



CENTRAL LAND COUNCIL

Submission to the Legislation Scrutiny Committee

***Inquiry into the Northern Territory Aboriginal Sacred Sites
Legislation Amendment Bill 2025***

4 April 2025

“Sacred sites belong to us, not the government, and it should not change the law protecting our sites without consulting traditional owners and native title holders”

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ACKNOWLEDGEMENT

The Central Land Council acknowledges the Territory's traditional owners, who were the first inhabitants in the Territory and remain the first and most important stewards of the Territory's resources.

EXECUTIVE SUMMARY

1. The Central Land Council (**CLC**) provides this submission to the Legislation Scrutiny Committee (**Scrutiny Committee**)’s Inquiry into the *Northern Territory Aboriginal Sacred Sites Legislation Amendment Bill 2025 (Bill)*.
2. The CLC condemns the design and consultation process undertaken for the Bill as well as the substance of the Bill itself.
3. Contrary to assertions in the Explanatory Statement,¹ the Bill weakens protections for sacred sites for the convenience of land users and developers. It does so without consultation with or the consent of the people whose sacred sites will be affected by these changes.
4. In response to the specific questions asked by the Scrutiny Committee, CLC answers as follows.
 - (a) Whether the Assembly should pass the Bill – **No**
 - (b) Whether the Assembly should amend the Bill – **No, it should reject it outright and a new bill should be co-designed with the Aboriginal Areas Protection Authority and all four Territory Land Councils**
 - (c) Whether the Bill has sufficient regard to the rights and liberties of individuals – **No, it disregards the rights and liberties of Aboriginal custodians of sacred sites**
 - (d) Whether the Bill has sufficient regard to the institution of Parliament – **No, parts of the Bill are contrary to enabling provisions in the Aboriginal Land Rights (Northern Territory) Act and are beyond Parliament’s power**
5. Reasons for those answers are set out in these submissions.

¹ Explanatory Statement on the Northern Territory Aboriginal Sacred Sites Legislation Amendment Bill 2025 (**Explanatory Statement**), General Outline, p1

SUBMISSIONS

6. The CLC thoroughly supports the statutory protection afforded to sacred sites under the *Northern Territory Aboriginal Sacred Sites Act 1989 (Act)* and the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (Land Rights Act)*. The NT is the only jurisdiction in Australia that provides sacred sites with such protection and should rightly be proud of this achievement and the recognition it affords to Aboriginal people in the NT. Such protections mean that Aboriginal people can safely support development proposals on their land in the comfort that their sacred sites will be adequately protected during the course of such developments.
7. The Land Rights Act underpins the sacred site protection regime in the NT. It allows the Territory to make laws to protect, or prevent the desecration of, sacred sites in the NT.² It provides the Land Councils with functions to ensure the protection of sacred sites.³ It makes it an offence to enter or remain on land that is a sacred site.⁴ These provisions are a safeguard to ensure the integrity of the NT's sacred site protection regime.
8. It is the long-standing experience of the CLC that Aboriginal people are supportive of sustainable development and willing for their land to provide opportunities for employment and income for their benefit. However, this is only true insofar as they can be confident that sacred sites are not at risk. Any changes to the Act that in any way diminish the protection of sacred sites will be opposed by Aboriginal land owners and holders of native title, and will risk development proposals receiving substantially reduced support.
9. In the CLC's view, the amendments proposed in the Bill risk precisely that. The Bill, in its current form, prioritises "*certainty and processes for economic development*"⁵ over the cultural authority and consent of traditional owners, and in doing so the Bill weakens protection for sacred sites. Further, parts of the Bill are in conflict with its enabling provisions, and it departs from the principles of protection contained in the Land Rights Act.

Consultation and consent

10. Sacred sites belong to Aboriginal people, not to the Territory government. Aboriginal custodians will be the ones to suffer if sacred sites are damaged or destroyed. No

² Land Rights Act, s73(1)(a)

³ Land Rights Act, s23(1)(ba)

⁴ Land Rights Act, s69

⁵ Explanatory Statement, General Outline, p1

amendments should be made to legislation that protects sacred sites without consultation with and the consent of the Aboriginal people to whom those sites belong.

11. Nor should amendment of such important legislation be undertaken in a hurried manner. To do so risks omission of important perspectives and occurrence of unintended consequences.
12. The CLC's express function under the Land Rights Act to "*assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council*",⁶ and its 50 years of experience at protecting sacred sites, makes it ideally placed to assist the government to design legislation affecting sacred sites.
13. The CLC has a history of constructive comment in relation to legislative reform. In December 2015 it made a submission to the Sacred Sites Processes and Outcomes Review which included 17 recommendations aimed at enhancing the workability of the sacred site protection regime without compromising site protection. A copy of that submission is attached to demonstrate to the Scrutiny Committee the sort of contribution that could have been made by the CLC for the benefit of many, had a consultative and co-design approach been taken.
14. There has been no genuine consultation about the Bill with the CLC or the people it represents. A token meeting was called by the Minister on 20 March 2025 at which little detail was provided, notwithstanding that draft legislation had already been prepared and was introduced into Parliament a week later. CLC's Executive committee were very clear with the Minister that they did not consent to the Bill nor regard that meeting as adequate consultation. Nor does a one week comment period to the Scrutiny Committee constitute adequate consultation.
15. Aside from media commentary following press releases by the Aboriginal Areas Protection Authority (**AAPA**) Board and Territory Land Councils, there has been little public coverage and no government-run education campaign targeted at those whose sites will be affected. This further reduces their ability to contribute to the development of appropriate legislation or make comment to the Scrutiny Committee about the Bill in the very limited timeframe.
16. The lack of consultation means that the Bill represents a missed opportunity. Co-designed legislation could have achieved true reform rather than limited changes which prioritise the

⁶ Land Rights Act, s23(1)(ba)

interests of land users and developers over the rights of custodians of sacred sites. For example, the recognition under the Act of sacred site clearance certificates issued by Land Councils pursuant to processes trusted and oft preferred by both traditional owners and proponents, would streamline the process of development approval, and reduce unnecessary costs.

17. The CLC maintains its first recommendation from its 2015 submission: that no amendments be made to the Act without first obtaining the explicit consent of the AAPA Board and the four Territory Land Councils. That has not occurred here. Media releases from the AAPA Board⁷ and the Northern Land Council,⁸ as well as the CLC,⁹ make it clear that the Bill has not been consulted on and does not have their consent.

Membership

18. The Bill's amendments to sections 6 and 7 of the Act change the nature of AAPA's board and could lead to racialised and political outcomes. It is not clear whether that is the intention.

19. Amendments in the Bill emphasise a distinction between:

- a. "*Aboriginal members*", who are appointed by the Administrator following nomination by Land Councils; and
- b. two members "*appointed on the nomination of the Minister*".¹⁰

20. There is no requirement that the Minister's appointees be Aboriginal. Both the language of the Bill and the Explanatory Statement¹¹ appear to assume that they will not be. Why the legislation should assume that the Minister will regard all Aboriginal people as unsuitable for nomination is not explained.

