



**Aboriginal Areas
Protection Authority**
protecting sacred sites across the territory

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Assistant Director General, Heritage Services
Department of Planning, Lands and Heritage
PO Box 7479 Cloisters Square,
Perth WA 6850

Via email: AHAreview@dplh.wa.gov.au

1 June 2018

Please find attached a submission to the review of the WA *Aboriginal Heritage Act* from the
Aboriginal Areas Protection Authority.

Please contact the Authority via secretariat.aapa@nt.gov.au if you require any further information.

Kind Regards,

Dr Ben Scambary
Chief Executive Officer

Darwin
P: +61 (08) 8999 5511
F: +61 (08) 8999 4334
www.aapant.org.au
enquiries.aapa@nt.gov.au
4th Floor, R.C.G Centre,
47 Mitchell Street DARWIN NT
GPO Box 1890, Darwin NT 0801

Alice Springs
P: +61 (08) 8999 5511
F: +61 (08) 8952 2824
www.aapant.org.au
enquiries.aapa@nt.gov.au
Ground Floor, Belvedere House
Cnr Bath & Parsons Streets Alice Springs NT
All mail to Darwin GPO

Dear Sir,

Re: Submission on the Review of the Western Australian *Aboriginal Heritage Act 1972* Consultation Paper

I am pleased to submit the following comments on your consultation paper regarding the review of the *Aboriginal Heritage Act 1972* (AHA).

Detailed below is some background information about AAPA and its legislation, followed by some specific comments regarding key questions within the consultation paper.

Background

The Aboriginal Areas Protection Authority ('the Authority') is an independent statutory authority established under the *Northern Territory Aboriginal Sacred Sites Act 1989*. The Authority is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the whole of Australia's Northern Territory.

The broad purpose of the Northern Territory Aboriginal Sacred Sites Act is to:

'...effect a practical balance between the recognised need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement...'

The Authority Board comprises twelve members, ten of whom are Aboriginal custodians of sacred sites. These ten members are nominated by the four Northern Territory land councils with the remaining two members appointed by the Northern Territory Government. The board consists of equal numbers of men and women who are appointed by the Administrator of the Northern Territory by notice in the *Northern Territory Government Gazette*. Custodian members of the Authority are appointed to achieve balance in gender and in regional representation across the Territory. The Authority Board meets at least four times each year, often in different parts of the Northern Territory.

The Authority Board structure ensures a clear separation between the Authority and Government with all employees being employed directly by the Authority except for the Chief Executive Officer who is appointed by the Northern Territory Administrator. We see this structure as having a range of significant advantages over the existing Aboriginal Cultural Materials Committee (ACMC) in the AHA:

- ☐ the Board is a representative group of senior Aboriginal people from across the Territory with expert cultural expertise;
- ☐ key day to day functions of the NTASSA are delegated to the executive which ensures a timely delivery of services under the Act; and
- ☐ Authority decisions are reviewable by the relevant Minister in an open and accountable process under s30 of the NTASSA.

The Authority employs approximately 34 people and has offices in both Darwin and Alice Springs. The key professional area of the AAPA is anthropology with approximately eleven anthropologists engaged in primary research to identify and define protective measures for sacred sites. Support staff includes a

specialised Geographic Information System (GIS) team, Secretariat and Administration. The Secretariat and Administration sections of the Authority are unique in that they maintain a balance between standard Public Sector requirements and the requirements of the NTASSA.

The AAPA maintains records of approximately 12,000 sacred sites across the Northern Territory. Approximately 2,000 sacred sites have been formally entered into a Register of sacred sites by the Board of the AAPA at the request of Aboriginal custodians. Through its key processes the AAPA makes certain information about sacred sites publicly available to comply with the ethos of the NTASSA, which strives to strike a balance between the protection of sacred sites and the economic development aspirations of all Territorians.

