

8 December 2021

Honourable Stephen Dawson MLC
Minister for Aboriginal Affairs
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Dear Minister

ABORIGINAL CULTURAL HERITAGE BILL 2021

The Law Society acknowledges the Government's consultation process in which it has engaged since 2018 in pursuit of the object of presenting to Parliament proposed legislation to better protect Aboriginal cultural heritage (ACH) in the State of Western Australia.

That consultation process has resulted in a complex piece of proposed legislation, in the form of the *Aboriginal Cultural Heritage Bill 2021* (the Bill) with some significant improvements upon the current *Aboriginal Heritage Act 1972* (WA) (the Act).

Significant improvements in the 2020 and 2021 versions of the *Aboriginal Cultural Heritage Bill*, compared to the Act include structured local Indigenous involvement,¹ stop activity orders,² prohibition orders³ and remediation orders,⁴ and the capacity to vary decisions if new information comes to light.

There have also been some significant improvements to the 2020 consultation draft of the Bill made in the Bill, including:

1. The Minister is now **obliged** to consider the outstanding significance of Protected Areas.
2. The Minister is also now **obliged**⁵ to authorise ACH Management Plans only where –
 - a) it is not a Protected area;
 - b) there has been consultation;
 - c) the Plan includes steps to avoid or minimise the risk of harm; and
 - d) **prescribed** matters must be taken into account, which means that matters to be taken into account may be prescribed in regulations created by the co-design process which is scheduled to take place in the future.⁶

¹ Part 2, Division 3.

² Part 7, Division 2.

³ Part 7, Division 3.

⁴ Part 7, Division 4.

⁵ Clause 165(1).

⁶ Clause 165(3)(a) and 163(1).

- e) Consent to Aboriginal Cultural Heritage Management Plans (ACHMP) must be “informed consent” which can only occur following “full and proper disclosure” and must be “voluntary” and without “coercion, intimidation or manipulation”⁷, i.e., free, prior and informed consent in form. However, the ‘free prior informed consent’ is somewhat illusory when the consent, if given, is being given in a circumstance where those consenting know that if they do not consent an application can be made to the Minister to authorise the ACHMP.
- f) The 3 tiers of harm are to be prescribed⁸, so will be the subject of definition by the co-design process creating regulations.
- g) A New Division⁹ regarding potential for compensation to Aboriginal people with traditional rights, interests, or responsibilities. The compensation will be determined by the CEO by prescribed criteria, so that is also open to be co-designed in regulations.
- h) Local Aboriginal Cultural Heritage Services (LACHS) are to be regional corporations¹⁰ and, in the absence of a regional corporation, a local Registered Native Title Body Corporate (RNTBC).

The potential lack of financial resources of LACHS is an issue which has been ventilated during the consultations relating to the Bill. There was a concern expressed during the consultations that many RNTBCs have no existing resources to provide even their current statutory responsibilities under the *Native Title Act 1993*.

The 2020 draft of the Bill had LACHS relied on securing fees for services from proponents. Consultations identified that that would be inadequate in a lot of instances. The current draft of the Bill has a provision (s 51) in it which allows a LACHS to be funded by Government.

There is still predicted to be an issue about the adequacy of that funding. The other related change (cl 40) is that the LACHS which the ACH Council will designate, in order of priority, are ‘regional corporations’ and then RNTBCs.

There is provision in the Bill giving to the ACH Council power to delegate certain significant aspects of its powers to a committee¹¹, allowing for the possibility of regional committees being established to carry out some ACH functions. That has been suggested to be a way of enhancing local decision-making. However, cl 20(6) makes most of the key functions of the ACH Council non-delegable.

In view of the improvements outlined, which are affected by the Bill it is undesirable that Aboriginal Cultural Heritage protection be left to be regulated by the current *Aboriginal Heritage Act 1972* (WA).

There remain, however, some areas where the Bill should be improved.

⁷ Clause 146.

⁸ Clause 100.

⁹ Part 5, Division 4.

¹⁰ The Regional Corporations defined in the *Land Administration (Southwest Native Title Settlement) Act 2016* (WA) s 3 the Regional Entity defined in the Yamatji Nation Indigenous Land Use Agreement and any other prescribed ILUAs.

¹¹ Clause 24(1)(c).

Review of Minister's decision

An important improvement would be to restore the provision, which was in the 2020 version of the Bill and removed from the 2021 draft, which allowed for an application for merits review by Aboriginal people of the Minister's decision to authorise an ACHMP for the management of an activity which may harm Aboriginal cultural heritage not agreed to by Aboriginal parties and thus permit destruction of Aboriginal cultural heritage.

It is arguable that the removal of the right of merits review of the Minister's decision from the Bill is an act of substantive racial discrimination. The current *Aboriginal Heritage Act 1972* (WA) has a right of review of the Minister's decision by the State Administrative Tribunal (SAT), for the 'Owner' of land who has applied for the Minister's consent to destroy Aboriginal heritage.