21. "*Aboriginal members*" can have their appointment terminated for "*incompetence or misbehaviour*". "*Incompetence or misbehaviour*" are not defined terms and are highly subjective. Despite a stated aim being to modernise the Act and improve certainty, no attempt has been made to do so in relation to those archaic terms. A vague and non-specific term like "*misbehaviour*" might encourage a Minister (on whose advice the

⁷ <https://www.aapant.org.au/news/aapa-board-calls-for-genuine-consultation-and-improvements-to-the-nt-sacred-sites-act-0>

⁸ <https://www.nlc.org.au/sacred-sites-bill-nt-government-ignored-traditional-owners>

⁹ <https://www.clc.org.au/land-council-slams-territory-for-secretive-changes-to-sacred-sites-act/>

¹⁰ Bill, Clause 5(3)

¹¹ Explanatory Statement, p2. Clause 5: "The majority of the Authority's members (10 out of 12) are Aboriginal members ..." which implies that the minority are not Aboriginal.

Administrator would act¹²) to recommend removal of an outspoken Aboriginal Board member who criticised government action. Similarly, most Ministers would not be qualified to determine whether a Board member is “*incompetent*”; only the custodians of sacred sites themselves have that qualification.

22. The Minister can recommend the Administrator terminate the appointments of the Minister’s appointees for any reason.¹³ By convention, the Administrator acts on advice. This means that those members serve at the Minister’s pleasure. If they do not pursue the government’s agenda, they are able to be removed. This renders the appointments political which goes against the beneficial nature of the Act, and the long-accepted status of AAPA as an independent and impartial institution.

Transfer

23. Transfer of Authority Certificates without consultation with custodians undermines cultural authority and control over sacred site protection and access. It is contrary to the Territory legislature’s enabling provision in section 73(1)(a) of the Land Rights Act and likely to be challenged on that basis.

24. The conditions imposed by custodians upon the grant of the original certificate relate to a specific project, a specific proponent, a specific area of land and a specific point in time. Any change to any of those could result in the imposition of different conditions, which won’t be known without consultation upon a proposed transfer. Not only must AAPA be required to consult on any proposed transfer, in accordance with the enabling provisions of the Land Rights Act it must be empowered to:

- a. refuse the transfer if custodians do not consent; and
- b. alter conditions to take into account custodians’ wishes.

25. The scope of work upon which an Authority Certificate is based is not always apparent on the face of the certificate, some of which were issued decades ago. Similarly, the scope of work of any major project is rarely identical to that envisaged at the start of the project and variations in scope often increase if a project changes hands.

26. While AAPA could ensure the scope of a project is clear for new certificates by annexing a detailed description and supporting information to the Authority Certificate, that does not address existing certificates where the project scope considered by custodians is not clear.

¹² Act, s7(3)

¹³ Bill, Clause 6(2)

For existing certificates, AAPA must be permitted to incorporate new conditions and clarify the scope of work for which the existing conditions were imposed. This is the bare minimum which is necessary for the legislation to fulfil its purpose – ensuring that actions taken in the vicinity of sacred sites do not involve any harm to or desecration of those sites.

27. However the CLC encourages the Scrutiny Committee not to accept “*bare minimum*” as the standard for which the Territory Parliament should aim. Rather, the Scrutiny Committee should recommend that the Territory government work with AAPA and the four Land Councils to design a system that can meet all parties’ needs.

Enforceable Undertakings

28. Allowing enforceable undertakings changes the focus of Act. Instead of emphasising protection of sites, it provides a mechanism to avoid prosecution for damaging sacred sites. This risks allowing damage to sites to become merely a cost of doing business.

29. The primary consideration for AAPA in accepting any enforceable undertaking must be the views and wishes of the affected custodians. It is a stunning oversight that this is not included in the Bill.

30. Enforceable undertakings presuppose that it is possible for remediation work to rectify damage to a sacred site. In many cases it is not. Whether a damaged site is capable of repair is not one of the matters that AAPA is required to consider before accepting an enforceable undertaking.¹⁴

31. A better response would be to properly resource AAPA to allow it to undertake investigations and enforcement action, and to increase the penalties if sites are damaged. That would increase the incentive for developers and users of land to comply with the Act and not damage any sacred sites or breach conditions of Authority Certificates.

Public purpose certificates

32. The CLC understands that earlier drafts of the Bill introduced Authority Certificates for a “public purpose”, including master planning or precinct planning. Such certificates could be for large areas, not tied to a specific project and apply to a range of proponents.

¹⁴ Bill, s39C(2)

33. Those provisions have been removed from the Bill, as introduced. However, for the sake of completeness, the CLC submits that such certificates should not be permitted and no amendments should be made to the Bill to allow them.
34. It is critical for custodians undertaking a site clearance to know what project they are considering. Their consent to works around sacred sites must be informed consent, if it is to be of any real value. Projects of different natures have different impacts on land and the conditions required to protect sacred sites will be different. A clearance undertaken in the abstract deprives custodians of the ability to make informed decisions on appropriate measures to protect their sacred sites.
35. If the Bill is amended to allow certificates that are not tied to specific projects, custodians could be forced into a position of adopting conservative and restrictive conditions. An unintended consequence of that may be to hinder projects for which less restrictive conditions might otherwise have been appropriate.



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Submission to the Sacred Sites Processes and Outcomes Review

December 2015

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Terms of Reference

The lengthy terms of reference are not included here, but it is worth highlighting the Preamble of the Act and the stated purpose of the review:

NORTHERN TERRITORY ABORIGINAL SACRED SITES ACT

Preamble

An Act to effect a practical balance between the recognized 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, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

The purpose of the Sacred Site Processes and Outcomes Review (the review) is to investigate the extent to which the *Northern Territory Aboriginal Sacred Sites Act 1989* (the Act) supports economic development in the Northern Territory. The review will examine the scope and operation of the Act as well as the strategic and day-to-day operations of the Aboriginal Areas protection authority (AAPA), the statutory authority set up by the Act to carry out the functions set out within it. The review should provide advice on:

1. Areas in which the Act might be strengthened to improve protections for sacred sites
2. Areas in which the Act might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory
3. Ways in which AAPA can:
 - a. become more efficient
 - b balance the need for development with the need for protection of sacred sites.

Executive Summary

The Central Land Council (CLC) thoroughly supports the statutory protection afforded to sacred sites under the *Northern Territory Aboriginal Sacred Sites Act* (Sacred Sites Act) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). The NT is the only jurisdiction in Australia that provides sacred sites with such protection and should rightly be proud of this achievement and the recognition it affords to Aboriginal people in the NT. Such protections mean that Aboriginal people can safely support development proposals on their land in the comfort that their sacred sites will be adequately protected in the face of such developments.

It must be recognised that the ALRA underpins the sacred site protection regime in the NT; by allowing the Territory to make laws to protect, or prevent the desecration of, sacred sites in the NT, by providing the Land Councils with functions to ensure the protection of sacred sites, and making it an offence to enter or remain on land that is a sacred site. These provisions act as a safeguard to ensure the integrity of the NT's sacred site protection regime. These provisions remain robust and relevant and this review should not recommend any amendments be made to the ALRA.

