ABORIGINAL CULTURAL HERITAGE BILL 2021
ABORIGINAL CULTURAL HERITAGE AMENDMENT BILL 2021

Second Reading — Cognate Debate

Resumed from an earlier stage of the sitting.

HON DR BRAD PETTITT (South Metropolitan) [5.03 pm]: I rise on behalf of the Greens to indicate that we will not be supporting the Aboriginal Cultural Heritage Bill 2021 and the Aboriginal Cultural Heritage Amendment Bill 2021. I say that with disappointment. Undoubtedly, we recognise the importance of protecting Aboriginal cultural heritage, but it is with frustration and sadness that we say, in our view, the legislation fails to do that. I think we all agree that legislation of this type is necessary, but, unfortunately, these bills will not do what is necessary to prevent another Juukan Gorge disaster from happening.

I have spent the last few months listening to traditional owners, knowledge holders and land councils across Western Australia, including representatives from the Kimberley, the Pilbara, the goldfields, the wheatbelt, the south west regions and metropolitan Perth. I have spoken with cultural heritage experts and lawyers. Unfortunately, their message is clear: they do not support the bill in its current form and have been disappointed and let down by the consultation process and the final bills that are before us today. We had a real opportunity to make changes with this bill, and I am worried that this opportunity has been lost.

I am aware of only one Aboriginal organisation in WA that has come out publicly in support of the bills. Although I respect its decision and reasons for doing so, I want to share with the chamber the countless others that have reached out to me to share their devastation and disappointment with these bills. I want to share the voices of the community that have said to us time and again that they feel that the McGowan government has not listened to the voices and is instead ramming this legislation through as quickly as possible. Of course, the reality is that we in this Parliament cannot do much to stop that, with our limited checks and balances, but we can make sure that those voices are heard and recorded in this place.

Let me start with a letter that I received in September from a delegation of elders across WA, including Slim Parker, a Banjima elder; Clayton Lewis, a Nanda Widi elder; Dr Anne Poelina, a Warrwa elder; and Kado Muir, a Ngalia cultural leader. They wrote —

> There is a broad agreement from Indigenous groups, cultural heritage experts and legal experts that the Bill contains no greater protections than the AHA —

The Aboriginal Heritage Act 1972 —

> and may in fact contain less.

Last month, in an open letter to the Premier, a large number of academics, religious leaders, artists, cultural heritage experts and lawyers urged the government to withdraw the bills. I would like to read that letter in full. I note that Hon Neil Thomson also referred to this letter. It states —

> **Dear Premier Mark McGowan**
>
> Open letter—Opposition to the Aboriginal Cultural Heritage Bill
>
> We bring to your urgent attention widespread Aboriginal opposition to the Government's proposed *Aboriginal Cultural Heritage Bill*, 2021 and notify you of its serious breaches of Australia's international human rights commitments.
>
> We do not believe that the Bill will 'recognise, protect and preserve Aboriginal cultural heritage'. The Bill does not allow for Aboriginal people to ensure heritage and site protection—without the agreement of the proponent and/or the Minister for Aboriginal Affairs.
>
> Aboriginal people have repeatedly requested improved legal protection of heritage sites, but the Bill is weighted against Indigenous custodians in all processes involving heritage applications to conduct activities that disturb or destroy areas of cultural heritage.
>
> We consider that the Bill breaches our commitments under the United Nations *Declaration of the Rights of Indigenous Peoples*. It fails to meet the protection of the rights that Indigenous Peoples have under the UNDRIP to access and enjoy their cultural heritage. It is also incompatible with Australia's obligations under the *Convention on the Elimination of All Forms of Racial Discrimination* and is now the subject of an *Early Warning and Urgent Action* before the UN Committee for the Elimination of Racial Discrimination for their review of the Bill.
>
> We draw your attention to the Senate Inquiry *A Way Forward* report into the destruction of Juukan Gorge which called on the WA Government to improve heritage protections to a standard appropriate to the national and global value it holds.

> Respectfully, we request you to withdraw the Bill and ensure the law is co-designed with Aboriginal people to respect human rights and ensure a 'best practice' system to protect Aboriginal cultural heritage in our state.
>
> **Yours faithfully**

Those members who saw this letter would know that it lists an extraordinary number of people. I will start to read the names; I am not sure I will get to the end. It includes Slim Parker, Banjima Native Title Aboriginal Corporation; Hannah McGlade, UN Permanent Forum for Indigenous Issues; Anthony Watson, Kimberley Land Council; Kado Muir, National Native Title Council; Clayton Lewis, Aboriginal Heritage Action Alliance; Brendon Moore, South West Aboriginal Land Council; Tyronne Garstone, Kimberley Land Council; Kay Goldsworthy, AO, Anglican Archbishop of Perth; Emeritus Professor Carmen Lawrence, Conservation Council of WA; Professor Fiona Stanley, AC, Telethon Kids Institute; Sam Walsh, AO, Banjima Native Title Aboriginal Corporation; Professor Megan Davis, UN Expert Mechanism on Rights of Indigenous People; Janet Holmes à Court, AC, HonFAHA, HonFAIB; Professor Bill Hare, Climate Analytics; Greg McIntyre, SC, Law Council of Australia; Professor Marcia Langton, AO, University of Melbourne; Ronald Lameman, International Indian Treaty Council; Professor Stephen van Leeuwen, Biodiversity and Environmental Science, Curtin University; Adjunct Professor James Fitzgerald, Australasian Council for Corporate Responsibility; Dr Anne Poelina, Martuwarra Fitzroy River Council; Professor Peter Veth, Head of Archaeology Discipline, University of Western Australia; Tony McAvoy, SC; Father Frank Brennan, SJ, AO, University of Melbourne; Hon Robin Chapple; Dennis Eggington, Aboriginal Legal Service WA; Ernie Dingo, AM; and Jamie Lowe, National Native Title Council.