During the Inquiry by the Joint Standing Committee on Northern Australia into the destruction of Aboriginal cultural heritage at Juukan Gorge that was pointed out to be an imbalance in the rights of review as between proponents and Aboriginal custodians. The 2020 version of the Bill sought to redress that imbalance by giving a right of review to both the 'Owner' and to 'Aboriginal parties'. The current version of the Bill removed that right of review from both the 'Owner' and 'Aboriginal parties', apparently seeking to be formally non-discriminatory.

However, the 2021 Bill leaves in place rights of merits review of the Minister's decisions to make stop activity orders, prohibition orders, remediation orders, amendments to remediation orders and cancellation of prohibition orders¹². Those rights of review apply only to the 'person given the orders', i.e., the person who has caused harm to Aboriginal cultural heritage.

The 2020 version of the Bill gave an Aboriginal party to an ACHMP and an applicant for approval of an ACHMP as 'persons affected' a right of review by the State Administrative Tribunal of a decision of the Minister under clause 147(1) of the 2020 Bill to authorise or refuse to authorise an ACHMP¹³. That right of review was deleted from the *Aboriginal Cultural Heritage Bill 2021*¹⁴. The explanation given for that removal in a Government of Western Australia *Aboriginal Cultural Heritage Bill 2021 Stakeholder Information briefing* document was

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Change made to reflect accepted principles of modern governance, public administration and the recognised responsibilities of the elected government of the day.

There is no basis in principle for denying SAT review of decisions by the Minister to authorise Aboriginal Cultural Management Plans, when such rights of review currently exist under the *Aboriginal Heritage Act 1972* (WA) cl 18 and will exist for those who harm Aboriginal cultural heritage under the current version of the 2021 Bill. If this denial of the right of review persists in the legislation which the Parliament passes, while formally not racially discriminatory (because it proposes to take away the right of review of cl.165 decisions from proponents and Aboriginal people) will amount to an instance of substantive racial discrimination.

It has been suggested that the removal of that right of review may be a 'Constitutional' issue: that the executive Government must retain the executive power to authorise activity which may harm Aboriginal cultural heritage, unfettered by a review process. That overstates or misstates the constitutional power structure in this State. While the **Parliament** has a broad

¹² Clause 277, Table Items 2,3 4 and 5 and 6.

¹³ *Aboriginal Cultural Heritage Bill 2020*, clause 258(6), Table Item 1.

¹⁴ The power of the Minister is in clause 165(1) and the remaining SAT review rights are in clause 277 of the 2021 Bill.

Constitutional power to make laws for the ‘peace order and good government’¹⁵ of the State, the Executive arm of Government is not included in the written Constitution of the State and exists by convention only¹⁶.

Aboriginal Cultural Heritage Council status

Another reasonable improvement would be for the Aboriginal Cultural Heritage Council to be a Statutory Corporation appointed by Indigenous bodies with a staff independent of the Executive arm of Government, like the Aboriginal Areas Protection Authority in the NT.

It is proposed by cl20(2) of the Bill that the ACH Council be “an agent of the State” with the “status, privileges and immunities of the State” and its members are appointed by the Minister¹⁷ and is provided by the Minister with the “facilities, and services, and other resources necessary to enable the Council to perform its function”¹⁸ and the Minister has power to “give a written direction to the ACH Council in respect of the performance of its functions, and the Council must give effect to the direction”¹⁹, except in relation to ACH permits, management plans, evaluation of Aboriginal cultural heritage and advising or making recommendations to the Minister²⁰.

By way of contrast, the *Northern Territory Aboriginal Sacred Sites Act 1989* establishes an Authority by the name of the Aboriginal Areas Protection Authority. The Authority is a body corporate established under that Act.²¹ It is subject to direction by the Minister in the performance of its functions and exercise of its powers²², except those functions and powers relating to employment of staff,²³ issuing a permit or authority to enter a sacred site²⁴, site protection procedure, including consulting with custodians, issuing certificates and registering sites²⁵ and prosecuting for desecration of sites.²⁶ The Authority comprises 12 members appointed by the Administrator of the Territory,²⁷ who are to be “custodians of sacred sites appointed in equal number from a panel of 10 male custodians and 10 female custodians nominated by the [four] land Councils”.²⁸ The Northern Territory Authority, thus, has a degree of independence from the executive Government and its membership is composed of Aboriginal custodians nominated by Aboriginal organisations and assisted by staff of its choosing, not by person chosen by a Minister of the Government.

The Northern Territory model has a greater degree of Aboriginal control of the primary decision-making in relation to Aboriginal cultural heritage protection than the proposed structure of the ACH Council and its relationship to the Minister under the *Aboriginal Cultural Heritage Bill 2021* (WA).