It is the long-standing experience of the CLC that Aboriginal people are supportive of sustainable development and willing for their land to provide opportunities for employment and income for their benefit. However, this is only true insofar as they can be confident that sacred sites are not at risk. Any changes to the *Sacred Sites Act* that in any way diminish the protection of sacred sites would be opposed by Aboriginal land owners and holders of native title, and would risk development proposals receiving substantially reduced support. Despite the clear inference in the terms of reference for this review that sacred site protection impedes development, the CLC asserts that a proper site protection regime actually increases the prospect that Aboriginal land owners will consent to third party development proposals, in addition to driving their own development agenda.

The CLC has identified a range of proposed amendments to the *Sacred Sites Act* and also developed recommendations regarding the operations of the Aboriginal Areas Protection Authority (AAPA). These recommendations are aimed at enhancing the workability of the sacred site protection regime without compromising site protection. Central to these proposals is the need to ensure the AAPA is independent and provided with sufficient resources to enable it to carry out its functions, including site registration in addition to fee for service work. Removing the ability for the Minister to over-ride AAPA decisions regarding site protection (s.32(1)(b)) is essential. The CLC also proposes a range of reforms that will assist to clarify the respective roles of the CLC and the AAPA, recognise the CLC Sacred Site Clearance Certificates, and generally improve collaboration. If implemented, the recommendations below will safeguard the integrity of the sacred site protection regime in the NT, improve workability and substantially improve the relationship between the CLC and the AAPA.

Recommendations

Recommendation 1: That no amendments be made to the *Sacred Sites Act* without first obtaining the explicit consent of the AAPA Board and the four Territory Land Councils.

Recommendation 2: That the ALRA provisions relating to sacred site protection remain robust and relevant, namely:

- Section 69 of the ALRA which makes it an offence for a person to enter or remain on land in the NT that it a sacred site;
- Section 23(1)(ba) which provides land councils with the responsibility to assist Aboriginal people to protect sacred sites, whether or not the sites are on Aboriginal land; and,
- Section 73(1)(a) which allows the Territory to make laws to protect or prevent the desecration of sacred sites in the NT;

and no amendments to the ALRA should be recommended by this review.

Recommendation 3: That the review highlights the critical and positive link between effective sacred site protection and the Aboriginal land owner consent to development proposals.

Recommendation 4: That the *Sacred Sites Act* be amended to provide a defence to a prosecution for an offence against subsection 34(1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, either a Sacred Site Clearance Certificate provided by a Land Council or an Authority Certificate. Similarly the offence provision s.37 should include reference to a Sacred Site Clearance Certificate provided by a Land Council.

Recommendation 5: That the *Sacred Sites Act* be amended to repeal the provision providing for the relevant Minister to override AAPA decisions subject to review (s.32 (1)(b)).

Recommendation 6: That the *Sacred Sites Act* be amended to accommodate a review process for a custodian or traditional owner who is aggrieved by an AAPA decision.

Recommendation 7: That 'legacy' Authority Certificates issued more than 10 years ago be declared void and the holders of such certificates be required to reapply.

Recommendation 8: That the AAPA be given the ability to retract certificates where new information has become available which is material to the certificate.

Recommendation 9: That the AAPA be resourced sufficiently to allow for timely processing of Authority Certificates, and a statutory timeframe is not imposed.

Recommendation 10: That sacred site clearances for undefined developments over broad areas not be contemplated as a means to increase processing times or facilitate development outcomes.

Recommendation 11: That the *Sacred Sites Act* should be amended to make certificates compulsory once certain development thresholds are reached, except where there is an alternative agreement with the relevant Land Council.

Recommendation 12: Consideration be given to the AAPA being capable of determining and holding a bond from a developer in appropriate cases. In the event of site damage due to a breach of the act the bond would be available as the basis for compensation direct to affected custodians.

Recommendation 13: That compensation for site damage be negotiated according to the nature of the site and the damage, not subject to a statutory damages payment scheme and fines.

Recommendation 14: That the review give consideration to amending the act to refine the definition of ignorance in relation to breaches of section 34(1) and 35 of the *Sacred Sites Act*.

Recommendation 15: That the Northern Territory government and the AAPA take steps to increase the profile of sacred site protection, the *Sacred Sites Act* and the role of the AAPA within the Northern Territory.

Recommendation 16: That in relation to board nominations section 6(2) be amended such that the Land Council may be permitted to simply nominate the required members for their region, and section (6) be amended to allow the Land Councils 90 rather than 60 days to provide nominations before the Administrator can act to appoint.

Recommendation 17: That the process of staggering board membership to provide for continuity of experience be investigated and implemented.

Introduction

The Central Land Council (CLC) welcomes this opportunity to provide a submission to the Northern Territory Government's Sacred Sites Processes and Outcomes Review.

The CLC is a corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('ALRA'). Amongst other functions, it has statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory. The CLC is also a Native Title Representative Body established under the *Native Title Act 1993* ('NTA'). Pursuant to the ALRA more than 50% of the NT is now held by Aboriginal Land Trusts on behalf of traditional owners. The CLC region covers approximately 780,000 km² of land, and 417,318 km² is Aboriginal land under the ALRA. Given existing pastoral land was not able to be claimed this Aboriginal land tends to be very arid and remote. In addition, rights have been asserted and won under the NTA, and traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under NT legislation.

Through its elected representative Council of 90 community delegates the CLC continues to represent the aspirations and interests of approximately 17,500 traditional landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

The CLC aims to improve the lives and futures of its Aboriginal constituents through sustainable development and change. The CLC's development approach is based on an integrated and strengths-based strategy of building economic, social and cultural capital. Significant work is being done under the various functions of the CLC in each of these related areas through initiatives in: natural and cultural resource management; the development of remote enterprise and employment pathways; innovative community development work, ensuring land owners use income generated from land use agreements for broad community benefit; and land administration and land use agreements for third parties and traditional owners, which of course includes sacred site protection and work area clearances.

Background

Relationship between the ALRA and the Sacred Sites Act

It must be recognised that the ALRA underpins the sacred site protection regime in the NT:

- Section 69 of the ALRA makes it an offence for a person to enter or remain on land in the NT that is a sacred site.
- Section 23(1)(ba) provides land councils with the responsibility to assist Aboriginal people to protect sacred sites, whether or not the sites are on Aboriginal land.
- Section 73(1)(a) allows the Territory to make laws to protect or prevent the desecration of sacred sites in the NT.

These provisions act as a safeguard to ensure the integrity of the NT's sacred site protection regime. The ALRA provisions remain robust and relevant and this review should not recommend any amendments be made to the ALRA.

Consistent with ALRA s73(1) the Northern Territory Government enacted the *Aboriginal Sacred Sites Act 1978* soon after enactment of the ALRA. It was one of the first pieces of legislation passed by the NT's new self-Government which also came into existence after the passing of the *Northern Territory (Self-Government) Act 1978*.