That list is very long. That was just the names in big text. There are a lot of other names here. I am very tempted to read them all in, but I realise that I may use up some of my precious time in doing so. The hundreds of others who sit below the names I have just read include Melissa Parke, chair of the Western Australian Museum Boola Bardip, and elders like Uncle Ben Taylor and Aunty Mingli. There are so many people here whose voices need to be heard and acknowledged. It is of great sadness and disappointment to me that we have such an overwhelming list of people of great stature in our community—so many that I do not dare read them all out—and, as I indicated before, only one group of Aboriginal people who have publicly come out in support of this bill.

We have to say: how did we get to this point? This is a once-in-a-40-year opportunity to get this bill right. What is common to everyone who is involved in this process is a sense that this has been rushed through. The government has not taken with it the very community that it should have taken with it on this journey.

It is extremely frustrating. My federal Greens colleague Dorinda Cox wrote an opinion piece in *The West Australian* of Tuesday, 30 November 2021. I want to quote from that. It says —

> … The current 1972 Act has been stripping the rights of First Nations people for nearly half a century—and longer, let's be honest.
>
> We saw that play out with the destruction of the 46,000 year old Juukan Gorge.
>
> To their credit, this Government has been the one to end the appalling 1972 Act.

This is very important. We all agree that the 1972 act needs to be changed. Dorinda Cox goes on to say —

> But what we have ended up with is business as usual.

The Yamatji Marlpa Aboriginal Corporation presented the Premier with an open letter from their co-chairpersons, Mr Peter Windie and Mrs Natalie Parker, on 19 November. I want to quote part of this letter also. They said —

> This isn't about politics for us, this is about us protecting our cultural heritage.
>
> While you may want to leave a legacy by being able to claim you got the bill through Parliament; the legacy we want to leave behind is ensuring our sites of significance, our cultural heritage, our spiritual connection to Country, is protected for our future generations. You can replace an act, but we can't replace our cultural heritage.

A Kimberley Land Council media statement said —

> The Kimberley Land Council has warned of a 'cultural catastrophe' as the WA Government push forward with its heritage bill after repeated calls for change remain ignored.

KLC CEO Tyronne Garstone said in the media release —

> … by ignoring our concerns the McGowan Government has treated Aboriginal people beneath contempt.
>
> "Fundamentally, this Bill will not protect Aboriginal cultural heritage and will continue a pattern of systematic structural racial discrimination against Aboriginal people."

KLC chair Anthony Watson stated —

> "Aboriginal people are 'included' in the process, only to be left without any influence over the outcome," …
>
> "The Aboriginal Cultural Heritage Bill 2021 is whitewashing. Aboriginal concerns about Aboriginal heritage have been ignored.
>
> "Once again, decisions about heritage will be made by non-Aboriginal people."
>
> "This legislation was supposed to be a reform. We cannot see how it improves protection of sites that cannot be replaced."

I also received a letter at the beginning of this month from the Western Australian chapter of the Australian Association of Consulting Archaeologists Inc. I understand it has written to my fellow MPs in this place as well. The chair Jo Thomson wrote —

> The ACHB 2021, in its current form, will not adequately protect Aboriginal heritage, nor will it incorporate a meaningful Aboriginal voice in the process. … The ACHB 2021 will thus fail to address the root causes of the Juukan Gorge disaster and will not prevent it from happening again.

I would also like to note the recent submission to the United Nations Committee on the Elimination of Racial Discrimination made by Slim Parker, Kado Muir, Dr Anne Poelina, Clayton Lewis and Dr Hannah McGlade, with the assistance of the Environmental Defenders Office, requesting a review of the draft Aboriginal Cultural Heritage Bill 2020. It was the 2020 draft because, of course, the 2021 draft was not made available to any of these groups. I think that is part of the outrage about this. What kind of process do we have when a bill goes to Parliament and the very people who are meant to have been part of its co-design did not even get to see it? The two key issues that were raised in this submission remain with the 2021 bill; namely, the traditional owners will ultimately be unable to say no to activities that will destroy significant cultural heritage and the minister administering the proposed legislation is the final decision-maker when there is a dispute between traditional owners and the proponent of an activity proposing to harm Aboriginal cultural heritage.

The McGowan government has chosen to ignore repeated calls from the community to slow down and listen to and address the concerns of the community before introducing this bill to WA Parliament. Along with the voices I have shared above, it is also important to note that former Rio Tinto boss Sam Walsh has publicly backed calls to rework the proposed heritage laws, saying "white people don't really get" sacred Indigenous sites and revealed plans to lobby the WA government for a conscience vote. It is sad that that conscience vote will not happen today, because I think that would be a small step in the right direction. Furthermore, a coalition of international institutional investors representing $461 billion in assets under management also called on the WA government to delay the passing of the Aboriginal Cultural Heritage Bill and to partner with Indigenous people to co-design a new version of the legislation. Mary Delahunty, the head of impact at HESTA superannuation fund, said the proposed new law would not do enough to stop another incident such as Juukan Gorge. She said —

> "They had such a great chance to make a real difference and make sure that a disaster like Juukan Gorge never happened again and we don't think this bill does that," …

I understand that Australia ICOMOS—the International Council on Monuments and Sites—also wrote to the Premier earlier this month with an urgent request for the government to withdraw the Aboriginal Cultural Heritage Bill. It is an extraordinary list of groups and individuals who are all demonstrating their strong opposition to the bill, and one that I am proud to get up today to give voice to in this Parliament.

What are the issues with this bill? The first, of course, is the overreach of ministerial powers. Despite being told in my briefings that this is better legislation because Aboriginal people will be empowered to determine what Aboriginal cultural heritage will be protected, this bill will nevertheless allow the minister to have the final say on matters of Aboriginal cultural heritage. Although the minister keeps saying that he will use his power sparingly, and I believe that—I respect this minister and I think he would do so—this legislation is not about this minister, who is a good minister; this legislation is about future ministers. We design legislation not just for this government, but for all future governments and ministers. This reminds me very much of what we no longer do in another area. Giving the minister all the power to decide is something that we got rid of in planning a long time ago. The planning minister used to be able to make decisions on planning matters. I am talking about built-environment development applications, for buildings and the like. Having a minister decide that is not right. That power gets misused. We saw that under previous governments and previous planning ministers; they absolutely misused that power. They rammed through approvals and the like in the dying days of government. One would think that we had learnt nothing from that. There was a reason to not do that. We do not do that anymore. The State Administrative Tribunal now makes those decisions; it is an impartial group that can do that. That was the system in the 2020 bill, but it was taken out of the 2021 bill. The minister says it is okay because we can trust him, but, as I said, it is not about this minister; this is actually about a process. Like the Aboriginal Heritage Act, this bill will be around for 40 or 50 years, and we need to make sure that it is safeguarded against all types of ministers and contains all kinds of protections. Unfortunately, we are seeing a reversion to pretty poor governance and things that we would not allow in other sectors. We no longer allow the

Minister for Planning to determine planning matters unilaterally, and nor should we. That is the kind of thing that should not happen anymore.

