Government of Western Australia
Department of Environment Regulation

Review of the *Contaminated Sites Act 2003*

Discussion paper

SUBMISSION COVER SHEET

Complete and email this form with your submission by

Monday 24 February 2014.

To assist us in collating stakeholder responses, please submit in Word format.
PLEASE DO NOT SEND PDF DOCUMENTS

Submissions will be published on the DER webpage, however, personal contact details will not be made public.

Email to: consitesreview@der.wa.gov.au

This submission is written on behalf of (individual or organisation name):					
Kimberley Community Legal Services					
Please indicate which best describes you / your organisation:					
Academic		Member of the public		Professional association	
Auditor		Industry		Real estate	
Community group		Legal practitioner	X	State agency	
Developer		Local government		Other (specify)	
Environmental consultant		Planning consultant			

Contact person			
Position			
Email		**Fax**	
Phone		**Mobile**	
Postal address		**State**	
Suburb / city		**Post code**	
Number of pages (including this cover sheet)			

Review of the
Contaminated Sites Act 2003
Discussion paper

Response template

To get the most out of your feedback, **please provide examples and relevant data to support your view (e.g. how the issue affects you, information regarding costs incurred and how frequently the issue arises**). Comments are most helpful if they:

- contain a clear rationale;
- provide evidence to support your view;
- describe any alternatives we should consider; and
- where possible provide data which could inform a costs and benefits analysis of the issue such as how often the issue arises and what direct and/or indirect costs or savings would be incurred if the change was made.

What will happen to the information I provide?

After the comment period has closed (24 February 2014), we will review and consider all stakeholder feedback and produce a detailed report for consideration by the Minister for the Environment. The review report will be tabled by the Minister in Parliament. All submissions received will be published on the DER website (personal contact details will not be made public).

Thank you

We would like to thank you for your time in contributing to this review process. This stakeholder consultation will provide valuable information for us to consider and incorporate into improving the operation of the CS Act and Regulations and the way we do our business.

(1) Duty to report

Under s.11(4) of the Act, the following persons have a duty to report a site:

- an owner or occupier of the site
- a person who knows, or suspects, that he or she has caused, or contributed to, the contamination
- an auditor engaged to provide a report that is required for the purposes of this Act in respect of the site.

If any other person becomes aware of a known or suspected contamination, they **may** report it, but are **not** obliged to do so.

In the Consultation paper we asked: Should a person with the professional knowledge or ability to identify contamination have a duty to report it?

Proposed way forward – include an 'environmental consultant' in the persons with a duty to report under s.11

The intent here is that the reporting obligation would apply to environmental consultants engaged for investigation or remediation purposes [an appropriate definition of 'environmental consultant' would need to be included in the Act]. It is suggested that for an environmental consultancy, the onus would be on the project manager to ensure that known/suspected contamination is reported to DER in the appropriate timeframe. It is not intended that a reporting obligation would apply to other professionals such as a field technician sampling wells, a laboratory technician conducting laboratory analyses or to someone conducting a survey at the site.

1.1	***Do you support the proposed change?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
1.1	Kimberley Community Legal Services Inc. (**KCLS**) bases its view and submissions on its experiences assisting public housing tenants in the Kimberley with known and suspected asbestos contamination at their rental properties. KCLS: • Supports the proposed change to extend the duty to environmental consultants. • Submits that the duty to report should be extended to any person engaged in work at a site who has the professional knowledge or ability to identify contamination at that site. KCLS submits that, where contamination is known or suspected by any such person, they should be required to report it as soon as reasonably practicable. • Submits that information campaigns should be undertaken and non-reporting penalties more actively enforced, particularly in remote areas, to increase compliance with the Act.