Sacred site protection legislation was surrounded in controversy in those early years and throughout the 1980s there were numerous attempts to amend the Act. The Aboriginal Areas Protection Authority (AAPA) 2013 – 2014 annual report¹ recounts the history of the NT's sacred site protection regime:

- In August 1986 Chief Minister Mr Stephen Hatton appointed a committee lead by the Solicitor General, Mr Brian Martin, to review legislation relating to sites of significance to Aboriginal people, including the *Aboriginal Sacred Sites Act 1978*.
- The review was tabled in Parliament on 25 August 1988. Key recommendations from the review included establishing a statutory authority to coordinate requests for protection of sacred sites and initiate prosecutions; giving the AAPA power to grant access and/or carryout work on sacred sites only after taking into account the wishes of Aboriginal people; accepting in principle that sites of significance to Aboriginal women should be dealt with by Aboriginal women, and that developers should be encouraged to consult with the Authority on sacred sites at an early stage in their project planning.
- On 12 October 1988 the Northern Territory Government introduced the *Aboriginal Areas Protection Bill (NT)* to the Assembly. The Bill was an attempt to strike a more effective balance between the protection of sacred sites and the development of the Territory, its people and resources. However the Bill did not proceed as there were concerns that it, and in particular the protection it extended to sacred sites, was incompatible with Section 73(1) of the *Land Rights Act*.
- The Government continued negotiations with the AAPA and Aboriginal Land Councils over amendments to the sacred sites legislation. The AAPA's independence was seen as important in the resolution of difficult issues in relation to sacred sites and any proposed development in and around sites. These were difficult negotiations, and in the end the final product was the *Northern Territory Aboriginal Sacred Sites Act 1989* which was passed on 26 May 1989 and came into force on 15 August 1989.

The *Sacred Sites Act* has not been reviewed since this time, a period of 25 years.

The ALRA, on the other hand, has been reviewed numerous times since its enactment, leading to significant amendments to the act in 2006, and most recently in 2015. However none of these amendments were in relation to sacred site protection. The review conducted in 1998 by Mr Reeves QC (the Reeves Review) made a number of unsubstantiated and controversial

¹ Aboriginal Areas Protection Authority, 2013-2014 Annual Report, p7, accessed at <http://www.aapant.org.au/publication/annual-reports>

recommendations regarding the ALRA and the operation of the Land Councils generally, and also in relation to sacred site protection. The recommendations were oriented towards undermining the role and legitimacy of the Land Councils. The 1999 Parliamentary inquiry into the Reeves review rejected the majority of the more radical recommendations, such as the proposal to replace the existing Land Councils with 18 regional land councils.²

In relation to sacred sites the Reeves review recommended that ss.23(1)(ba) and 69 of the ALRA be deleted, leaving the AAPA with sole responsibility for the protection of sacred sites in the NT.

Understandably this was widely condemned by the Land Councils, with the CLC asserting that:

The Sacred Sites protections provisions currently contained in the ALRA together with the inconsistency provisions act as an assurance and a safeguard to ensure that the NT Government legislation, in relation to Sacred Sites, is not hollow and worthless. It is also important for the Land Councils to retain their role in relation to sacred sites as numerous Sacred Site issues arise from day to day interaction between Land Council and its constituents. To say to constituents, yes we have a role in relation to your land, but not in relation to the sites and places of significance situated upon the land would be nonsense. The Reviewer's proposal is merely a means to diminish the capacity of the Land Council to act in protection of Aboriginal interests.

The Parliamentary inquiry noted the tensions between the Land Councils and AAPA, and recommended that:

Recommendation 43 – The Minister for Indigenous Affairs liaise with the Northern Territory Minister for Aboriginal Development and the land councils to establish protocols for cooperation between the Northern Territory Aboriginal Areas Protection Authority and the land councils when fulfilling their functions under section 23(1)(ba) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.³

Consistent with this recommendation, the CLC and AAPA did commence negotiations towards a protocol in 2004 and 2005. Despite much hard work and good intentions these protocol negotiations did not succeed and were ultimately abandoned. Instead, the NT Government issued a clear policy directive that all NT agencies were required to obtain an AAPA certificate, even for areas of Aboriginal land. This only served to exacerbate tensions given the previous (informal) arrangement left Land Councils to manage sacred site protection work on Aboriginal land.

Given this background of tension regarding the operations of the *Sacred Sites Act* and interaction with the Land Councils it is timely and useful to review the operations of the *Sacred Sites Act* with a view to improving operations and coordination. It is disappointing, however, that the terms of reference so squarely frames this review as a competition between sacred site protection and economic development. It infers that sacred site protection is an inhibiting factor for economic

² Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 1999, 'Unlocking the Future: the Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976

³ Parliament of the Commonwealth of Australia House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, 1999, 'Unlocking the Future: the Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976, p.148

development and gives the strong impression that outcomes are likely to focus on greater 'efficiencies' in the sacred site process, and therefore diminished protection for sacred sites. It is the long-standing experience of the CLC that Aboriginal people are supportive of development and eager for their land to provide avenues for income for them. However, this is only true insofar as their sacred sites are not at risk. Any changes to the *Sacred Sites Act* that in any way diminish the protection of sacred sites would be opposed by Aboriginal land owners and holders of native title, and would result in development proposals having a substantially reduced support. Despite the clear inference in the terms of reference for this review that sacred site protection impedes development, the CLC asserts that an adequate site protection regime actually increases the prospect that Aboriginal land owners will consent to third party development proposals, and drive their own development agenda.

Recommendation 1: That no amendments be made to the *Sacred Sites Act* without first obtaining the explicit consent of the AAPA Board and the four Territory Land Councils.

Recommendation 2: That the ALRA provisions relating to sacred site protection remain robust and relevant, namely:

- Section 69 of the ALRA which makes it an offence for a person to enter or remain on land in the NT that it a sacred site;
- Section 23(1)(ba) which provides land councils with the responsibility to assist Aboriginal people to protect sacred sites, whether or not the sites are on Aboriginal land; and,
- Section 73(1)(a) which allows the Territory to make laws to protect or prevent the desecration of sacred sites in the NT;

and no amendments to the ALRA should be recommended by this review.

Recommendation 3: That the review highlights the critical and positive link between effective sacred site protection and the Aboriginal land owner consent to development proposals.

CLC approach to sacred site protection

Sacred sites are places of deep spiritual significance and are an integral part of Aboriginal culture. Their protection is vital for the continuation of religious and cultural traditions and as a source of identity for Aboriginal people. Consistent with our functions, the CLC assists Aboriginal people to protect their sacred sites by ensuring that every development proposal that comes before the Council (including exploration and mining, infrastructure and road works) is subject to site clearance (work area clearance process).

A site clearance is triggered by a request to work on Aboriginal land, and it is completed prior to the proposed commencement date of the work. Through the clearance process, traditional owners gain a sound understanding of the request and its impact on their land, enabling them to make informed decisions about it.

The first step in the site clearance process, and in consultations about any other proposal, involves identifying the traditional owners of the land in question. This is vital, as it is the CLC's statutory responsibility to ensure traditional landowners are correctly identified. The Land Council must 'consult with traditional Aboriginal owners of Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of the land'. The statutory responsibility is a direct expression of the central rights of Aboriginal land owners, under their own traditions and systems of land tenure, to be asked about use of or activity upon their land.