The key processes of the Authority include:

- a. issuing of Authority Certificate site clearances to provide legally indemnifying instructions to developers about the constraints, if any, that might arise in relation to sacred sites - Authority Certificates are voluntary but provide an effective risk management tool for developers and site protection measure for custodians;
- b. registration of sacred sites, ensuring that sufficiently detailed documentation about specific sacred sites is recorded to warrant their inclusion by the Board (after landowners are afforded the opportunity to comment) into the Register of Sacred Sites, establishing their *prima facie* status as a sacred site;
- c. providing abstracts of sacred site information to advise the public where sacred sites are known to exist so that they are not inadvertently damaged, and inform them that they may not carry out works on these sacred sites without an Authority Certificate, and that any development proposals take into account the existence of sacred sites; and
- d. compliance in relation to the offence provisions of the Act.

The Authority is a small agency, but one which plays an important role in the social, economic and cultural development of the Northern Territory. The AAPA has been involved at the planning stage in most major developments in the Northern Territory. These include undertaking sacred site clearances for the significant investments by the NT Government in infrastructure development across the Northern Territory. In addition the AAPA works closely with industry sectors such as mining and exploration, the pastoral sector and the seafood industry sector to provide advice on sacred sites and to assist these industries in managing their risks and liabilities in protecting sacred sites.

Legislation

The NTASSA establishes a framework for the protection of sacred sites that balances the need to preserve and enhance Aboriginal cultural tradition with the economic, cultural and social advancement of all Territorians (NTASSA preamble). This balance is achieved through voluntary engagement with the processes of the Act by those wishing to develop areas of land, and the offence provisions of the Act which make it an offence to enter, work on, or desecrate a sacred site. For many years the NTASSA has

been regarded as one of the strongest and most effective legislative frameworks for the protection of cultural heritage nationally. The Act is companion legislation to the *Aboriginal Land Rights (NT) Act 1976*.

Importantly, the *NTASSA* contains provisions for Ministerial review of decisions and processes of the Authority. In 40 years there have only been three such reviews requested, with only one resulting in a decision of the Authority being over turned. Given the numbers of sacred sites that have been protected via the Authority Certificate process, this low number of reviews is an indicator of the success of the legislative framework. In addition the *NTASSA* has provided a successful framework for mediating and negotiating positive outcomes for the protection of sacred sites in often controversial circumstances. This is evidenced by the relatively low numbers of prosecutions undertaken for breaches of the Act.

The current Sacred Sites Act has only been subject to minor changes since it was established in 1989, and has not been amended to reflect the considerable economic, political or social developments that have occurred in the Northern Territory over the last three decades. As a result in 2015 the NT Government commissioned an independent review of the Sacred Sites Act and the Aboriginal Areas Protection Authority to provide an open and transparent look at the regulatory framework and identified where improvements can be made to ensure the Act is contemporary and meets the needs of all Territorians.

While the review found that the Sacred Sites Act has, by and large, achieved its original purpose, there is significant improvement available through legislative amendments, better coordination and funding by the NT Government and improvements to AAPA's structure and operations. The review made 39 recommendations to improve protections for sacred sites, while reducing red tape and certainty for all stakeholders.

A copy of the 2016 review is available at

https://dhcd.nt.gov.au/data/assets/pdf_file/0004/297148/sacred-sites-review.pdf

Specific Comments

The Authority has considered the Review of the Aboriginal Heritage Act 1972 Consultation Paper and wishes to respond to several questions contained in the Paper.

Roles under the Act

Question 2. What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected, and how a proposal may impact those places?

To ensure that the appropriate Aboriginal people are consulted about Aboriginal heritage matters, the Authority suggests defining who should be consulted within the Act.

For example, in relation to applications for Authority Certificates, the Authority consults 'custodians' with responsibility for 'sacred sites' in accordance with the NTSSA. The Act (section 3) defines a custodian as 'an Aboriginal who, by Aboriginal tradition, has responsibility for' a 'sacred site'. 'Aboriginal tradition' is defined by reference to the definition in the Aboriginal Land Rights Act (ALRA) (Northern Territory) 1976 (section 3).

Question 4. Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions would you suggest?

Membership of the Aboriginal Cultural Material Committee

Section 28 of the AHA establishes the advisory body called the Aboriginal Cultural Material Committee. The role of the Committee is to 'evaluate, on behalf of the community, the importance or significance of Aboriginal places and objects and recommend places and objects to the Minister which are or have been of special significance to Aboriginal people.

