

20 September 2019

STATUTORY REVIEW OF THE *ABORIGINAL HERITAGE ACT 1975*

The Planning Institute of Australia (PIA) Tasmania Division acknowledges the traditional owners of country throughout Australia and their continuing connection to land, sea and community and we pay our respects to them and their cultures and to their elders both past and present.

PIA welcomes the opportunity to comment on the statutory review of the *Aboriginal Heritage Act 1975* (AHA) and we provide the following submission on the review and the Discussion Paper.

PIA nationally, in welcoming the *Uluru Statement From the Heart*, agreed with the call for the First Nations Voice to be enshrined in the Constitution and supported ‘*a process of agreement making to take place between governments and First Nations. Both would serve to give Aboriginal and Torres Strait Islander peoples a genuine voice in matters that affect them, including those relating to land use planning.*’ In this statement PIA went on to acknowledge that some ‘*argue that the requisite consultation and engagement is complex, difficult and time-consuming. But it has been demonstrated through constructive engagement and local agreement making that Indigenous peoples’ values and aspirations can be integrated into contemporary planning processes that values and enhances differing world views.*’¹

PIA supports the need to review current legislation, to better align with the views and aspirations of the Tasmanian Aboriginal people and to provide better protection to the significant value Tasmanian Aboriginal heritage has both within the community locally but also nationally and internationally. PIA further submits that the review of the AHA should improve the interface between the Act and other parts of the Resource Management Planning System (RMPS). We believe that there is still work to do in the area of appropriately recognising Aboriginal heritage values, whether they are physically, culturally, spiritually, aesthetically or historically significant, and the inclusion of this acknowledgement within the legislative framework. In particular, we believe that there is a lack of

¹ Media Release 7/8/2019 - PIA welcomes the Uluru Statement From the Heart - <https://www.planning.org.au/news-archive/2016-2017-media-releases/pia-welcomes-the-uluru-st%E2%80%A6>

coordination between Aboriginal Heritage legislation and other legislative processes, particularly the *Land Use Planning and Approvals Act 1993* (LUPAA).

The following provides further submission addressing the questions from the Discussion Paper:

What is the Aboriginal Heritage Act 1975 trying to Achieve?

It is considered that review of the AHA would provide the opportunity to better articulate within the Act its intents. While there are different mechanisms within the legislation which could achieve this, the model provided by other legislation including LUPAA, where a clear set of Objectives are detailed within Schedule 1 of that Act would be in PIA's view an appropriate model. The drafting of these Objectives would require wide consultation with the Aboriginal Community as well as other stakeholders, however once established could provide an important element in the protection and management of Aboriginal heritage.

What is Aboriginal heritage?

PIA believes that Aboriginal heritage is not currently well defined by the AHA and in particular the focus of the definition and terminology as a 'relic' does not adequately provide for the full extent of matters of significance which should be protected by the Act.

While we appreciate there has been an attempt to shift away from merely 'relics' when the legislation was renamed, we suggest that the word 'relic' implies that it is artefacts which hold the significance and while this may of course be the case, it does not recognise the importance of place, sites or context.

In comparison Tasmania's *Historic Cultural Heritage Act 1995* (HCH Act) sets out the intent of preserving both tangible and intangible values more clearly, it does this through listing of a place of historic cultural heritage significance rather than just the built or other fabric. Further the HCH Act in Section 16 provides assessment criteria for listing which includes a broad range of criteria and specifically including:

- ...(f) the place has a strong or special association with a particular community or cultural group for social or spiritual reasons;*
- (g) the place has a special association with the life or works of a person, or group of persons, of importance in Tasmania's history;...*

Unlike Tasmania's AHA, the Victorian *Aboriginal Heritage Act 2006* recognises intangible heritage, and encourages a focus that is broader than physical places and objects, including allowing for the registration of intangible heritage as defined under Part 5A of the Act.

PIA therefore considers that, consistent with other legislation, the review of the AHA should provide for the recognition and preservation of Aboriginal heritage including those that have significance and not restricted to artefacts.