I again want to quote from the piece by Dorinda Cox in *The West Australian*. She wrote that this bill —

> … still favours the miners and developers because if the two sides can't agree, the minister will get the final say on "what is in the social and economic best interests of the State".
>
> In the last four years, the minister of the day has rejected one application to overturn a Section 18 approval, out of 143.
>
> We know where the best interests of the State sit.
>
> We are not fools to see it is not with First Nations people and their rights to country.
>
> In the past 10 years, 463 ministerial consents have been given to mining companies alone in WA. We do not know how many sacred sites like Juukan Gorge have been destroyed because the system is not transparent.

A way forward: *Final report into the destruction of Indigenous heritage sites at Juukan Gorge* mirrored these sentiments. It said —

> The perspective of Aboriginal organisations is that the due diligence process, and the powers it gives to proponents, the ACH Council and the Minister will, in practice, circumvent the capacity of traditional owners to make decisions about their cultural heritage at all stages of the processes provided for in the Bill. In the words of the PKKP, 'the ultimate power still rests with the Minister to make decisions about the destruction of sites'.

Let us just play this through. Imagine that a mining company really wants to see a site mined, but it will involve cultural heritage being destroyed. It knows that it has a minister who will back it, so why would it come to an agreement? Why would it not just hold out? If it holds out long enough, the minister will decide.

In fact, this undermines the idea that it is about allowing an agreement, because now the power will absolutely sit with the company that wants to see the Aboriginal heritage destroyed. The company can simply say, "Sorry, we couldn't come to an agreement", knowing full well that the minister will back them. I have said again and again that this will set a huge precedent for ministerial overreach. I would go so far as to say that it will actually open us up for potential corruption. That is why we got rid of these kinds of things in the planning system, and there is no way they should be introduced for Aboriginal cultural heritage. That is one of the key bits that I think needs to change.

The next part of the Aboriginal Cultural Heritage Bill that is problematic is it lacks the provision of free, prior and informed consent and self-determination for First Nations people. The United Nations Declaration on the Rights of Indigenous Peoples clearly spells out the principle of free, prior and informed consent. First Nations people have the right to maintain, control, protect and develop their own heritage.

In a recent conversation with Senator Dorinda Cox, she highlighted that she understood Aboriginal cultural heritage to be like an inheritance of First Nations people. She said they have a right to manage it and pass it on to future generations to preserve culture. However, First Nations people are not being given this right in the bill. Dorinda also highlighted the lack of free, prior and informed consent in her letter to Minister Dawson on 4 November. I would like to quote from that letter. It says —

> … Free, Prior and Informed Consent means that the outcome is not predetermined, occurring prior to any exploration—including an independent assessment of proposed works and their impacts on the proposed area and evidence that consent was obtained without coercion. The Minister's ability to approve the destruction of Cultural Heritage where parties cannot reach agreement does not meet the principle of Free, Prior and Informed Consent.

So, it is not possible that the McGowan government's legislation will allow free and informed consent to be obtained because the minister will ultimately have the power of veto over all decisions. Of course, the fact that the minister will have veto power means that traditional owners will not. By definition, self-determination should mean that First Nations people have the right of veto on matters of cultural heritage.

The Kimberley Land Council wrote a letter to all state MPs that said —

> Free Prior and Informed Consent means that Traditional Owners can say "no" and this will be respected.

I could not agree more. First Nations people, not the minister, should have the final say over matters of First Nations heritage. This government has made it abundantly clear that it does not support a veto right, but it is a critical underpinning of First Nations self-determination.

There is a precedent for better rights in other places in Australia. The Northern Territory is a really interesting example of this. The Aboriginal Land Rights (Northern Territory) Act gives traditional owners the right to say no to mining companies on matters of cultural heritage. If traditional owners say no, the proponents must wait another

five years before they can apply again. Of course, the Northern Territory's legislation is not perfect, but it is a much better model because it underpins free, prior and informed consent. In the Northern Territory, First Nations people have a right to preserve their heritage by saying no and they cannot be coerced. Unfortunately, these rights will not be afforded to traditional owners in Western Australia. I quote again the Kimberley Land Council's letter to state MPs on 24 November —

> The *Aboriginal Cultural Heritage Bill* will give every other party, other than Traditional Owners, the control over decision making about Aboriginal cultural heritage. The Aboriginal Cultural Heritage Bill gives Traditional Owners the right to say "yes" to impacts on cultural heritage but no right to say "no".

The KLC also highlighted —

- Proponents control decisions about cultural heritage if they assess their proposal as "exempt" or "tier 1".
- The ACH Council controls decisions about cultural heritage if proponents assess their proposal as "tier 2".
- The Minister ultimately controls decisions about cultural heritage if proponents assess their proposal as "tier 3".

Where is the opportunity for traditional owners to be the primary decision-makers on matters of cultural heritage and withhold consent when they want to, as the Juukan inquiry recommended?

The next point that I want to highlight about the limitations of this bill is that there is no right of appeal for First Nations people on ministerial decisions. The United Nations Declaration on the Rights of Indigenous Peoples states —

> … States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

As Senator Dorinda Cox points out —

> … Aboriginal Affairs Minister Stephen Dawson removed any rights for First Nations people to appeal to the State Administrative Tribunal from early drafts of the Bill.
>
> He said the buck stopped with him, claiming that "it would end up in long court processes" …

This quote is from Dorinda Cox's opinion piece in *The West Australian*. It continues —

> The minister said in the rare instance that parties cannot agree, the "minister will make a decision".
>
> Well, we say in the even rarer instance that First nations people don't agree with the minister, they should have a right to appeal.
>
> First Nations people must have the right to say no. We feel devastated, disappointed and disrespected.