Once the traditional owners are identified, CLC staff (and representatives of those submitting the work program) discuss the land use proposal with them to ensure they are fully informed of, and understand the nature and scope of, the request. In this way, the Land Council ascertains 'the wishes' of traditional owners 'as to the management of land'. If the traditional owners are, in principle, in favour of the work proceeding, they and CLC staff travel across the country covered by the proposal. Through this clearance activity, traditional owners are able, where they deem necessary, to place any culturally sensitive areas off limits or subject works to particular restrictions. The CLC also ensures that the wishes of traditional owners regarding activities on their lands are made known to those making the requests.

The two functions of seeking consent for proposals and protecting sacred sites in the context of those proposals are naturally joined exercises for which the land councils have appropriate authority and expertise. The AAPA cannot provide consent for works on any tenure of land. In relation to Aboriginal land, it is only the land councils that have statutory duties to consult the traditional owners and seek their consent for works. On Aboriginal land this consent is required regardless of the possession of an Authority Certificate. References to the duplication of processes between the AAPA and the CLC consistently fail to recognise the crucial statutory duty of the CLC to obtain the consent of the landowners for use of their land. Given these statutory requirements, it is the AAPA that duplicates the process of the land councils on Aboriginal land, not the reverse.

This process also occurs for development proposals on non-Aboriginal land. Pursuant to the *Native Title Act 1993*, native title holders are identified and the CLC seeks to negotiate agreements with proponents, including the negotiation of Indigenous Land Use Agreements. Given the lesser rights afforded to native title holders, as compared with traditional owners under the ALRA, the CLC is not able to compel proponents to agree to negotiate with native title holders, nor can native title holders exercise a veto right over development proposals.

Each year the CLC receives numerous requests from government agencies, public sector corporations, mining and other commercial interests seeking permission from Aboriginal landowners and native title holders to undertake a diverse range of activities on their lands. In 2013 – 2014 the CLC issued 137 sacred site clearance certificates in relation to Aboriginal culture and heritage maintenance, while 145 sacred site clearance certificates were issued in 2014-2015. The CLC also conducted anthropological research or gave anthropological advice about Aboriginal culture and heritage for a wide range of purposes:

CLC: Proposals requiring anthropological advice	2014-2015	2013 - 2014
Exploration and mining on Aboriginal land	18	17
Exploration and mining on native title land	15	21
Telecommunications infrastructure	52	31
Community infrastructure	77	48
Road works	4	8
Land management activities	17	4
Site damage investigation	5	4
Infrastructure	N/A	11
Repatriation and miscellaneous	5	5
Genealogical information requests	48	24
Total	241	173

CLC sacred site clearance certificate

Any person who proposes to carry out work on Aboriginal land is required to obtain a [CLC Sacred Site Clearance Certificate](#). An application form must be completed and submitted to the CLC with supporting documentation. The CLCs website sets out the process for applying for a CLC sacred site certificate. Obtaining a CLC Sacred Site Clearance Certificate serves a two-fold purpose. First, it aims to prevent damage to, and interference with, Aboriginal sacred sites. The certificate achieves this by setting out conditions in relation to entering and working on the subject land. An applicant, when applying for a certificate, agrees to be bound by the conditions of the certificate. Second, a CLC Sacred Site certificate serves to protect the Applicant against prosecution for entering, damaging, or interfering with sacred sites under the *Sacred Sites Act* and the ALRA. It achieves this by providing the applicant with documentary evidence that the custodians and traditional Aboriginal owners of the subject land have been consulted and consent to the Applicant's proposed works. Applications are logged in a register and all certificates are signed, numbered and their details recorded.

In cases where the particular activity is not subject to a formal legal agreement or lease that provides consent, the certificate also provides surety that the traditional owners of the land have been consulted about the activity and consent to it.

After receiving an application, the CLC will consult with traditional Aboriginal owners of the subject land about the proposed works. In some cases the CLC will have standing instructions and further consultations will not be necessary. If the CLC is satisfied that the proposed work program does not present a risk of damage to or interference with a sacred site, and the traditional Aboriginal owners consent to the works on that basis, the CLC will issue a Sacred Site Clearance Certificate to the applicant. The Certificate will include conditions to protect sacred sites.

In relation to non-Aboriginal land, the CLC Sacred Site Clearance Certificate may be a condition of an agreement between the Applicant and the CLC in relation to works on non-Aboriginal land. If a person is proposing to carry out work on non-Aboriginal land and there is no agreement between the Applicant and the CLC requiring a CLC Sacred Site Clearance Certificate, the Applicant may

need to obtain an Authority Certificate from the AAPA in order to protect itself against prosecution under the *Sacred Sites Act*.

The CLC seeks to recover the costs of certain consultations with traditional Aboriginal owners, primarily those relating to resource exploration. Costs are determined on a case-by-case basis and are calculated using an established schedule of fees and charges. Obtaining a CLC Sacred Site Certificate for other purposes (community infrastructure, roads etc) generally does not incur a fee, except in the case of major projects.

Where cooperation is warranted the CLC does collaborate with the AAPA in the issue of Authority Certificates. It is usually the case that these are developments of a major nature, across multiple tenures, where it makes sense for the CLC and AAPA to work together to minimise repetitive consultations. Examples include the Darwin – Alice Springs railway, the NBN fibre optic cable along the railway corridor and the Barkley highway, and the Molyhil and Wonara phosphate mine proposals. The site clearance aspects for these projects have proceeded well and been completed in a timely fashion considering the difficult nature of such infrastructure projects.

There is further discussion and recommendations below regarding better alignment of the work of the CLC and the AAPA in relation to sacred site protection and the issuing of certificates.

CLC Response to Key Review Areas

Before noting views under each of the eight headings set out in the terms of reference document, this submission first provides recommendations relating to the first objective of the review relating to improving sacred site protection.

Improving sacred site protection

Land Council site clearance certificates should have the same legal affect as an Authority Certificate in terms of defences (the defence or ‘indemnity’ issue)

The CLC recognises that there is currently unnecessary duplication in the work being undertaken by AAPA and CLC. This is a result of AAPA duplicating some of the functions that are already carried out by Land Councils whilst seeking consents or approvals under the ALRA or the *Native Title Act 1993*. Under the ALRA, the CLC’s functions are to protect the interests of traditional Aboriginal owners of Aboriginal land (s23 1(b)) and to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land) in the area of the Land Council (s23 1(ba)). Furthermore, under the section 203BB of the *Native Title Act 1993*, the CLC’s functions are to assist registered native title bodies corporate, native title holders and persons who may hold native title in consultations, mediations, negotiations and proceedings relating to native title applications, future acts, ILUAs and other agreements, rights of access conferred under the Act, and any other matters relating to native title or the operation of the Act. For these reasons, the CLC strongly asserts the right to represent the traditional owners of land across all areas of responsibility, including site protection.

