises some matters for consideration.

3. Objectives of the Aboriginal Cultural Heritage Bill 2020

3.1 The primary objectives of the Bill are as follows:

- a) *to recognise —*
- i. *the fundamental importance to Aboriginal people of Aboriginal cultural heritage and the central role of Aboriginal cultural heritage in Aboriginal communities past, present, and future; and*
 - ii. *that Aboriginal people have custodianship over Aboriginal cultural heritage; and*
 - iii. *the value of Aboriginal cultural heritage to Aboriginal people and the wider Western Australian community;*
- b) *to recognise, protect and preserve Aboriginal cultural heritage;*
- c) *to manage activities that may harm Aboriginal cultural heritage so as to achieve clarity, confidence and certainty in providing balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community;*
- d) *to promote an appreciation of Aboriginal cultural heritage.*

3.2 The Law Society considers that the above objectives are laudable, however could be strengthened and enhanced through additional objectives analogous to the NSW *Aboriginal Cultural Heritage Bill 2018* (NSW):⁵

- *to recognise Aboriginal cultural heritage as a living culture that is intrinsic to the well-being of Aboriginal people;*
- *to enable and support voluntary actions that conserve Aboriginal cultural heritage.*

The Law Society is particularly concerned that the 'museum mentality' regarding Aboriginal Cultural Heritage that is present in the Act is not continued in the Bill and that the new cultural heritage regime reflects contemporary understandings and best practice of Aboriginal cultural heritage management.

4. Updated Aboriginal cultural heritage definition

- 4.1 The Law Society welcomes the updated definition in the Bill, and it considers it a marked improvement on the existing definition in the Act.
- 4.2 In particular, the inclusion of places, objects, intangible cultural landscapes and a set definition for ancestral remains is supported.

⁵ *Aboriginal Cultural Heritage Bill 2018* (NSW)

- 4.3 The Law Society notes that the definition of 'place' is consistent with the definition in the Burra Charter.⁶
- 4.4 However, the definition does not capture intangible heritage beyond an interconnected group of areas. The definition therefore excludes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge from the operation of the proposed Act.
- 4.5 Intangible heritage is dealt with under part 5A of the Victorian *Aboriginal Heritage Act 2006* (Vic) (**VIC Act**) and Division 3 of the NSW Bill, though the establishment of registers of intangible heritage.
- 4.6 As stated by the Yamatji Marlpa Aboriginal Corporation, 'a meaningful piece of legislation that seeks to protect and promote Aboriginal Heritage should not be limited to things that can be given a boundary in a European sense'.⁷
- 4.7 Furthermore, intangible heritage such as songlines are often inexorably and irreducibly linked to tangible heritage such as places, and it is through intangible customary laws that geographic areas have their cultural significance. The Bill acknowledges this through the definition of 'cultural landscapes' but falls short of applying to other important forms of cultural heritage.
- 4.8 Past President of the Law Society, Greg McIntyre SC, in his (personal) submission to the 2018 review of the Act, contends that 'culture' should have a broad definition: 'the characteristics and knowledge of a particular group of people, encompassing language, religion, cuisine, social habits, music and the arts'.⁸ Past President McIntyre goes on to contend that the definition of heritage should be broad and general: 'qualities, traditions, or features of life that have been passed down from one generation to another'.⁹
- 4.9 An expanded definition of Aboriginal Cultural Heritage would allow intangible cultural heritage to be incorporated into the Aboriginal Cultural Heritage Directory in part 9 of the Bill.

5. Recognising Aboriginal custodianship and control of cultural heritage

- 5.1 The Law Society supports the duty for organisations and individuals to repatriate Aboriginal ancestral remains to custodians, or if a custodian cannot be identified, to the Aboriginal Heritage Council.¹⁰
- 5.2 The Law Society supports the duty of prescribed public authorities (the WA Museum and Universities) to return secret or sacred objects to custodians, or if a custodian cannot be identified, to the Aboriginal Heritage Council.¹¹

⁶ International Council on Monuments and Sites (ICOMOS), *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013*

⁷ Yamatji Marlpa Aboriginal Corporation, *Submission to Review of Aboriginal Heritage Act 1972 - Consultation Phase 2 March 2019*, page 4

⁸ Greg McIntyre SC, *Review of the Aboriginal Heritage Act 1972*, 30 May 2018.