In a recent article in *The Conversation*, Joe Dortch, Anne Poelina, Jo Thomson and Kado Muir highlight, and I quote —

> … the developer can appeal to the state administrative tribunal over ministerial decisions they don't like. The Aboriginal custodians for that area will not have an equivalent right of appeal.

Therefore, mining companies can appeal to the SAT, but traditional owners cannot. I do not see how that is not discriminatory.

I will now talk about the Aboriginal Cultural Heritage Council. This is the council that will make recommendations to the Minister for Aboriginal Affairs on cultural heritage. It will require only a majority of First Nations membership, which means it needs more than 50 per cent of members to be First Nations people. It is my belief, and the belief of many of the First Nations people whom I speak to, that the board should have 100 per cent First Nations membership to ensure that the decisions on cultural heritage are made entirely by First Nations people, without influence or coercion from other parties.

The minister has made comments that the ACH council will require certain industry expertise, hence why non–First Nations people are needed on the council. I think this is a problematic assumption, and there are other ways of bringing in the expertise, if required. The truth of the matter is: plenty of First Nations people have the technical and industry skills to inform this committee. Another problem for the Aboriginal Cultural Heritage Council is that its members will be appointed by the minister and not elected. This provides, I think, further avenues for bias and undue influence. Even if the council did have members who were elected and not appointed, the Aboriginal Cultural Heritage Bill will allow the minister to overturn whatever decisions the council makes anyway.

Again, I want to contrast this bill with the Northern Territory legislation. In the Northern Territory, a board of First Nations people oversees the protection of sites, maintains a register and decides whether to issue an authority for permission to alter. Authority tickets can be issued only when the board considers that there is no substantive

harm to sites. The board is made up of 10 First Nations representatives and two government representatives. The 10 First Nations people are elected by an administrator who is independent of the state minister. Again, we have a sense here of proper separation and proper accountability, which is the kind of legislation that we should have. As we change the act for the first time in many decades, we are losing this opportunity.

One of the other things that I wanted to raise, and certainly would have raised earlier, was how quickly we have got to where we are today in this process. There has been a real frustration that this bill is being rammed through the Parliament. This is not just the feeling among the Greens, as pretty well most of us here have been very disappointed to see a bill that no-one got to see until the day before it was introduced in the other place and that spent a whole three days being debated in that place—a bill that was received in this place only last week, and that we are told will go through all stages and be dealt with in this place in coming days. It is hard not to see this process as rushed or being pushed through. I will quote the words of the chair of the South West Aboriginal Land and Sea Council, Brendan Moore, who, according to my notes, said —

> Aboriginal people and the wider public have all been unable to read and consider the Bill until it was released less than 24 hours before being tabled along with an urgency motion. We consider it to be an unjustified use of the powers and majority this government has been entrusted with by the people of Western Australia. There is simply no reason to rush this bill through without oversight, and against the wishes of the majority of Aboriginal people.

It certainly goes against the spirit of co-design that we have heard so much about in this place, which I will discuss a bit later. Over 100 changes were made to the 2020 bill, which the First Nations people did get to see, compared with the bill before us today, which no-one got to see. There has been no opportunity for this bill to be properly scrutinised and given the oversight it deserves.

This is a really important bill. We have heard the concerns of other members in this house, coming from a different angle to me. Our concerns remain. The hub of my concern is the lack of co-design. We heard a lot of talk about co-design, but when I asked a question in this place a few weeks ago about the number of consultations conducted by First Nations people or in their languages, I inferred from the answer that there had been none. I find this extraordinary. If the government is serious about co-design, it needs to have a proper co-design process, which is about doing things with First Nations people, in their languages and in their places. First Nations people will not have input. A lot of the mining industry want to work alongside First Nations people. I will read, in part, a letter dated 18 November from the Yamatji Marlpa Aboriginal Corporation to the government, which states —

> We want to talk to you (and industry), so *together* we can develop a law that we can all work with. But you don't want to talk to us. You keep saying you've "consulted", but we keep telling you that there is still work to be done. But you ignore us. We don't think we are being unreasonable—isn't this something worthy enough of wanting to get it right?

Dorinda Cox wrote —

> Over the past five years, First Nations people have been walking that pathway with the WA Government in what we thought were "good faith" talks and engaged in a government-led process to "co-design" a new law to protect our cultural heritage": the Aboriginal Cultural Heritage Bill.
>
> So imagine our shock and disbelief … when the McGowan Government introduced the Bill into the WA Parliament without giving traditional owners the respect to see the final version.
>
> Many traditional owners from all corners of the State have told me they are angry, they are hurt and feel betrayed to read a law that contains many provisions that will continue to facilitate the destruction of cultural heritage places.
>
> …
>
> We requested that we be allowed to negotiate the terms of this law in good faith, but that was ignored. We asked for a seat at the table, instead we were talked at.
>
> Some groups have been "consulted", it's true. But we reject the ongoing statements of the Aboriginal Affairs Minister and Premier relating to consultation, because our advice and requests never made it into the Bill.

Co-design is not informing; co-design is working together to create a bill together. They are very, very different things. Co-design is everyone working together in a space where they can work properly. I do not think I have heard one of the First Nations people who were involved in that process say that they felt they were involved in a proper process of equal co-design. Again, I think that is a huge lost opportunity.

Of course, we have talked about Juukan Gorge. *A way forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* only came down a few weeks ago, and there is no way that the recommendations of that report could have been included in the 2021 version of this bill. This is a very important report. In fact, an

entire section of the Juukan Gorge report is dedicated to WA legislation, and one of the key findings in that section is that there is widespread doubt among First Nations groups that the McGowan government's bill will do anything to prevent an incident such as Juukan Gorge from happening again. The committee wrote —

> Submissions from Aboriginal organisations conveyed deep scepticism about the Bill. They indicated a lack of trust that the proposed legislation would improve the management and protection of Aboriginal heritage, even extending to concerns that the Bill would make things worse and be 'a step backwards'. Criticisms of the Bill challenged the conceptual foundation of many provisions, while also arguing that the practical application of the Bill would, like the existing legislation, lead to the destruction of Aboriginal cultural heritage.