Under section 19B of the *Sacred Site Act*, “a person who proposes to use or carry out work on land may apply to the Authority... for an Authority Certificate” and under section 19F, AAPA is required to consult with custodians of sacred sites regarding Authority Certificate applications. Because

AAPA duplicates some of the functions carried out by Land Councils in the protection of sacred sites, proponents can be confused as to which organisation they should apply to for a sacred sites clearance. We understand that current NT government policy requires government departments to apply for AAPA Authority Certificates for proposed works, regardless of whether the CLC is already undertaking site clearances for the same proposed works. Similar advice is provided to development proponents by government departments. Such duplication is unnecessary and inefficient. The CLC acknowledges that the duplication of site clearance work leads to a waste of limited resources; confusion for traditional owners about why they are being consulted twice by different people about the same proposal; and the potential for delay, confusion and additional costs for proponents.

The NT Government has previously asserted that the way through this impasse is for the CLC to undertake the work and provide the information for the AAPA to issue an Authority Certificate. There are a number of reasons why the CLC believes that this process is inappropriate, including the fact that AAPA cannot ensure the privacy/secretcy of the information provided about sacred sites because they are obliged to make this information public on the Register of Sacred Sites. Furthermore, the CLC has found this process to be administratively cumbersome, and it wastes the time and resources of both organisations. It is the CLC's firm legal opinion that a Certificate issued by the CLC is sufficient in providing the applicant with a defence against prosecution under section 36 of the Sacred Sites Act. It is therefore an unnecessary administrative duplication for AAPA to require the CLC to provide a report to AAPA for the issuing of an Authority Certificate, when the CLC has already issued a Sacred Sites Clearance Certificate to the proponent.

The CLC submits that this Government policy position should be amended and advice provided to all developers and government departments that they can choose to apply for a CLC or an AAPA certificate, depending on the circumstance, but that it not necessary to apply to both organisations. Developers and government departments should also be advised that under the Land Rights Act, they must apply directly to the relevant Land Council for site clearances in relation to proposed works on Aboriginal land. In addition, where developers/government departments have commitments under ILUAs or Joint Management agreements to apply for Land Council site clearances, they should apply directly to the relevant Land Council. AAPA Authority Certificates are not necessary and do not add value nor additional protection for sites in these circumstances.

The CLC asserts that a change in government policy as outlined above would result in improved site protection and a significant reduction in delays for processing applications. It would also enable a far more cooperative relationship between the CLC and AAPA.

The CLC recommends that the *Sacred Sites Act* be amended to include reference to Land Council Sacred Site Clearance Certificates. The suggested amendments below would help clear up the 'grey areas' in the current legislation and provide more clarity to developers regarding the ability of Land Council Sacred Site Clearance Certificates to provide indemnity under the *Sacred Sites Act*.

Suggested amendments to the *Sacred Sites Act* are:

- s.34 "Work on a sacred site":
 - (1) Current wording applies

(2) It is a defence to a prosecution for an offence against subsection (1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of, an Authority Certificate or Land Council Sacred Site Clearance Certificate permitting the defendant to do so.

- s.37 “Contravention of sites avoidance conditions” wording should be changed to:
A person who contravenes or fails to comply with a condition of an Authority Certificate, or Land Council Sacred Site Clearance Certificate relating to work which may be done on or use that may be made of land and by so doing causes damage to a sacred site or distress to a custodian of a sacred site, is guilty of an offence.
Maximum penalty: Either
 - a) In the case of a natural person – 200 penalty units or imprisonment for 12 months.
In the case of a body corporate – 1000 penalty units. Or,
 - b) A payment of a mutually agreed amount of compensation to the custodians of the site.
- Definitions: “Sacred Site Clearance Certificate” means a certificate issued by a Northern Territory Land Council, which stipulates site protection conditions relevant to the proposed works.

Recommendation 4: That the *Sacred Sites Act* be amended to provide a defence to a prosecution for an offence against subsection 34(1) if it is proved that the defendant carried out the work on or used the sacred site with, and in accordance with the conditions of either a Sacred Site Clearance Certificate provided by a Land Council or an Authority Certificate. Similarly the offence provision s.37 should include reference to a Sacred Site Clearance Certificate provided by a Land Council.

Removing the Ministerial Override (s.32(b))

In the case where an applicant has sought a review of a decision of the AAPA, the relevant Minister is provided with the power to override a decision of the AAPA (s.32(1)(b)). Specifically, the Minister is able to either uphold decisions of the AAPA, or proceed to issue an Authority Certificate regardless of AAPA advice. The CLC submits that this provision undermines the integrity and intent of the *Sacred Sites Act* and should be repealed. Further, the current provisions are biased in that they give a review avenue only to a certificate applicant who is aggrieved by an AAPA decision, and not a custodian or traditional owner who is aggrieved by an AAPA decision.

Further, it can be argued that the ministerial override is ultra vires and conflicts with the power from ALRA to ‘protect sites’. The NT, as a Commonwealth territory, has no plenary powers and obtains its legislative power through various Commonwealth Acts, particularly the *Self-Government Act 1978* but also through the Land Rights Act. The head of power for the *Sacred Sites Act* specifically derives from ALRA s.73(1)(a) which enables the Legislative Assembly of the Northern Territory to make ‘laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, The section provides;

73 Reciprocal legislation of the Northern Territory

- (1) The power of the Legislative Assembly of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* in relation to the making of laws extends to the making of:
 - (a) laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but so that any such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected;....

However, the provision does not extend the legislative ability of the Northern Territory to provide a Minister with power to authorise works on a site or enable the destruction nor desecration of a site. If the AAPA has issued an Authority Certificate in order to protect sacred sites it would be beyond the power extended by s.73(1)(a) for a Minister to issue a Minister's certificate which would have the effect (one presumes, given the decision of the AAPA over which review is sought) of authorising works on a site that would lead to damage of a site.

Recommendation 5: That the *Sacred Sites Act* be amended to repeal the provision providing for the relevant Minister to override AAPA decisions subject to review (s.32 (1)(b)).

Recommendation 6: That the *Sacred Sites Act* be amended to accommodate a review process for a custodian or traditional owner who is aggrieved by an AAPA decision.

Legacy certificates

The CLC is aware that there are many certificates issued prior to 2000 that are purportedly still valid and are still used for works by Government Departments. There are a number of problems with certificates of such an age. The sacred site protections and activities dealt with in such certificates may not be known by current senior custodians and they can become concerned about works occurring of which they are not informed. These certificates were usually issued with a much lower level of accuracy in the recording of locations of sacred sites and related restricted work areas. Current mapping and GPS technology is far superior to methods previously employed. Current certificates older than 10 years should be made void as a matter of course and the holder of such a Certificate should have to reapply.

Recommendation 7: That 'legacy' Authority Certificates issued more than 10 years ago be declared void and the holders of such certificates be required to reapply.

Capacity to retract and re-issue certificates.

The AAPA requires the ability to retract certificates in reasonable circumstances without fear of litigation. The capacity is required as new information may arise regarding the significance of a particular site or area that was not previously available. A development may proceed in ways not expected under the original certificate and that custodians may consider would put sacred sites at a higher level of risk. The custodians of a sacred site should not experience undue distress where there is a possibility to address a potential problem. This would also address point 6 of the review,

where it is recognised that there may be a need for the AAPA to intervene where an Authority Certificate has been issued but there are concerns remaining regarding protection of sacred sites.