¹⁵ *Constitution Act 1889* (WA), s 2(1).

¹⁶ [https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/resources/file-04-governor-and-executive-council/\\$file/Sheet%204%20-%20Governor%20and%20Executive%20Council.pdf](https://www.parliament.wa.gov.au/WebCMS/webcms.nsf/resources/file-04-governor-and-executive-council/$file/Sheet%204%20-%20Governor%20and%20Executive%20Council.pdf).

¹⁷ Clause 21.

¹⁸ Clause 25(1).

¹⁹ Clause 27(1).

²⁰ Clause 27(2).

²¹ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) Section 5(2)(a).

²² Section 5(5), site protection procedure

²³ Section 17.

²⁴ Section 43.

²⁵ Part III.

²⁶ Part IV.

²⁷ Section 6(1).

²⁸ Section 6(2).

Recommended amendments

The Society recommends that the Government and the Parliament in debating the *Aboriginal Cultural Heritage Bill 2021* (WA) consider the following amendments to the Bill.

1. Aboriginal Cultural Heritage Council

- 1.1 Amend s 20(2) to delete the words “is an agent of the State and has the status, immunities and privileges of the State” and replace them with –
(a) is a body corporate with perpetual succession;
(b) shall have a common seal; and
(c) is capable, in its corporate name, of acquiring, holding and disposing of real (including leasehold) and personal property and of suing and being sued.”
- 1.2 Amend cl 21(1) (a) and (b), (2) and (3) to delete the word “Minister: wherever it appears and replace it with “Governor”.
- 1.3 Amend cl 21 (3)(a) to delete the word “such” in line 1 and delete the words “the Minister considers appropriate” and replace them with the words “as knowledge holders of Aboriginal cultural heritage in the State of Western Australia”.
- 1.4 Amend cl 21 (3)(b) to delete the words “as far as practicable”.
- 1.5 Amend cl 21 (3)(b)(i) to delete the words “the majority of”.

2. State Administrative Tribunal Review

To amend the Table in cl 277 by inserting the following items and renumbering the remaining items:

Item	Reviewable decision	Affected person
1	A decision of the Minister under section 165(1) to authorise or refuse to authorise an ACH management plan.	The applicant for the ACH management plan to be approved under section 147(1) if the plan is found to relate to Aboriginal heritage of State significance. The applicant for the ACH management plan to be authorised under section 157(1) A person who is, or would be, an Aboriginal party in relation to the ACH management plan.
2.	A decision by the Minister under section 165(1) (as read with section 170) to authorise or refuse to authorise an amended ACH management plan.	A party to the ACH management plan.

Note this in effect reinserts the SAT review that was in the 2020 draft.

3. Right to object to the grant of an ACH permit.

3.1 Amend clause 131(1) by making the existing words a new subsection (a) and inserting a new subsection (b) as follows:

(b) *A person to be notified may, within the prescribed period, object in writing to the Minister if the ACH Council grants the permit under section 119(1)(c)(i).*

3.2 Amend cl131(2) as follows:

3.2.1 Insert after the words “holder of an ACH permit” in the opening sentence, the following words:

“or a person to be notified”

3.2.2 Insert into (a) before the word “refuses to extend” the following words:

“extends an ACH permit or”

3.2.3 Replace the words “section 126(1)(c)(ii)” in subsection (a) with the words:

“section 126(1)(c)”.

Note cl131 allows an applicant for an ACH permit or the holder of an ACH permit to object to the Minister against decisions of the ACH Council to refuse an ACH permit or to refuse to extend it or to cancel it etc

These amendments to cl131 are to give a right to a person to be notified (ie the Aboriginal groups defined in cl107) an equal right to object to the Minister against the grant of a permit to decide to extend it etc.

4. Definition of harm in cl90

Substitute subsection (1) of section 90 with the following:

- (1) *To **harm** Aboriginal cultural heritage includes the following –*
- (a) *To destroy or damage the Aboriginal cultural heritage;*
 - (b) *To carry out any act in relation to the Aboriginal cultural heritage, other than to express an opinion or belief, that:*
 - (i) *demonstrates disrespect for the importance of Aboriginal cultural heritage to Aboriginal people; or*
 - (ii) *diminishes or otherwise affects the preservation of Aboriginal cultural heritage to Aboriginal people.*

Note this is to reinsert the exact terms in cl81(1) of the 2020 consultation draft.

Alternatively, a more limited, but probably as effective, clause could be to limit (b) to:

- (b) *To carry out any act in relation to the Aboriginal cultural heritage, other than to express an opinion or belief, that desecrates, diminishes or otherwise adversely affects the value of Aboriginal cultural heritage to Aboriginal people.*

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Boujos', with a large, stylized initial 'J'.

Jocelyne Boujos
President