Although the government continues to spout that this legislation is world-class and strongly aligned with the findings from the Juukan Gorge inquiry, several critical recommendations from the Juukan Gorge report are clearly not included in the bill that is before us. For example, the inquiry recommended —

- decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage

This recommendation from the Juukan Gorge inquiry's final report is not in the bill. The inquiry recommended —

- an ability for traditional owners to withhold consent to the destruction of cultural heritage

Again, that is not in this bill, even though it was a recommendation of the Juukan Gorge inquiry. The inquiry further recommended —

- mechanisms for traditional owners to seek review or appeal of decisions

Again, that is certainly not in this bill. The list goes on. One of the most important inquiries in this space brought down its recommendations just over a month ago, and those recommendations are not reflected in the bill that is before this Parliament. Again, that is a lost opportunity. I ask: why are we rushing this legislation through when that report and its recommendations should have actually been at the very heart of rethinking, co-designing and modifying this bill before it came to this Parliament? In fact, that is why this house should have supported this bill being sent to committee.

To finish, I think that there has been a sense that this bill is a failure in many ways. As I said, I did not read every name, and I could easily spend the next 20 minutes reading all the other names on this list of high-profile people—experts in this area—who did not support this bill. I am not going to do that, but I say to those members who will be supporting this bill in this house today that I will be fascinated to hear them tell me in reply who is supporting this bill. I look forward to hearing the list of people who are willing to put their names forward in this Parliament as supporting this bill, because there is an extraordinary number of people who do not. Those people are not saying "Don't do this bill"; they are saying, "Let's pause this. Let's go out, modify and co-design this and make sure that this is a bill that everybody supports." I think there is a sense of great frustration, sadness and disappointment—in fact, devastation—for many people that the government has not done that with this bill. In fact, there is a real sense that this is a once-in-a-generation opportunity that has sadly been lost. Ultimately, because the government has the numbers, it will come down to the regulations, which again will be co-designed. Forgive me and forgive First Nations people for not having confidence in co-design after, apparently, the co-design that has already happened; it certainly was not the co-design we expected.

This is a lost opportunity to make sure that we really do protect Aboriginal cultural heritage. Across this nation, there has been a fundamental shift in people's thinking about how we understand Aboriginal cultural heritage and a new-found respect. That is fantastic. People want to see Aboriginal cultural heritage protected and I think there should be, and there is, disappointment that this bill will not do that.

I appreciate the hard work that has gone into this bill; there are some really good parts to this bill. But I am saddened, as a whole, that key people involved in this bill see it as a step backwards and some see it as a small step forward; I am yet to find anyone who sees this legislation as the kind of step forward on the path of reconciliation that it could be and it should be. For me, probably the most disappointing thing about this legislation is that it has not done that.

Sam Walsh, former chief executive officer of Rio Tinto, said —

> "I think that there is a fundamental flaw … the issue with it for me is we haven't rectified the problem with the old legislation and the problem was the final call is with the minister …
>
> "It doesn't provide an independent appeal which, I think is critical in the process as we saw with Juukan Gorge, a section 18 [application to destroy the site] was approved [by the minister] for that."

In short, Juukan Gorge was destroyed because it was legal to do so. The minister approved it with a section 18 notice. The current bill will still allow cultural heritage to be destroyed if the minister approves it without the agreement

of traditional owners. This legislation is not the step forward that we need and, unfortunately, the government has not taken the community with it. For those reasons, I will not be supporting this bill.

HON DR BRIAN WALKER (East Metropolitan) [5.46 pm]: I rise as the lead speaker for the Legalise Cannabis WA Party to speak on the Aboriginal Cultural Heritage Bill 2021 and the Aboriginal Cultural Heritage Amendment Bill 2021. It will be a fairly short contribution because of the admirable exposition that came before us just now of the flaws and faults in these bills.

It must be said, and I will say this loudly and clearly: I greatly admire what the government has done and how it has gone about doing it. I think the government's understanding and the intent is admirable. I am not going to criticise the government. I think this has been an effort to rectify a wrong and I commend the government for that. But serious concerns have been raised about a number of areas, as pointed out by Hon Dr Brad Pettitt.

First of all, we are far from convinced that the minister should be the final arbiter on anything to do with Indigenous rights. We are also far from convinced that the consultative process went as far we were told it did. I listened to the briefing. It was an admirable briefing and I was thoroughly convinced by what was said. I am sure that is exactly what the government intended. The consultation, from a place point of view, was fairly extensive. Imagine my surprise when I then heard from only people who disagree with the bill. Perhaps it is a biased ear, and people who agree with the bill are nice and quiet and think it will go through Parliament with no problems—it is possible.

I want to begin my contribution with a very apposite quote from the other side of the world, because, you see, history is always shown to be repeated. I think it is insightful for us to have before us a quote from someone on the other side of the world who has actually experienced this. I quote —

> One of the most terrible things about the English … system in Ireland is its ruthlessness … It is cold and mechanical, like the ruthlessness of an immensely powerful engine. A machine vast, complicated … It grinds night and day; it obeys immutable and predetermined laws; it is as devoid of understanding, of sympathy, of imagination, as is any other piece of machinery that performs an appointed task. Into it is fed all the raw material in Ireland; it seizes upon it inexorably and rends and compresses and remoulds …

I suspect only one member in the chamber today will recognise the author of that piece of wisdom and, ironically, the member I am alluding to is the Minister for Aboriginal Affairs who has passage of the bill before us. I say that because he was educated for a number of years in an Irish language school—am I right, sir? If anyone recognises the words of Patrick Pearse in English, it almost certainly is my friend—indeed, I consider him a good friend. I quote Pearse because I fear we risk falling into the same trap that he saw in England's diktats to the Indigenous Irish. The English are masters of the imposition of unilateral decrees on those under their so-called care. I am sorry to say that the bill and the manner in which it has progressed has far too much in common with that colonial habit than I can stomach.