Recommendation 8 : That the AAPA be given the ability to retract certificates where new information has become available which is material to the certificate.

Reducing red-tape and improvement of timeframes

Guaranteed funding for the operations of the AAPA

The review specifically seeks comments on matters that would improve the effectiveness of the AAPA in protecting sacred sites and enabling development. It is the view of the CLC that ensuring that the AAPA has sufficient funding to promptly address its statutory duties is essential. It is disingenuous of the NT Government to question the effectiveness of the AAPA when it appears that resources are not being provided to ensure it is able to undertake its functions adequately. It is particularly noticeable that the AAPA is increasingly confined to work relating to the issuing of Authority Certificates for which a fee for service can be charged, at the expense of sacred site registration processes. For example in 2001-2002 the AAPA entered a total of 53 sites onto the sacred site register⁴, while in 2013-2014 the Authority entered only 12 sites onto the register⁵. While the CLC fully comprehends that numbers alone cannot capture the variation in complexity and time required for any one registration, we believe it is still indicative of the way the AAPA has to prioritise fee for service work over more proactive site registration and protection work.

The CLC further suggests that guaranteed funding would ensure the independence of the AAPA and enable it to most effectively carry out its statutory duties in an environment free of political influence. Such a guarantee of independence would provide Aboriginal custodians with much comfort in the protection of their sacred sites and would in the opinion of the CLC actually facilitate development that is appropriate, in an environment of respect for sacred sites. This funding should potentially come from the monies gathered by the NT Government from statutory royalties from mining on Aboriginal land.

Improving timeframes

The CLC agrees that prompt provision of Authority Certificates is an effective method of protecting sacred sites and facilitating development. However, forcing legislative timeframes upon the issue of certificates is not an appropriate mechanism to ensure that development proceeds. Consultations with Aboriginal custodians can be subject to a number of pressures such as required attendance at sorry business or summer ceremonies. Further, some developments may need to be considered for a lengthy period of time by custodians in order for groups to work through complex issues and to ensure that they are comfortable with such development in proximity to their sacred sites. The CLC finds that in some respects, such as the issue of register inspections, the AAPA is very prompt. In other ways the AAPA does appear to be under a significant load and responses to simple administrative questions are very lengthy.

⁴ Aboriginal Areas Protection Authority, 2001-2002 Annual Report, p11, accessed at <http://www.aapant.org.au/publication/annual-reports>

⁵ Aboriginal Areas Protection Authority, 2013-2014 Annual Report, p17, accessed at <http://www.aapant.org.au/publication/annual-reports>

An effective way to aid prompt provision of Authority Certificates is to ensure that the AAPA is sufficiently well resourced to undertake the works, as discussed above. Clarity and a greater emphasis within the NTG on the importance of the protection of sacred sites would also alert developers earlier in the process, ensuring that they conduct due diligence checks. It is insufficient on the part of developers to claim that they were unaware of the need for an Authority Certificate until very late in the process. The NT Government must provide sufficient advice to developers on the required processes, and emphasise the importance of sacred site protection to Aboriginal Territorians.

Recommendation 9: That the AAPA be resourced sufficiently to allow for timely processing of Authority Certificates, and a statutory timeframe is not imposed.

Investigation of a system of site clearances for broader areas

The CLC is broadly opposed to the provision of site clearance over broad areas that then denies custodians ongoing involvement in the development or the opportunity to revisit their protections as a development advances or alters. Custodians need to consider particular activities and their impact or otherwise on sites. Their considerations are often in relation to the particular activity. Where a particular development changes, custodians require the ability to revisit their instructions and revise them if necessary. Site clearance over broad areas may thus result in an increased risk of damage to sacred sites. For these reasons, site clearance over broad areas would be culturally inappropriate and would discriminate against Aboriginal custodians who are exercising their traditional responsibilities to care for sacred sites.

From a cost point of view, broad area clearances would be expensive, time consuming and generally not necessary except in cases of particular developments such as a mine site or agricultural development. The CLC accepts that at a certain stage in a development clearance over large areas may be required, but that such an approach should be restricted and assessed on a case-by-case basis between the developer and the AAPA. An application for an Authority Certificate can certainly accommodate such a request.

The CLC is unclear how the AAPA can extend the validity of certificates, given that proponents are given two years to commence works. Certificates are not issued with an expiry date under the current regime to our knowledge.

Recommendation 10 : That sacred site clearances for undefined developments over broad areas not be contemplated as a means to increase processing times or facilitate development outcomes.

Aligning the Sacred Sites Act with other NT regulatory frameworks

The CLC is supportive of the government taking measures to incorporate the *Sacred Sites Act* within other legislative and regulatory frameworks to provide greater clarity to developers regarding the need for sacred site clearances in the NT. However, any changes to other Acts would also need to acknowledge that the functions of AAPA cannot subsume the functions that Land Councils carry out under the ALRA and the Native Title Act. In other words, changes to other legislative frameworks should not stipulate that developers must apply to AAPA for an Authority Certificate; instead it should be made clear that an Authority Certificate application is only

necessary if there is no existing agreement with the relevant Land Council for a sacred site clearance. Developers should be required to apply to either AAPA or the Land Council depending on which organisation is the most appropriate in the circumstance.

In addition to amending other legislation to make reference to the *Sacred Sites Act* (and the Land Rights and Native Title Acts), the CLC believes that the *Sacred Sites Act* should be amended to make certificates compulsory once certain development thresholds are reached, except where there is an alternative agreement with the relevant Land Council. Making certificates compulsory for works above a certain threshold would have the twin virtues of ensuring a greater level of protection for sites, and enabling the Authority to intervene in cases where sites are potentially at risk from development where an Authority Certificate has not been sought. This would provide the certainty that the review aims to achieve, in that there would be no question that an Authority Certificate or Land Council certificate is required. Such a step would improve protections for sacred sites. It would ensure that all developers are well aware of their need to protect sacred sites, and would also mean that the defence of ignorance under section 36 of the *Sacred Sites Act* could not be invoked in almost all cases. It is the view of the CLC that this would also be beneficial to developers in that they would accept it early as a cost of doing business and put in applications for Authority Certificates or Land Council certificates earlier in the development process, instead of late in the process when it may delay the project at a crucial moment.

Recommendation 11: That the *Sacred Sites Act* should be amended to make certificates compulsory once certain development thresholds are reached, except where there is an alternative agreement with the relevant land council.

Compensation where site damage has occurred

The CLC thoroughly supports a scheme for providing compensation to the custodians of a site where damage to a sacred site has caused distress. Currently, should a site be damaged, AAPA is not able to pursue compensation on behalf of custodians. The only option is for prosecution, which forces custodians through a long and drawn out process that is unfamiliar to them. Should the prosecution be successful, any fines are payable to the NT Government. Arguably, the NT Government has suffered no detriment, but the people who have suffered, the custodians of the damaged site, receive nothing to address their concerns. This is completely contrary to norms of natural justice and obligations under Aboriginal tradition. It is far more acceptable to Aboriginal custodians that compensation is paid promptly and without argument, and the matter is resolved without causing further grievance to an already distressed group of people.