⁹ *Ibid.*

¹⁰ Aboriginal Cultural Heritage Bill 2020 (WA), s.51 – s.52

¹¹ *Ibid.*, s.59

- 5.3 The Law Society notes a potential for disputes if there are multiple custodians or persons claiming to be custodians who could be eligible for receipt of ancestral remains or sacred objects.
- 5.4 In regards to secret or sacred objects, section 57 of the Bill provides that '[a]n Aboriginal person, group or community that has, in accordance with Aboriginal tradition, rights, interests and responsibilities in respect of a secret or sacred object is a custodian and rightful owner of the object and entitled to possession and control of the object'.
- 5.5 There is no mechanism in the Bill, apart from the reference to 'Aboriginal tradition, rights, interests and responsibilities' for resolving who is the rightful owner of a sacred object if there are competing claims to ownership.

6. A new directory of Aboriginal cultural heritage

- 6.1 The Law Society supports the new Directory of Aboriginal Cultural Heritage (the Directory) established in the Bill and the duty to report Aboriginal cultural heritage to the Directory.
- 6.2 As noted in section 4, the definition of Aboriginal Cultural Heritage limits the types of cultural heritage which could be included in the Directory.

7. Enabling an Aboriginal voice through the Aboriginal Cultural Heritage Council and Local Aboriginal Heritage Services

- 7.1 The Law Society supports the establishment of the Aboriginal Cultural Heritage Council (ACH Council) as an important statutory body controlled by an Aboriginal chairperson.
- 7.2 The Law Society notes that other ACH Council members may not necessarily be Aboriginal, but must have 'such knowledge, skills and experience as the Minister considers appropriate'.
- 7.3 The Law Society considers it important that the ACH Council is also comprised of representatives from around Western Australia. This may be a matter for the Regulations.
- 7.4 The ACH Council has powers under the Bill to appoint local native title parties and Aboriginal Corporations as a local Aboriginal Cultural Heritage service (LACHS) to perform various functions.¹²
- 7.5 The Law Society is concerned that LACHS may be ill equipped to adequately perform their functions under the Bill due to resourcing constraints.
- 7.6 The Law Society supports the function of the LACHS to consult with other local ACH services, native title parties and knowledge holders who are not native title parties about Aboriginal cultural heritage that extends beyond the geographic boundaries of an area,¹³ as depending on what LACHS is appointed in an area, relevant Aboriginal elders or knowledge holders may not be involved in a LACHS directly. The Law Society notes that

¹² Ibid, s.32.

¹³ Ibid, s. 32(g)

unsuccessful applicants to be a LACHS may make a written objection to the Minister, and the Minister may ultimately overturn the decision of the ACH Council to appoint a LACHS.¹⁴

- 7.7 There may be numerous entities which could potentially be the LACHS for an area and it may be difficult for the ACH Council to determine who are the 'right people' to perform the functions of the LACHS. As stated by the Australian Association of Consulting Archaeologists Incorporated:

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'.¹⁵

- 7.8 Care would need to be taken by the Aboriginal Heritage Council in appointing a LACHS to avoid a duplication of heritage services in a certain area, given the existence of prescribed bodies corporate under the *Native Title Act 1993* (Cth), and also to avoid tension between an entity with functions under Native Title legislation and a different entity with functions under the Bill.
- 7.9 It is also foreseeable that, for example, a mineral exploration company may be charged fees by both a native title party and a LACHS¹⁶ for providing the same service.
- 7.10 The Law Society recommends that thorough consideration be given to the interaction between native title processes and the proposed heritage regime in the Act.

8. Protecting areas of outstanding significance

- 8.1 The Law Society supports the provisions in the Bill regarding Protected Areas.
- 8.2 The Law Society notes that Protected Areas under the Act will retain their status, however, notes some commentary that historically protected areas status has been of limited value in protecting aboriginal cultural heritage.¹⁷
- 8.3 Resourcing will be important to ensure that applications for protected area declarations by 'knowledge holders' are sufficient for the ACH to form their preliminary view on the applications. Resourcing will also be important within the ACH itself to follow the process set out in the Bill to make recommendations to the Minister.

¹⁴ Aboriginal Cultural Heritage Bill 2020 (WA), s.40(5).

¹⁵ 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)

¹⁶ Aboriginal Cultural Heritage Bill 2020 (WA), s.34(2)(g)

¹⁷ For example, see the submission to the discussion paper of the Anthropological Association of WA "It is generally recognised that the current system of Protected Areas does not work as they would seem to be subject to the same section 18 provisions as other areas of land".