The minister may well tell us that his department undertook one of the most comprehensive consultative exercises in recent government history during the drafting of this legislation. That is certainly what I was told when I was briefed on the bill last week. I thank all those involved in the briefing for their time and insight. I enjoyed it immensely; I was deeply impressed. But we should listen to what Hon Brad Pettitt just brought to us; it is not what I am hearing from Indigenous groups from around the state either. They have told me that they do not feel that they have been adequately consulted or, at the very least, adequately listened to, and that worries me. It could be that we are seeing what we would see in any group of people when seeking an opinion—we find that people have opposite opinions. I use the example here of the Fremantle Dockers and West Coast Eagles; two good football teams but with very opposite opinions. The same goes for any opinion: refugees, yes or no—there will be a polarisation of views. It could be that we are looking at this, but it could also be that we have not listened properly when we think that we have listened.

I will tell the story of what happened in Newman when a couple of lovely white nurses—very experienced of course—came from Canberra to visit us in our clinic and wanted to talk about closing the gap of Indigenous health in Newman. They went to community meetings with their whiteboard and asked people for ideas about Closing the Gap. On that whiteboard they put some very good suggestions, but when a suggestion was made that did not fit within the mould, they would talk about it and say, "Yes, you have to understand it doesn't quite work that way", and the suggestion would not go up on the whiteboard. Another suggestion would be made and they would say, "Yes, of course. Very good point", and up it would go. The points that they put on the whiteboard were the ones that fitted—were aligned—with the white middle-class political ideas of their Canberra masters. That consultative process was flawed and it failed because it simply imposed upon people the opinions of those who were far away and they did not listen to what really mattered. I do not know, but I wonder whether something similar is not happening here.

We have also seen that approach by other departments in this house in recent months, have we not? It is my way or the highway. That might well be the Premier's next campaign slogan, based on the speed at which he has pushed through things such as the Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021. We were assured that he had no plans there, but here we are.

Puppy farming legislation is also due to be debated in this place as well. The government promised consultation, but I will bring members the words of people who feel as though they have not been consulted and listened to. The minister knows best and will plough on regardless. We might argue that that is what government does: government takes account of the situation and tells us what we need because we do not know what we need. It is one thing to dictate to Dogs West owners, but it is quite another to dictate to our First Nations people. The suggestion that large groups have not been properly consulted or feel as though they have not been consulted—that is equally important—should worry us all. It should also worry us that, having imposed the government's will, we are then looking to continue that imposition by enshrining in law the role of the minister as the last court of appeal when it comes to the retention of heritage sites. I echo the words of my honourable colleague by stressing that I have every respect for, and faith in, our current Minister for Aboriginal Affairs—an honourable and conscientious man. I bow down to him. But who will succeed him, and who will succeed his successor? We do not know, so we should not rush into giving unknown ministers of the future legislative power that will allow them to dictate to our Indigenous brothers and sisters.

I concede that that may well be the case now, but that does not make it ideal. I will even concede that it may be the norm just now, but that is not ideal and it is not adequate. We should not be doing this. We should be thinking outside the box here, should we not, and looking at alternative solutions that empower the Aboriginal community to take responsibility for and active oversight of their own heritage, and not to rely on a whitefella, however honest and well meaning, in a tower block in West Perth to do it for them. Personally, I would much rather see a body of senior, respected Indigenous elders formed to make the final deliberations on such questions. Would that be difficult to do?

We passed up the chance to refer this legislation to the Standing Committee on Legislation, and I think that was a big error on our part. First and foremost, we need an opportunity to consider in detail—in a committee and in the new year—alternatives to the minister having final power. It may be that there are no such workable alternatives, but I would like to be reassured of the ability of the bill to perform as advertised by the government. It needs to be investigated and questioned closely, and we will not have time to do that in the rapid passage of this bill. I counsel government members to think for themselves and imagine what would happen if this bill were to be passed and did not meet the needs of Indigenous people. It would be in place for another 40 years.

I would also welcome the opportunity for a committee—I am happy to say that I am looking for a job in a committee!—to do what the government, at least according to its critics, has failed to do: to consult more widely and to take into account the views of Indigenous communities, individuals and organisations. I would like each of us to have the time over the recess to engage with stakeholders in our own districts across the state to reassure ourselves that this is the best legislation we could hope for and that we can provide through this Parliament to preserve and enhance Aboriginal heritage and culture here in WA.

It was mentioned earlier that the Yamatji Marlpa Aboriginal Corporation has plans to host a two-day workshop on this legislation and its potential impacts, both good and bad, in the eyes of its members. It is scheduled to take place in January. I cannot blame the timing, unless the corporation had an earlier briefing; this legislation was rushed through only a week ago. We all deserve and need more time to consider the legislation in more detail, and a committee referral would have furnished us with enough time over the recess.

I feel certain that other members of the committee would also welcome the opportunity to examine this bill in great detail. We were not called upon in the first six months of the McGowan government, and I do —

Hon Darren West: Member, I think you may be reflecting on a decision of the house.

Hon Dr BRIAN WALKER: I withdraw.

Detailed examination over a suitable period would be no more than the legislation deserves; indeed, it demands it. We need to take the time to do that, here in Parliament. If nothing else, we could hold off consideration of the bill until our next sitting in February; there is no rush. How much time might the committee have needed? I would have thought March would have been a good time. We could defer it and consider it ourselves, in this Parliament, according to that timetable. We have nothing else on our agenda, have we?

Hon Darren West: You're doing it again!

Hon Dr BRIAN WALKER: Okay!

I realise the government has used the Juukan Gorge scandal as a kind of shadow to attach some urgency to this legislation, and that is understandable. If people had taken the time to think and consider the case in Juukan Gorge more, that would not have happened. In fact, we know that there was a verbal command: "You will not do this." That command was overturned when a new CEO came in and said, "Yes; we will go and do it." Had they thought about it with more detail would they have made that mistake? I think probably not. Rushing was the cause of this, and we are doing that here. Posterity will judge it for us, will it not, because we will have rushed through legislation that at least a sizeable number of First Nations people are saying, "This is not suitable for us." We can say, "Okay, we have consulted, or at least we think we have; you don't matter." Do we really want to give that word out to the First Nations people of our state? Are we really prepared to say to a sizeable proportion of the Indigenous population in WA, "Your opinion does not matter"? The message should be that we are taking a measured response, not a rushed response.