Ownership of Aboriginal Heritage

While PIA believes that there will be a need to review the part/s of the Act which relate to ownership of 'relics' as part of the overall review, we believe that this is not an area currently which PIA can comment on.

Making decisions about what happens to Aboriginal heritage

PIA believe that there is a need for more clarity and guidance around the regulatory and decision-making processes regarding matters concerning Aboriginal heritage. This should include the provision of Objectives or other guidance within the Act, along with review of the approval and decision-making structures. The AHA review should also consider better alignment between Aboriginal heritage assessments and the development processes under LUPAA.

Within our current legislative framework we have a number of examples where LUPAA and other legislation is coordinated including the process requiring consideration of planning applications which also impact on a heritage listed site under the HCH Act, the *Water and Sewerage Industry Act 2008* which applies to most application for development and the assessment of Level 2 activities under *Environmental Management and Pollution Control Act 1994*.

The decision-making process of the Act should again, in PIA's view, have a structure similar to that of the HCH Act where decisions about heritage are made by the Heritage Council. It is considered that the role of the Aboriginal Heritage Council should include decision making powers however that the structure of the legislation should also, consistent with other part of the RMPS provisions related to appropriate appeal of decisions to the Resource Planning and Appeal Tribunal.

The Aboriginal Heritage Council – what it is and what it does

PIA supports the current provisions of the Act where the Aboriginal Heritage Council (AHC) is comprised of Aboriginal people. As detailed above PIA believes that the AHA review should include provision of the AHC as a decision-making body, with determination of matters made which further either objectives of the Act or other alternative decision-making framework which the review includes.

Similar to other legislation it would seem appropriate for the Act to include criteria for membership of the AHC and this could also ensure the Aboriginal community from across the State is represented, however again this is an area which PIA would seek to understand the views of the Aboriginal community.

Offences under the Act and penalties for doing the wrong thing

PIA as detailed above consider that decisions relating to the interference with Aboriginal heritage should be made by the AHC and therefore that this part of the Act should be reviewed to reflect this.

In relation to penalties it is understood that these are now largely consistent with other legislation, however the extent of reporting and or enforcement is likely not to be assisted by the current

legislation. The amendment of the AHA, to bring it more in line with other part of the RMPS, would be likely to have an improved outcome in this regard as it could include requirements for referral for applications as part of the coordinated assessment processes.

When can Aboriginal heritage be interfered with?

Review of the Act should include a clear system and pathway for applications to be made and considered by the AHC, the decision making should be informed by the Act in either the furthering of Objectives or consideration of relevant matters both which in PIA's view should be included in amendments to the Act.

Enforcement of the legislation

As with other legislation enforcement processes have limitations in their effectiveness. Importantly PIA would submit that by review of the structure, referral and application processes, and coordination with LUPAA process, it would provide a system with increased rigour which would reduce reliance on enforcement and provide a more effective approach to the protection and management of Aboriginal heritage.

Other ways the legislation protects Aboriginal heritage

Currently, the AHA is not included within the RMPS. As detailed previously PIA believe this should be amended in the review of the Act, while we understand that this integration would necessarily increase the complexity of the Act, we are of the opinion that this complexity is warranted.

The RMPS is an integrated system of laws, policies and procedures which all share a common set of objectives. These objectives are aimed at promoting sustainable development while ensuring the conservation and protection of various environmental, social and economic values. We believe that similar to the HCH Act, the AHA should also be recognised and included within the RMPS system. It would share the same objective of ensuring sustainable development that is responsive and respects tangible and intangible values of Aboriginal heritage and culture.

PIA Tasmania would welcome the opportunity to be an active part of the review as the process continues and ask that we be kept informed of its progress. We would also welcome the opportunity to participate in any future face to face consultations. Please contact Jacqui Blowfield, our Policy and Advocacy Chair, for all enquiries regarding this submission and future consultation.

Yours sincerely

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