The Authority notes that there is no legislative requirement for Aboriginal committee members with cultural expertise and suggests that membership of the Committee be reviewed to address this gap.

As mentioned above (page 2) the Authority has a Board made up of 10 Aboriginal custodians and two Government representatives. The custodians come from across the Territory and provide the Board with the cultural and traditional expertise and advice relating to sacred sites and broader cultural matters.

Role of the Minister

Under the AHA, the responsibility for administering the Act vests in the Minister and the decision to preserve and protect Aboriginal cultural places rests with the Minister, who can delegate all or any of their powers under the Act. Under the AHA the Minister is not required

This approach contrasts to the framework established under the NT Sacred Sites Act.

Under the NTSSA the Authority is responsible for protecting sacred sites and is independent from Government. As noted above (see page 2), the NTSSA has a review process by which a person who applied for an Authority Certificate and is aggrieved by a decision or action of the Authority may apply to the Minister for a review of the decision. The Minister shall provide reasons for their decision

The Authority's independence and transparency of any Ministerial review process are key to the Authority's effectiveness in protecting sacred sites.

What is protected?

Question 5. Does section 5 of the AHA adequately describe the sorts of places or sites that should be protected under the amended Act? If not, how can it be improved?

Definition of sacred sites

In the Northern Territory the definition of sacred sites comes from the Aboriginal Land Rights (NT) Act 1976 and is adopted in the NT Sacred Sites Act. The NT Sacred Sites Act automatically protects all sacred sites in the Territory on land and sea.

The Authority notes in section 5 of the AHA sacred sites must both be 'sacred and of importance and special significance to person of Aboriginal descent' to be registered under the Act. Consequently not all sacred sites will meet this criteria and will not be afforded protection.

The Authority suggests that the WA Government may wish to consider broadening its criteria to effect a system which will protect all sacred sites.

Protection and enforcement

12. Who should provide consent or authorisation for proposals that will affect Aboriginal site?

Under the current section 18 of the AHA, the Minister consents, on the advice of the Aboriginal Cultural Material Committee, to the use of the land for a purpose that may affect a heritage site. In evaluating the request the Committee is not required to consult with the Traditional Owners/custodians. The Authority suggests that the requirement to obtain consent from the appropriate Traditional Owners/custodians be considered as part of a future review of the AHA.

For example, as part the Authority's Authority Certificate process, anyone wanting to work on the land can apply for an Authority Certificate. On-site consultations are carried out with the Aboriginal custodians of the land to identify and record any sacred sites within the area and to identify any conditions to protect these sites. The Authority Certificate sets out the conditions under which works can occur on or in the vicinity of the sacred site. The effectiveness of these conditions is attested to by the relatively low number of breaches of the NTASSA whilst development has progressed in the Territory.

The Authority also notes in section 18 of the AHA that the appeals process can only be initiated by the 'land owner'. For the purposes of fairness and balance, the Authority suggests that consideration be given to expanding this provision to allow other stakeholders who may legitimately be impacted by the Minister's decision under section 18 to initiate appeals, in particular Traditional Owners/custodians.

Protection and Enforcement

16. Are the current penalties under the Act adequate? If not, how can they be improved?

The NT Sacred Sites Act establishes a range of offences and associated penalties that are aimed at protecting sacred sites.

The 2016 Independent review into the NT Sacred Sites Act recommended a number of ways in which the NT Sacred Sites Act could be strengthened to improve protections for sacred sites, such as amending penalties to better align with community expectations about the importance of sacred sites, introducing a stop work power and introducing a compensation measures. The Authority notes that the 2016 review's recommendations relating to strengthening the protection of sacred sites may be a useful reference point for the AHA in considering how to improve protection and enforcement.

Conclusion

In the Northern Territory the statutory separation of the AAPA from Government, the independence and Aboriginality of the Authority Board and the transparency of any Ministerial review process are

fundamental to our record of effectively protecting sacred sites. These strengths of the NTASSA have not impeded mining, tourism, pastoralism, urban or any other form of development in the Northern Territory. On the contrary they have provided clarity, certainty and confidence to these sectors.

Please do not hesitate in contacting us should you require any further information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ben Scambary', with a stylized, cursive script.

Dr Ben Scambary
Chief Executive Officer