We can never consult too widely when it comes to other people's cultural rights. Now that points have been raised, it is a perfectly valid argument to take the time to sit back, think about the legislation and maybe reflect on whether it could be improved. Is there any need to rethink this? It is not as though this is an emergency and we have to do this now. No bomb is being dropped; no war is being declared. It is not something that we have to do right now. I challenge anyone here to tell me why there is an urgent need; I will take any interjections. Is there really an urgent need to make this legislation happen right now? The silence from the house tells me no. An approach of taking our time might allow for an apt level of concern for the future and feelings of the stakeholders, our First Nations people across WA, and indeed a sign for all Indigenous peoples of Australia, that befit from a consultative, forward-looking government. Western Australians could stand proud that our government is doing the right thing by all peoples.

I opened with a quote from Patrick Pearse, so I ask members and the minister in particular whether we can, as Pearse did, claim "we have kept faith with the past, and handed on its tradition to the future"? Or are we more akin to the lawyers, whom he looked upon with disdain, who "sat in council, the men with the keen, long faces, and said, 'This man is a fool'", for striving to give life "to a dream that was dreamed in the heart"? Members are welcome to sit with long faces and call me a fool if they will. If it makes a man a fool to listen to the ordinary people, I am a fool. If it makes a man a fool to believe that it is not the place of a whitefella to dictate to the blackfella, as has so often been the habit of the colonial master, then I am a fool. But I tell members this plainly: I do not believe that history will call me a fool if this legislation, like others before it, is rushed through the house by dint of the government's majority. As much as it saddens me, I think that title will rest elsewhere, and with no little justification, for we will have failed our Indigenous sisters and brothers here today if we do not take the time to listen to the concerns that they have raised about this legislation, and then take those complaints on board rather than believe that we know best.

I will not support the passage of this legislation in its current form. I entirely support the intent, and honour the intent of the government; I respect it greatly for this, but it needs more time to be examined more properly. It needs not to be rushed through. I would beg the government to listen to these words, and respect that the future will judge us by what we do today.

HON TJORN SIBMA (North Metropolitan) [6.03 pm]: I rise to make a brief contribution to the debate on the Aboriginal Cultural Heritage Bill 2021 and Aboriginal Cultural Heritage Amendment Bill 2021. For the purposes of the house's efficiency, and as a courtesy to all other members present, I will attempt to make a contribution that will last the length of this order of business and to bring it to a conclusion at 6.20 pm, whereupon we ordinarily take members' statements. At this time of the year, with time being limited, I think that should restrain my contribution and direct my efforts, when they arise, through the consideration of the legislation in the Committee of the Whole House stage.

At the outset, it is worth acknowledging the sheer magnitude of these bills both in qualitative and quantitative terms. This is substantial legislation and deserves to be treated with the respect and consideration it deserves. One can make that observation irrespective of the position they take on the bills themselves, even if they take a prudent course and decide to withhold at least their opposition, but not give it their full-throated support. The Aboriginal Cultural Heritage Bill is a bill in 16 parts with 353 clauses. The explanatory memorandum is a detailed document in itself. It is a very useful document, but it is an expansive one. I do not think that this chamber has the capacity to scrutinise this bill with respect in the time that will be made available to us. I make no reflection on the decision of the house previously, but that was always going to be the result. It is said that in life there are two certainties, death and taxes, and I think for the next three years there will be one additional certainty we can be reassured about; that is, the McGowan government will get through legislation in whatever form it chooses. That is a certainty. In acknowledgement of that fact, how do we discharge our responsibilities, particularly non-government members—the opposition and the crossbench? We have been elected to do a job as well and that is to scrutinise legislation. We will not have the opportunity to scrutinise this bill to the degree I think necessary or sufficient. I will limit my remarks to some broad assessments, because they are the only assessments I have been able to form.

In part, I want to address an element of the second reading contribution provided by Hon Dr Brad Pettitt. I think it is worth acknowledging that argument. It is a public argument that has been put about the bill. In the course of the honourable member's contribution, there was list of notable or eminent Australians and Western Australians who have taken a position of opposition to the bill. I want to address one of the comments that was elaborated upon, and they were remarks attributed to Mr Sam Walsh, whose legacy in this state is well acknowledged. There was a quote of his that Hon Dr Brad Pettitt read in, which I have seen repeated in the media as well, that I find objectionable. I think it is an unsustainable argument. That was the argument that white people do not really get sacred Indigenous sites. I think that is a very loaded and, frankly, incorrect and unjustifiable position to adopt. I think that any human being, irrespective of their ethnic origin, who is intelligent and intellectually curious, with a respect for their own cultural traditions, can—if they are consistent and a person of integrity—at least empathise with the cultural heritage and traditions of other groups of people. I would like to put myself in that category. The destruction of something like Juukan Gorge was quite obviously a cultural desecration, and a cultural desecration felt by the traditional owners of the country. But it was also a loss to humanity of a consequence that I think is comparable to the burning of the Library of Alexandria a millennium ago. There is a tradition, unfortunately, by human beings of empiric expansion and cultural desecration, but also of assimilation and regrowth. But there is acknowledgement that certain things lost can never be recovered. One of the

tests of this Aboriginal Cultural Heritage Bill is whether it will put this jurisdiction in a position to avoid a cultural loss of a similar magnitude. I am not in a position to form a judgement on that yet, but I suspect that it will to a large degree. One has to respect the work that has gone into this bill. There can be differences of opinion about its satisfaction or its suitability, but I think that the government can legitimately claim that this is a reform of some magnitude.

