

ABORIGINAL HERITAGE LEGISLATION AMENDMENT AND REPEAL BILL 2023

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Sandra Carr) in the chair; Hon Sue Ellery, (Leader of the House) in charge of the bill.

Clause 2: Commencement —

Committee was interrupted after the clause had been partly considered.

Hon SUE ELLERY: I will get to Hon Nick Goiran's question, but if I can start. A question was raised earlier in debate about the number of guidelines that will be published. The intention is to have two guideline policy documents specific to section 18. The first the section 18 guidelines and the second the consultation policy. These documents were sent out for consultation.

Another question was about whether any further regulations are intended. In addition to the three sets of draft regulations I mentioned earlier, the government will continue to engage with the relevant bodies to ensure ongoing protection and suitable access and use parameters for the protected areas. Section 26 of the Aboriginal Cultural Heritage Act 1972 provides the power for government to make regulations relating to the use and access of protected areas. Regulations may be made under that section in the future; however, this work is ongoing, with each protected area required to be considered on a case-by-case basis.

I respond to the question asked by Hon Nick Goiran. The clause provides flexibility for the provision to commence as soon as possible. I have already said that it is our intention to do that in early November, and it absolutely must be done by 31 December 2023. That is what we intend to do. It may be earlier than 31 December 2023, but it cannot be later. The clause does not refer to 31 December because the government intends to do this as quickly as possible.

Hon NICK GOIRAN: The problem is that the minister says it absolutely must be done by a certain date and she also says it cannot be done later, but it can because there is the power under clause 2(d) for the rest of the act to come in on a day fixed by proclamation and different days may be fixed for different provisions. I absolutely acknowledge what the minister has said about the intention of the government. She has made it clear that it is the intention of the government that this happens on or before 31 December. In fact, it is the aspiration of the government that this occur in early November, and it is the expectation of the government that this will happen in early November. However, all of that is not reflected in the bill, other than to say that the bill allows for those circumstances to occur. The bill certainly is not consistent with the notion that it absolutely must be done by 31 December 2023 and that it cannot be done after that date. The concern I have is that the Leader of the House indicated earlier that if the proclamation specifically of part 2 of the bill were not to occur by 1 January next year, Western Australia would be left with the 2021 act. Of course, part 2 of the bill seeks to repeal the 2021 act in its entirety. Were the government on 2 January next year, let us say, to proclaim part 2 of this bill, we would be left with no law at all because the 1972 act would have been repealed. As I understand it, the Leader of the House indicated earlier that that would happen on 1 January 2024. I am not suggesting that this would be the intention of the government—clearly not, as the Leader of the House made clear earlier this afternoon, the intention of the government is to repeal the bill; it has been said on multiple occasions, both inside and outside Parliament—nevertheless, if an irresponsible government were to then proclaim part 2, we would find that the 2021 act would have been repealed, so we would have no 1972 act as at 1 January 2024 and no 2021 act as at 2 January 2024. That is an entirely untenable set of circumstances. I hasten to add that I understand that that is not the intention of the government. What has prevented the government in clause 2 from specifying that part 2 will come into effect on a day fixed by proclamation, no later than 31 December 2023?

Hon SUE ELLERY: I reiterate the point I made before and I understand the point the honourable member made. He is saying that failure to put in those extra words leaves it open to a government to do the opposite of what this government has said we intend to do. I understand that is the point he is making. We have been back to parliamentary counsel to ask why it was specifically drafted in this way and to ask the question Hon Nick Goiran has just asked. The honourable member is smiling because he already knows what the answer is, and I know what he is thinking about it. This is standard drafting and it is to provide the flexibility in the event that something needs to change. I completely understand the point the member made. All the pain this government has been through as a consequence of making the very significant change that we have made would be for nothing if we were not to honour the commitments I have given here, and that the Premier and the minister have given.

Hon Nick Goiran: I accept that.

Hon SUE ELLERY: I know. None of us in this place, as political beings, are prepared to suffer political pain for no gain, but I understand the point the honourable member makes.

Hon NICK GOIRAN: The problem here, which is not isolated to this bill, is that the Parliamentary Counsel's Office, with all due respect, is not the lawmaker of Western Australia. The final lawmakers in Western Australia are the 36 people elected to this chamber. If parliamentary counsel wants to have a convention or a standard drafting practice, that is all well and good and it is ordinarily a good and proper thing that they have that, but they are not the determiners of the law of Western Australia. If the government of Western Australia, currently the Cook Labor government, is saying that this absolutely must be done by 31 December 2023, it is not the place of the Parliamentary Counsel's Office to stand in the way of the government of Western Australia. It is not the place of the Parliamentary Counsel's Office to stand in the way of the will of the people of Western Australia who actually want this thing repealed yesterday. The people of Western Australia do not even want to wait until 31 December 2023, so it is a wholly unsatisfactory situation that we find ourselves in here that clause 2 leaves to the government of the day, currently the Cook Labor government, the possibility of never repealing this law, which clearly the people of Western Australia want and, clearly, the government wants. Most certainly the opposition does, including our lead speaker, Hon Neil Thomson, who tabled a record e-petition on this point. I hasten to add, again, that with all due respect the determining factor here cannot be the convention of parliamentary counsel. If it wants to have a convention like that, it needs to provide a persuasive reason to the 36 elected final lawmakers of Western Australia. We do not have the opportunity here to cross-examine parliamentary counsel on this practice that leaves us in this unsatisfactory situation.

Having made those comments and noting that we are rapidly approaching adjournment for the day and the week and that, regrettably, I will need to take up this matter again next week, I urge the government to consider moving an amendment to clause 2 to reflect what we have just been discussing. Nevertheless, can I get a response from the Leader of the House on what would be the effect of changing the commencement date for part 2 so that it coincides with the commencement of part 3, division 1; that is to say that part 2 would commence on the day after assent?

Hon SUE ELLERY: I have touched on this already. Sections 4A and 4B of the 1972 act currently provide that the 1972 act has limited operation. In effect, applications under section 16(2), notices under section 18(2) and applications under regulations 7 and 10 given before 1 July 2023 can continue to be determined. That is the only effect that the 1972 act currently has and it is governed by sections 4A and 4B of the 1972 act. That is, the 1972 act has operation in the circumstance the honourable member put only in relation to a restricted number of matters. Clause 12 in part 3, division 2, deletes sections 4A and 4B from the 1972 act, such that once the repeal of the 2021 act happens, and the amended 1972 act commences, there is protection for Aboriginal heritage in Western Australia. Otherwise, if the 2021 act were simply to be repealed and we reverted to the 1972 act, Aboriginal sites and objects would have no protection in Western Australia as there would be no applicable Aboriginal legislation to give them any protection. For example, there would be no offences for harming Aboriginal sites in Western Australia under either the 2021 act or the 1972 act. Anyone could harm a site and there would be no offence for which anyone could be charged under either the 2021 act or the 1972 act. There would be no registered or lodged Aboriginal sites in Western Australia as no concept of Aboriginal sites in Western Australia would exist and nor would there be a register on which Aboriginal sites could be recorded.

Progress reported and leave granted to sit again, pursuant to standing orders.