



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ENVIRONMENT, CLIMATE CHANGE AND BIODIVERSITY
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Submission Cover Sheet

Inquiry into ACT's heritage arrangements

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Submission to the Inquiry into the ACT's heritage arrangements

Aboriginal Cultural Heritage Council

Thank you for providing the opportunity for the Aboriginal Cultural Heritage Council (Council) to make a submission to the *Inquiry into the ACT's heritage arrangements*. While the Council is newly formed its members have substantial experience in Aboriginal cultural heritage and I hope that our input is able to provide some guidance. We look forward to hearing how the review progresses and would be happy to share further information as our own governance journey progresses.

Responses are provided to the key questions on which a submission was requested.

1. The processes and procedures in Western Australia for protecting Indigenous cultural heritage

Our response will focus on the arrangements as intended under the *Aboriginal Cultural Heritage Act 2021* (Act), noting that this will not be fully active until 1 July 2023. We trust that this gives a better indication of the State's intent for modern legislation for Aboriginal cultural heritage (ACH).

On 6 April 2023 the Minister for Aboriginal Affairs announced the release of documents crucial for the implementation of the new Act, including key regulations and guidelines. [Current information](#), including these documents, is maintained on the State government website.

The process of developing these key regulations and guidelines included significant community engagement, much of it on country, through a three phase co-design process. Any review of legislation or procedure relating to ACH must include culturally appropriate consultation and allow sufficient time for engagement, education and establishment of relationships that enable genuine participation.

One of the key objects of the Act is to recognise, protect, conserve and preserve ACH. A key principle is to ensure that the values held by Aboriginal people are prioritised when managing activities that may harm ACH. For non-exempt activities, a due diligence assessment must be undertaken to assess whether there is a risk of harm to any identified ACH. This then determines the process for how to proceed, including any notification and consultation with the relevant Aboriginal people required to ensure that proposals will avoid or minimise harm to ACH. Activities that do harm ACH and do not have the appropriate authorisation may be subject to significant penalties.

The Act recognises Aboriginal people as the most appropriate people to make decisions about their ACH and, significantly, to decide its level of importance. It specifies who a proponent is required to notify or consult for activities and critically sets out the need for "informed consent" (defined in the Act) from Aboriginal people.

The tools available for protecting ACH are more varied and better able to respond to different levels of risk than under the current *Aboriginal Heritage Act 1972* (1972 Act). Proposed activities are assessed on the tier of the activity, which is linked to the level of ground disturbance, and therefore the potential to harm ACH. The Act provides that

proponents may seek assistance on this how to classify proposed activities from the Department of Planning, Lands and Heritage (Department).

All non-exempt activities fall within a tier of activity and require a due diligence assessment. Due diligence is a proactive process that must be undertaken to identify the potential for an activity to harm ACH.

For the most disruptive activities an ACH management plan (Plan) is required that identifies how harm will be reduced, and any mitigation measures that will be taken. The Plan is agreed with each interested Aboriginal party (defined in the Act) to the Plan. This will be the local Aboriginal cultural heritage service (LACHS), where established under the Act. If there is no LACHS for the area, it will be each native title party or, if no native title party, each native title representative body for the area. Native title party is defined in the Act and includes both PBCs and registered claimants.

A key requirement of any Plan is to identify how parties will respond and re-engage if new information is provided that may materially affect the potential for harm, the significance of the site or any relevant matter. This provides flexibility and responsiveness, making the Plan a much more practical tool between the parties for the protection of ACH.

The Council's role extends to the review of all agreed Plans to ensure that informed consent has been given. The Council is also provided the opportunity to determine whether the ACH over which the Plan is agreed may be considered to have exceptional importance to the cultural identity of the State and warrant further protection, which is then determined by the Minister.

If parties are unable to agree to a Plan, the Council may choose to mediate between the parties and can provide the Aboriginal party with the opportunity to submit its own preferred version of the Plan. The Council reviews all material, including potentially developing its own suggested management Plan. and advises the Minister for Aboriginal Affairs, who will determine the matter.