The difficulty we have in this chamber, however, is in attempting to stress test black-letter law legislation and to have a sensible pragmatic view about the framework and the regulatory instruments that will flow from its passage. Quite frankly, I think "the rubber hits the road test" will apply to this legislation more than perhaps it applied—I will be generous in my description here—to the reform of the Environmental Protection Act last year or the reform of the Planning and Development Act under a COVID guise last year. This bill will affect—I hate the phrase; it is instrumentalist in its view—a broad range of stakeholders, Indigenous and non-Indigenous. A bill has to work for the entire Western Australian community—all land users. A framework that is credible, legible and predictable and does not introduce perversities in outcome is the absolute objective. I think that is the test.

I want to focus on a couple of elements, one of which I think in the explanatory memorandum's description is that the definition of cultural heritage has been broadened. As a responsible legislator, I want to understand what the actual implication of that broadening definition entails because I need to understand what a cultural landscape is. This is an issue that was addressed in the briefing. I compliment the government staff who provided a reasonably comprehensive overview of the bill in the time they were permitted. Expanding the concept of a cultural landscape seems to me to be beset with all kinds of pragmatic problems. I think it also introduces, implicitly and unintentionally, almost a concept of privileged or exclusionary ownership over a landscape. I am not necessarily sure whether the argument has advanced too significantly to at least define what is meant by that. Hopefully, we are not introducing such things as vistas and outlook, but I suspect we might be doing that because there is an aesthetic quality that I think is at least acknowledged in the EM and the bill. I think aesthetic values are something that one could have a debate about. I wish they applied more to some of the developments in the CBD that get approved. We have a sort of global glass and steel architectural monoculture, but that is an aside and I am being tangential.

There needs to be a better sense of what is meant by "cultural landscape". It cannot be that there is a view or a cover for a lack of definitive information, resolution or agreement on the location of specific sites. I do not want to see with the passage of this bill scope creep in the application of a heritage site, because I think that would be dangerous. It is also worth acknowledging, in my view, that the movement towards a tiered scale of potential harm is a useful framework. I know that others might disagree with that view. However, I think that in that context there will be proponents who will be in a position to navigate more easily than others that particular tiered structure, as well as the framework overall. If this bill will be to the advantage of any one set of proponents, it will be those who currently operate at scale and who have the capacity or who are nimbler than others at adapting to the changes in the regulatory framework. I mention, for example, the exploration industry. I do not think it is in the same position as those who are involved in production, if we look just at the mining sector, for example. Tomorrow I will put questions without notice to the minister that might facilitate discussion at the committee stage.

Hon Stephen Dawson: I am happy to. We will probably get to it before then.

Hon TJORN SIBMA: I will raise them now because that might expedite it.

Hon Stephen Dawson: I have answers ready for you, so if we do not get to question time before that, I will bring them into the debate.

Hon TJORN SIBMA: That would be useful. I might address those issues now. Briefly, they are about the act that will govern members of the Aboriginal Cultural Heritage Council—whether or not it is the Public Sector Management Act—and will govern or regulate the activities of the local cultural heritage staff. I will also jump to the clauses that deal with the new powers to regulate, which Hon Neil Thomson addressed. I am talking about the capacity to stop and search vehicles and the like. What training will be provided to the officers who will undertake that and what will be the process of appointment? More to the point, what will be the process of regulating it? I can envisage a potentially very, very dangerous and unsatisfactory scenario because of the creation of that new power. In the time available to me before I conclude my remarks, I also seek some certainty over the follow-up action that the government will need to undertake to put together the framework to draft all the enabling regulations. I think a view was put to us in the briefing that that could take up to 24 months, and I have been told that it could potentially take up to 36 months.

Hon Stephen Dawson: I hope not.

Hon TJORN SIBMA: This is it. My focus in a pragmatic sense is on that transition phase and on getting as much clarity as we can about the process following the passage of this bill. That would be appreciated.

I gave a commitment to not speak for as long as I would like to on this bill. I will direct my efforts to the committee stage, but I wanted to put those sentiments on the record. I will round out the debate on this point: I do not think that the interest in this bill should be culturally mediated or that opposition to it or different perspectives on it should effectively entrench racially based positions. There is an element of this argument that I find deeply uncomfortable.

It has been mentioned by people of the stature of Sam Walsh. I hope that we can work through these issues in a sensible, sensitive and pragmatic way.

HON COLIN de GRUSSA (Agricultural — Deputy Leader of the Opposition) [6.19 pm]: I, too, rise to make some remarks on the second reading of the Aboriginal Cultural Heritage Bill 2021 and the Aboriginal Cultural Heritage Amendment Bill 2021, which we are debating cognately. I will confine my remarks to some key issues rather than talk too broadly about the bills and their policy. I will talk about specific issues that have been raised with me or that have come across my desk during the time that we have been able to look at the bills before us, which has not been a particularly long time. It is worth reiterating that reform of this magnitude—it is significant reform and there is no doubt it is much needed—should be done with the will of the house on all sides. We should come together and ensure that we properly debate and assess the legislation before us so we get it right, because that is our job. As legislators in this place who represent the people of Western Australia, it is our job to make sure that the laws we make are as appropriate as they can be for the people of Western Australia. Particularly when it comes to something as significant and important as Aboriginal cultural heritage, we need to make sure that we are doing the right job for the people of Western Australia.

A few key issues have come across my desk. I will talk through some of those in the time I have available, and perhaps the minister can respond to some of those queries during his reply. I will have further questions, most likely at clause 1 in the Committee of the Whole stage of the bill, which I will probably constrain my committee contributions to and, hopefully, get some answers on the way.

Clause 5(5) in particular states —

> The management of activities that may harm Aboriginal cultural heritage is dealt with in Part 6, which includes the following —
>
> (a) providing that proponents must undertake due diligence assessments under Part 6 Division 2 in relation to proposed activities (unless the activities are exempt activities), to assess —
>
> (i) whether areas where it is intended to carry out proposed activities include any area that is part of a protected area; and
>
> (ii) based on the level of ground disturbance …

This aspect of the bill seems like a reasonable approach, but if we had the proper time to scrutinise the legislation, without fear of extended sittings, whether that was through the normal committee process or through the process of referral to a committee, we would gain an understanding of some of the issues that will arise.

Debate adjourned, pursuant to standing orders.