	The following example demonstrates the need for an expanded duty to report and improved compliance with the Act. KCLS assisted a tenant where asbestos contamination became known to that tenant following the completion of refurbishments at their rental property (**Example 1**). The tenant reported the asbestos contamination under the Act. The asbestos contamination involved clearly visible, exposed and broken asbestos fragments under the home and around the property. The contamination was not reported by the workers engaged to undertake the refurbishment works. As recognised in the DER's Review Discussion Paper, under the current provisions of the Act such workers *may*, but are *not required* to, report it. KCLS submits that this example highlights that such workers, who are well-placed to make useful reports, are not doing so voluntarily. It is also noted that the contamination was not reported under the Act by the owner of the property, the Department of Housing (**DOH**). This is despite the contamination being made known to the DOH and the DOH thereby having an obligation to report the matter as an owner. KCLS submits that this highlights problems with compliance with the reporting requirements under the Act.
1.2	***If your answer is no, why do you not support the proposed change?***
1.2	

(2) Site classification scheme

In the Consultation paper we asked: In circumstances where contamination has been identified but requires further investigation to determine whether clean-up is necessary for the current or proposed land use, would a new classification, *contaminated—investigation required* be helpful? Would such a classification prompt more timely investigations at a site?

Proposed way forward — process improvements — no change to classification system

We have initiated substantial improvements to our internal procedures to provide clearer guidance on what a site classification of *possibly contaminated— investigation required* means. A summary of the planned improvements is provided in the Discussion paper.

2.1	***Do you support the proposed way forward?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
2.1	No.
2.2	***If not, what modifications or alternative course of action do you propose?***
2.2	KCLS: • Agrees with the DER's response at page 11 of its Review Discussion Paper that the classification of sites as contaminated sites and the subsequent listing of such sites in the Contaminated Sites Database is consistent with the objectives of the Act. • Submits that a new classification of *'contaminated – investigation required'* is likely to drive faster and more satisfactory action from site owners. KCLS submits that not classifying sites that are known to be currently contaminated is inconsistent with the objectives of the Act. • Notes that, at page 13 of the DER's Review Discussion Paper, consideration was given to concerns about site owners being unsure about their responsibilities and, in light of that, DER proposed not to expand classifications. KCLS does not support this reasoning. KCLS submits that public safety should be the priority and site owners' knowledge of their responsibilities can be managed through education and enforcement. KCLS further submits that improvements should be made to the implementation of the current reporting and site classification process to place greater emphasis on clearer, more efficient and responsible outcomes, which are consistent with the objectives of the Act. KCLS is concerned that, in some cases, sites have not been adequately investigated and have been classified '*decontaminated*' or '*not contaminated*' without the necessary remediation works and / or investigations being conducted.

	In Example 1 (referred to at (1.1) above) remediation works were undertaken following the reporting of the contamination under the Act by the tenant. The site was initially classified '*possibly contaminated – investigation required*'. At the conclusion of the remedial works, the site was classified '*decontaminated*'. Since this time, fragments of asbestos have continued to be found on site. The tenant considers the matter unresolved, despite the matter having been reported nearly two years ago and the site being classified decontaminated. Several children live at the site. KCLS has also found that tenants have not been satisfactorily included in the investigation process. In Example 1, following the report under the Act, the tenant was required to deal with a number of governmental agencies, including the Department of Housing, the local Shire, the Department of Health, the Department of Commerce and the DER. This made the process confusing for the tenant, as it was often unclear which individuals and contract workers were representing which departments, who was responsible for particular actions and who the relevant contact was in certain situations. The tenant and KCLS still do not know, based on correspondence with the Department of Housing, the Shire and the DER, where responsibility lies and what is to be done should further asbestos be found on site (which has already occurred several times). From a process management point of view, this decentralised approach also led to considerable inefficiencies and inadequate outcomes. Instead of one department taking responsibility for the matter and managing all of the information in connection with it, each different departmental worker had to remain informed. In addition, the tenant was not regularly updated or advised of arrangements by the various departments and was often unable to obtain such information upon request due to the range of people involved. This placed the tenant under further stress. A second example further demonstrates the practical difficulties faced by tenants when ascertaining their responsibilities to report suspected contamination. In this matter, a public housing tenant's home was damaged and building materials known to contain asbestos were broken (**Example 2**). These building materials sat directly above soil, that is, they were not enclosed inside the home. The tenant subsequently reported suspected asbestos contamination under the Act. Despite the report to the DER being made on the basis that it was suspected contamination, the DER classified the matter '*report not substantiated'* because the tenant was unable to specifically identify any asbestos containing materials other than the broken building materials above the soil. KCLS submits that occupiers such as tenants cannot be expected to have the knowledge to identify asbestos and under the terms of the Act they are merely required to report where they *suspect* contamination. The DER referred the tenant to the Department of Health's 'Guidelines for the Assessment, Remediation and Management of Asbestos-Contaminated Sites in Western Australia' (**Guidelines**). The Guidelines propose that in some circumstances tenants should remove asbestos themselves. The Guidelines also recommend that tenants should consult with the Shire, the Department of Health and the DER, depending on the level of asbestos contamination. This highlights how tenants, who often have limited knowledge about asbestos materials, are in some cases being required to navigate various government department processes in order to meet their responsibilities and protect their safety.