9. Managing activities that may cause harm to Aboriginal cultural heritage through a tiered system and agreement between parties

- 9.1 The Law Society supports the tiered system of exempt, minimal, low, and medium to high impact managing activities as a reasonable approach to protecting cultural heritage and facilitating recreational and economic activity.
- 9.2 The Law Society supports the system in the Bill by which an Aboriginal cultural heritage plan may be progressed by the Aboriginal Cultural Heritage Council if Aboriginal parties and proponents cannot agree.¹⁸
- 9.3 The Law Society notes that ultimately the Minister may make decisions on Aboriginal cultural heritage,¹⁹ and this conclusion does not differ from the existing Act in which many culturally significant sites have been destroyed following Ministerial approval.²⁰
- 9.4 The Law Society notes the comments from the Chief Executive Officer of the National Native Title Council:

Under the draft WA bill, ultimate decision-making power still sits with the minister. If Traditional Owners don't agree to the destruction of a site, then such authorisation can be provided by the minister. This forces the hand of Traditional Owners to reach agreement because they're damned if they do, damned if they don't. This is not genuine "consent", it is harm mitigation.²¹

10. Stronger compliance and enforcement

- 10.1 The Law Society supports the tough penalties in the Bill for the new offences of serious harm, material harm and harm to Aboriginal cultural heritage and the ability of the Minister to issue stop work orders.
- 10.2 The Law Society notes the defence that a person had undertaken a due diligence assessment and 'all reasonable steps to ensure that the activity was managed so as to avoid or minimise the risk of harm being caused to Aboriginal cultural heritage by the activity'.²² 'All reasonable steps' is undefined in the Bill and may be subject to conjecture and argument. The Law Society recommends that the Guidelines provide more information for proponents on what constitutes 'all reasonable steps'.
- 10.3 The Law Society also supports the extension of the limitation period for prosecutions to six years, although notes that offences will most likely be committed in very remote locations and may be difficult to detect.
- 10.4 It may be appropriate approach would be to add the ingredient of 'discoverability' to define the commencement of the limitation period. That would mean that the limitation period for commencing a prosecution would not commence until, or could be extended by leave, the

¹⁸ Ibid, s.140.

¹⁹ Ibid, s.121

²⁰ Most recently the approval of the Juukan Gorge destruction pursuant to s.18 of the *Aboriginal Heritage Act 1972*

²¹ https://nntc.com.au/media_releases/nntc-welcomes-ministerial-communique-but-says-was-proposed-cultural-heritage-bill-falls-short/

²² Ibid, s.89(b)(ii)

time when the AHC discovered, or could with reasonable diligence have discovered, the existence of the breach of the Act. This is a similar approach to cases where an injury or defect is latent and legislation has allowed for the point of accrual being redefined to run from when the injury was discovered or became reasonably discoverable²³ or an extension of the limitation period applying where material facts were not apparent,²⁴ sometimes subject to the Court concluding that it is just and reasonable to do so.

11. Rights of review and improved transparency

11.1 The Law Society supports the rights of review of key decisions by the State Administrative Tribunal for both proponents and Aboriginal people, and notes that this is a marked improvement on the situation in the Act where Aboriginal people have no right of review.

12. Increased certainty with statutory guidelines

12.1 The Law Society supports the development of guidelines on practical matters such as conducting due diligence and consultation. The guidelines should provide clarity and certainty to parties in their compliance with the requirements in the Bill.

13. Transitional provisions

13.1 The Law Society supports transitional provisions in the Bill and notes the importance of establishing the Aboriginal Heritage Council and LACHS to administer the proposed Law. Adequate funding to the entities who will have rights and responsibilities under the Bill will be crucial to the success of the new legislation.



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²³ *Limitation Act 1980* (UK) s 11, originally enacted by the *Limitation Act 1975* (UK); *Limitation of Actions Act 1958* (Vic) 5 5(IA) (limited to personal injuries consisting of a disease or disorder: no longer applicable as from 2003); *Limitation Act 2005* (WA), s 55(1).

²⁴ *Limitation Act 1963* (UK); *Limitation Act 1969* (NSW) 55 57-58; *Limitation of Actions Act 1974* (Qld) 55 30-31; *Limitation of Actions Act 1958* (Vic) 5 23A (added 1972, replaced 1983). Note also *Limitation of Actions Act 1936* (SA) 5 48 (added 1972); *Limitation Act 1981* (NT) 5 44 (not limited to personal injury cases); see P Handford, "A new Limitation Act for the 21st Century" [2007] *UWALaw Rv* 7; (2007) 33(2) *University of Western Australia Law Review* 387.