Aboriginal people can also apply to have the most significant places designated as Protected Areas under the Act. It will be the Council's role to review applications and undertake consultation to make its own assessment. This will inform a recommendation to the Minister for Aboriginal Affairs as to whether a Protected Area will be declared who makes the decision, via a recommendation to the Governor. Protected areas have the highest level of protection and can only be repealed or reduced in area if approved by both Houses of Parliament.

Overall, the legislation provides robust protection and opportunity for activity on country to be carried out in a way that is informed by an understanding of ACH and allows Aboriginal people a significant voice in cultural heritage outcomes.

2. What your governance arrangements are

The Council is convened by the Minister for Aboriginal Affairs with Aboriginal female and male co-Chairs, in accordance with cultural tradition and to allow consideration of restricted cultural business. Membership is required, to the extent possible, to be majority Aboriginal and with a balanced gender composition.

Members are required to have experience or knowledge in ACH and as a collective reflect the broad expertise required to perform its functions. A list of relevant knowledge areas is provided in the *Aboriginal Cultural Heritage Regulations 2022*. Should the Council require additional expertise, it may seek this from committees or external advisors.

The Minister may direct the Council in certain matters, excluding specified functions including decisions relating to specific permits or Plans, the evaluation of ACH or the giving of advice. The Minister must provide support to the Council through the Department, which provides financial management, governance and technical support.

With the Act still to be fully deployed the Council has not yet considered how it will deliver all of its functions under the Act and what implications these may have for governance. An initial contingent of five members plus the two co-chairpersons has adopted basic governance and policy settings considered to be best practice. The governance framework is likely to extend as the Council develops its role.

3. How your governance arrangements may differ to those of the former Aboriginal Cultural Material Committee (ACMC) under the now former *Aboriginal Heritage Act 1972*

Board structure and composition of the ACMC under the 1972 Act has no requirement for Aboriginal representation. Three ex-officio members are included representing various government offices. One member is required to be an anthropologist. The ACMC is given a more specific function under the 1972 Act, which in practice focuses on determining whether an identified area can be registered as a 'site' and making recommendations to the Minister on proposed land use, which may involve destruction or impairment of a site.

The ACMC's legislated governance and structure were deemed appropriate for that role based on the standards and understanding of the day. The ACMC has subsequently adopted more modern governance practices, similar to those being adopted by the Council

The new legislation requires the Council to operate with transparency and provides opportunity for a proactive strategic role that responds to its functions. Where relevant, governance will follow common requirements of other State boards and agencies and the requirements of the Act. This is particularly relevant for areas of corporate governance such as managing conflicts of interest.

The Council will develop its governance arrangements with an awareness of the growing community interest in, and scrutiny of, protection of ACH. We acknowledge the need for transparency and consistency in decision-making and respectful engagement with all of our stakeholders. These will inform our decisions as we build our governance framework.

4. What your relationship and governance arrangements with the Department of Planning, Lands and Heritage looks like, including the division of roles and responsibilities

The Council's activities to date have been in guiding the implementation process for the Act. This will change significantly as we transition to the operation of the new Act and determine our processes.

As foreshadowed by the Minister in his second reading speech on the Aboriginal Cultural Heritage Bill, we would anticipate the potential for delegating low-risk and repetitive actions to the Department under clearly articulated policy and guidelines. This will be reviewed

once we have an established pattern of activity and can identify likely priorities and focus areas.

An EOI process is currently underway to appoint a further four members to make the Board up to its full complement. Once that has occurred, we will progress our strategic planning process to guide longer term priorities. We would expect this document to provide guidance to the Department on allocation of resources and its own business planning process.

The Council's budget is currently held in full by the Department and is managed on our behalf. Future arrangements may be subject to discussion with the Minister and Department, but this situation is not seen as an impediment to our operations at present.

We note that the Department maintains a number of boards, including the Heritage Council of WA, and will be reviewing its engagement and operational arrangements to inform our own business model. We will be happy to provide further updates as we make progress in this area.

While Council members often have substantial commitments, we recognise the importance of direct engagement and participation in activities that are central to our operation. The co-Chairs may be considered to hold primary responsibility in representing the Council but are well supported by the members. This has been particularly important in enabling us to field representatives best able to engage with our different stakeholder groups.