	The tenant subsequently vacated the relevant property and accordingly did not pursue the matter. As the DER classified the matter '*report not substantiated*' (rather than investigating the matter itself or referring it to another department with the capacity to identify asbestos), it remains unknown whether or not the site is contaminated. As the site is now vacant, there is a risk that local children may play in it. We note that children have been found playing in abandoned buildings that are believed to contain asbestos in the communities of Wangkatjungka, Bayulu and Beagle Bay in the Kimberley (see Walsh, Rourke, 'Asbestos concerns at Kimberley community', *The Kimberley Echo* (19 December 2013)).

(3) Mandatory disclosure

Under s.68 of the Act, landowners must provide written disclosure to any new or potential owners if selling or transferring land that is classified *contaminated—restricted use, contaminated—remediation required* or *remediated for restricted use* or land that is subject to a regulatory notice.

In the Consultation paper we asked: Are the mandatory disclosure requirements clear? Have you encountered difficulties in knowing when to make a disclosure?

Proposed way forward—minor changes to the Act

The definition of 'owner' is provided in s.5 (1) of the Act. For the purposes of s.68, we propose to clarify the meaning of **'owner'** and **'completion of a transaction'** as described in the Discussion paper.

3.1	***Do you support the proposed way forward?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
3.1	This proposal is not directly relevant to KCLS' dealings with the Act, however, submissions are provided at (3.2) below in relation to extending mandatory disclosure.
3.2	***If not, what modifications or alternative course of action do you propose?***
3.2	KCLS submits that mandatory disclosure should be extended to include disclosure by owners to new or potential owners, as well as new or potential occupiers, of the presence of any asbestos at a site whether classified contaminated or not contaminated. In Examples 1 and 2 (referred to at (1.1) and (2.2) above), the tenants were excluded from the various government department processes despite these matters having important implications for their health and safety. A requirement for landlords to disclose the presence of asbestos at a site to new or potential occupiers would provide occupiers with the information they need to manage matters that may affect their health. Such transparency may also encourage owners and occupiers to work together to understand and manage asbestos risks and quickly resolve any instances of potential contamination, potentially improving relations between landlords and tenants and increasing the public's knowledge of, and reducing its concern about, asbestos materials. KCLS understands that it may currently be outside the scope of the Act to prescribe such disclosure. KCLS submits that consideration must be given to a legislative scheme that provides greater transparency and promotes awareness and risk management of potential asbestos contamination at any site or building. KCLS further submits that disclosure of possible health risks would be consistent with the approach taken in other jurisdictions. For example, the *Residential Tenancies Act 2010* (NSW) (**RTA**) prohibits landlords from knowingly concealing "materials facts" prior to the tenant signing the lease. One material fact is that "the residential premises are subject to