Further, litigation is almost always expensive and protracted. In any reasonable view the money spent on litigation would be better accepted by the custodians as compensation, rather than enduring a court process that ultimately provides them with little or no satisfaction and may actually increase their distress.

Should compensation provisions be introduced, the Act should provide that:

- Where an offence has occurred against section 33, 34(1) or 35, the alleged offender and the Land Council or AAPA (on behalf of the traditional owners) can agree on the payment of compensation as an alternative to taking the case for prosecution to court.

- Where no agreement can be reached, the Land Council or AAPA (on behalf of traditional owners) should be empowered to bring civil action for the recovery of compensation.

Consideration should be given to development of a bond mechanism, analogous to environmental/security bonds for mining companies, whereby for significant developments the AAPA may stipulate a bond from a developer in appropriate cases. This could then be used as the basis for negotiation of compensation direct to affected custodians.

The CLC does not accept that a schedule should be developed. In cases where compensation is required, it is up to the custodians involved as to what kind or level of compensation will be acceptable to them and will satisfy their grievances and resolve the issues appropriately. Compensation is and should be negotiated on a case by case basis according to nature of the site and the damage.

Recommendation 12: Consideration be given to the AAPA being capable of determining and holding a bond from a developer in appropriate cases. In the event of site damage due to a breach of the act the bond would be available as the basis for compensation direct to affected custodians.

Recommendation 13: That compensation for site damage be negotiated according to the nature of the site and the damage, not subject to a statutory damages payment scheme and fines.

Roles and relations with land councils: avoiding duplication; increasing certainty, cooperation and efficiencies

Roles and relations with land councils.

Implementation of the recommendations contained in this submission, particularly that relating to the recognition of the CLC Sacred Site Clearance Certificate in the *Sacred Sites Act*, would remove some points of tension between the CLC and the AAPA and substantially improve the relationship between the two organisations.

Reviewing the offence provisions in the Act

Refining the definition of ignorance.

The defence of ignorance in the event of site damage often prevents the AAPA from taking any action once a site is damaged. Given virtually any development of any scale should require some form of permission from the NT government, the government should ensure that its regulatory and compliance procedures ensure that all proponents are well aware of the need to protect sacred sites. The Act also states that ignorance can be claimed as a defence “if it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site”. The CLC argues that an average reasonable person can have little or no knowledge of Aboriginal tradition and therefore has little to no understanding of what might constitute a site under Aboriginal tradition. Aboriginal tradition is a complex body of knowledge that is held by the group of traditional owners and others entitled under Aboriginal tradition. Such knowledge is transmitted in ways particular to Aboriginal tradition and may be subject to restrictions on the basis of age, gender etc. It is the group of traditional owners who are expert in their traditions and

their sites. The group of traditional owners does not express their knowledge in usual circumstances to an average person outside of their group. It is thus virtually impossible for an average reasonable person to have any expectation that a site may be a sacred site. In this context it is insufficient for a person to claim they did not seek advice, therefore they are ignorant of the site, and therefore they can invoke the defence of ignorance. At minimum the defence provisions should be significantly altered or refined in relation to breaches of section 34(1) and 35 of the *Sacred Sites Act*. It is in these cases where the possibility of damage to a site is greatest, where the works will have required other regulatory or other approvals and hence the defendant, whilst perhaps ignorant of the fact that the sacred site is a sacred site, is not ignorant of the fact that there are statutory requirements to protect sacred sites in the face of such works. In combination with our proposal to make certificates compulsory, and changes to NTG regulatory and compliance regimes, the defence of ignorance should be capable of being invoked much less frequently.

Recommendation 14: That the review give consideration to amending the act to refine the definition of ignorance in relation to breaches of section 34(1) and 35 of the *Sacred Sites Act*.

Recommendation 15: That the Northern Territory government and the AAPA take steps to increase the profile of sacred site protection, the *Sacred Sites Act* and the role of the AAPA within the Northern Territory.

The AAPA Board appointment process and terms of membership

Currently the Land Councils are responsible for the majority of the nominations to the Board, and the CLC strongly supports a continuation of this process. It provides a clear and practical link to Aboriginal landowners across the Territory, and ensures members with cultural authority and knowledge are nominated to the Board. However, the CLC does recommend that the process be amended, as follows:

- Section 6(2) be amended such that the land council do not provide a panel of nominations but simply nominate the required members for their region.
- Section (6) be amended to allow the Land Councils 90 rather than 60 days to provide nominations before the Administrator can act

Further, the CLC is not opposed to the idea that the term of the Board members should be staggered, to provide greater continuity. The CLC would be strongly opposed to proposals to change the nomination process aimed at “increasing flexibility in how Board members are nominated”, if that were to mean that the Land Councils were not able to continue to nominate the majority of Board members.

Recommendation 16: That in relation to board nominations section 6(2) be amended such that the Land Council may be permitted to simply nominate the required members for their region, and section (6) be amended to allow the Land Councils 90 rather than 60 days to provide nominations before the Administrator can act to appoint.

Recommendation 17: That the process of staggering board membership to provide for continuity of experience be investigated and implemented.

Determining the use and protection of sacred site information – creating certainty

The CLC has reservations about the appropriateness of publically providing information about sacred sites. It is not clear to the CLC how the public register might reduce processing times and drive development. There are a number of problems with the use of the public register and the information it conveys. With the exception of registered sites, the majority of the information on sites on the register is indicative only. The register is not a complete record of all sacred sites in the Territory and accurate instructions regarding how sites can be best protected can only be provided in an Authority Certificate or equivalent certificate issued by Land Council. Checking the public register, whilst it may be a step in the due diligence processes for developers, does not avoid the need for them to apply for Authority Certificates. Some developers may assume, innocently or otherwise, that possession of a register inspection is sufficient to protect sacred sites. This is despite the disclaimer AAPA routinely provides in a letter format. This is particularly the case for smaller, poorly resourced developers and/or individuals.

Despite these reservations, CLC is cautiously supportive of a proposed web-based portal to provide information to applicants about sacred sites within a given area at the point of application, provided that this information is provided in such a manner that applicants are advised of the limitations of the information.

Whilst again not avoiding the need for Authority Certificates for works, it is an argument for increasing certainty that the AAPA is provided with more resources to enable it to register sites more frequently, thus providing greater clarity up front about areas where development is highly unlikely to be acceptable to custodians.

Conclusion

The CLC has welcomed this opportunity to contribute to the review of the *Sacred Sites Act*, given its importance for Aboriginal Territorians and the constituents of the CLC. Our recommendations are soundly based in our long experience in matters of consulting traditional Aboriginal owners and the protection of their sacred sites. If implemented, the recommendations in this submission will safeguard the integrity of the sacred site protection regime in the NT, improve the workability of the *Sacred Sites Act*, and substantially improve the relationship between the CLC and the AAPA. It must be emphasised, however, that any changes to the *Sacred Sites Act* that in any way diminish the protection of sacred sites would be strongly opposed by the CLC and Aboriginal land owners and holders of native title, and would risk development proposals receiving substantially reduced support.