	significant health or safety risks that are not apparent to a reasonable person on inspection of the premises" (regulation 7, *Residential Tenancies Regulation 2010* (NSW)). Significantly, the Real Estate Institute of New South Wales advises that NSW Fair Trading, which administers the RTA, has noted that "two examples of when they consider disclosure will be required are when the landlord or agent has knowledge of the presence of asbestos or lead paint in the premises" (see "Residential Tenancies Act 2010 - formation to tenancies", https://www.reinsw.com.au/default.aspx?ArticleID=8300). KCLS submits that a requirement for a publically available database for sites and buildings containing any asbestos would promote transparency, information-sharing and public safety. KCLS reiterates its submissions at 2.2 that the current processes involving various government departments, legislation and guidelines are confusing, inefficient and inadequate and submits that this is a barrier to the object and principles of the Act, which is to protect human health and the environment by identifying, recording, managing and remediating contaminated sites. KCLS further submits that, at a minimum, government department owners such as the DOH should be required to implement publically available databases in relation to their housing stock and to publish asbestos management policies on their websites. This would demonstrate a commitment by government to work with community members in relation to asbestos, adopt best practice, promote empowered decision-making and remove barriers to information-sharing and transparency. Such a database could also be managed in co-operation with other databases, such as the National Asbestos Exposure Register, which would increase the reach of such databases.

(4) The Contaminated Sites Committee

(4.1) Improved timeframes for decisions on responsibility for remediation

It was originally anticipated that most committee decisions on responsibility for remediation would be made within six months of a request being filed with the committee (reg. 27). However, these decisions are taking much longer in practice. In many cases this is because relevant information is submitted after material has been circulated by the committee, resulting in multiple rounds of consultation prior to the committee making its final decision.

In the Consultation paper we asked: Should there be a time limit and requirement for all relevant documents to be sent to the committee to decide on the responsibility for remediation? What time limit (e.g. three months) would be fair to all parties? Can you suggest other ways to expedite the decision making process?

Way forward – possible changes to the Act

The possible changes to the Act to improve the timeliness of committee decision-making could include:

- a timeframe of three months in the Act to complete the circulation of all information submitted to the committee. For example, a three-month timeframe would mean that parties would have about 10 weeks from the call for submissions to provide all relevant information for circulation to the other parties. The process would need to be clearly articulated in supporting guidelines to avoid claims that the process lacked procedural fairness if exchange of information was curtailed.
- extending the offence of providing 'false or misleading information' (s. 94) to include making a written submission to the committee in connection with a decision on responsibility for remediation (penalty $125,000, and a daily penalty of $25,000).
- the authority (or 'headpower') in the Act for the committee to publish its reasons for each decision on responsibility for remediation. (Reference to published decisions may help parties to identify the types of documentation which will be required by the committee and may also help parties to come to an agreement on responsibility without applying to the committee for a formal decision).

Please also consider the next section on the role of the committee and whether you would support the possible transfer of some committee functions to the State Administrative Tribunal before finalising your response to Q.4.1.

4.1	***Do you support the proposed changes?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
4.1	This proposal is not directly relevant to KCLS' dealings with the Act. However, KCLS supports any changes that will drive faster action and in this regard we refer to our submissions at 2.2.
	If not, what modifications or alternative course of action do you propose?

4.1	

(4.2) Role of the Contaminated Sites Committee and the State Administrative Tribunal

When the Act was being drafted, the State Administrative Tribunal (SAT) did not exist so Parliament did not address the question of whether or not all or part of the role of the committee should be performed by SAT. Further information on this issue is provided in the Discussion paper.

4.2.1	***Do you support SAT review of the Contaminated Sites Committee's primary decisions (e.g. the committee decisions on responsibility for remediation), assuming that SAT is appropriately resourced to perform this task?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
4.2.1	This is not directly relevant to KCLS' dealings with the Act.
4.2.2	***Do you support SAT becoming the review decision-maker in place of the Contaminated Sites Committee for appeals against classification and notices served under the Act, assuming that SAT is appropriately resourced to perform this task?*** Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
4.2.2	This is not directly relevant to KCLS' dealings with the Act.