

Statutory Review of the Aboriginal Heritage Act 1975

Introduction

Reviews of legislation occur very infrequently. The effects of this review will be long lasting and will have consequences on Aboriginal heritage that will be experienced by current and future generations of Tasmanian Aboriginal people. Aboriginal heritage is facing increased threats and impacts on a number of fronts through an increased and geographically wider population distribution, increased tourism activities, and other economic development.

It is therefore imperative that the Act is transformed into meaningful outcomes for the management and protection of Aboriginal cultural heritage, which includes appropriate enforcement measures and consequences for non-compliance.

The Act should not endorse 'token' protection for some Aboriginal heritage that is at the discretion of non-Aboriginal people, or can be influenced by politics and development. Tasmanian Aboriginal people should be recognised as the true and rightful 'owners' and 'custodians' of their cultural heritage – rights that have never been ceded. Tasmanian Aboriginal people as the First Peoples of this island should be the decision-maker on the management, protection and preservation of Aboriginal heritage. Once our heritage is destroyed it is lost for and cannot be replaced.

What the Aboriginal Heritage Act should achieve

The question in the discussion paper asks if the Act is clear and how this could be improved. The below points respond to this question.

- The Act is not clear and does not represent Tasmanian Aboriginal people as rights holders of their heritage. This is demonstrated the limited definition of what Aboriginal heritage is.
- The Act does not give Tasmanian Aboriginal people the ability to make decisions regarding their heritage and culture. It does not provide us with the ability to manage, protect and preserve our heritage and cultural landscapes which include land, inland waters and sea.
- The Aboriginal Heritage Council does not currently have any powers to make decisions that relate to Aboriginal heritage. Recommendations can be disregarded by decision makers, whom are not required to provide any reason or justification for their decisions, particularly when it ignores the Council's advice. Decisions are open to political, development and tourism bias, which may not be in the best interests for the management and protection the First Nations people of Tasmania heritage.

- The Act should provide empowerment to Tasmanian Aboriginal people to be the decision-maker and to develop cultural and land management plans for developments that may impact cultural and heritage landscapes.
- There is a lack of education and awareness of the value Aboriginal heritage and cultural landscapes have to Aboriginal people. The Act should provide clarity and credibility of these values to landowners, both private and public, and the priority that our heritage should have over economic development.
- Protection should be provided on privately owned land – recognising that Aboriginal people are rights holders and custodians and therefore should be recognised as such within the legislation.
- Allowing our people to continue to access, engage and connect with cultural heritage landscapes should also be provided within the legislation.
- The Act needs to link with various other legislation, such as *Land Use Planning and Approvals Act 1993* (LUPAA) to ensure that Aboriginal heritage issues are considered early in the application process, and the *Coroners Act 1995* in relation to the return of Aboriginal human remains.
- It also must be a requirement for any development applications and written into the Local Government planning process as a requirement for when Planning Authorities assess permit applications. Currently, the responsibility lays with the developer who are not required to report any Aboriginal Heritage assessments within their development applications to local councils.
- Aboriginal Heritage Officers should be supported to provide immediate advice regards road works and/or new development sites being monitored at all times. Managers of such sites need to be responsible for ensuring protection protocols are followed by all staff.
- The Act needs to include clear definitions and a glossary on key terms.
- Clarification on how the Act intersects with Federal legislation needs undertaking.

What is Aboriginal Heritage?

The definition and meaning of Aboriginal heritage is restricted within the Act.

- The word 'relic' used to describe Aboriginal heritage is out dated. Use of the word 'Relic' to describe Aboriginal heritage implies that it is of a people whom no longer exist. We are not a 'dead people' but are people who have survived invasion and are recognised under the State's Constitution. We have a strong living culture which the language used to describe Aboriginal heritage should reflect – our heritage is not just past but should include the present and future.
- Similarly, there are issues associated with interpretation and the use of the word 'historic'. The Anglo-European interpretation of 'historic' is one that is limited to the time period that extends back to first contact and

colonisation, it ignores the time when Aboriginal people first roamed this island.

- The legislative language used in the Act does not reflect or accurately represent Aboriginal meanings and values and must be addressed within this review. The Council suggests that a better term to describe Aboriginal heritage could be 'Tasmanian Aboriginal cultural heritage'. The use of this term could encapsulate tangible and intangible heritage values. Cultural landscapes that include managed landscapes such as button grass plains, and natural features such as mountains, trees, waterways (inland and coastal) etc. should also be included as they all connect with the cultural story of our people. As well, areas that have social values and are associated with oral stories, traditions, ceremony, and trade relations need to be recognised too. It is imperative that the term used to describe the tangible and intangible Aboriginal heritage values are defined by the Aboriginal community. It is also important to recognise and protect areas that include newly discovered natural resource sites, such as ochre and stone tool material. These are important to allow for the continuation of traditional practices without damaging sites recorded on the Tasmanian Aboriginal Site Index.
- Examples of current definitions that more accurately reflect Aboriginal heritage are used within other Aboriginal Heritage Acts across Australia. The *Victorian Aboriginal Heritage Act 2006* with amendments from 2017 provides encouraging examples of language that should be considered in consultation with Tasmanian Aboriginal people.
- The *Coroners Act 1995* is outdated and does not integrate with the Aboriginal Heritage Act. There is no clear and transparent process under the *Coroners Act* on who Aboriginal human remains are to be returned too, or how an Aboriginal organisation is 'approved'. The decision on who to hand Aboriginal human remains back to is made by the Attorney General – there is no requirement to consult with the wider Tasmanian Aboriginal community. This was highlighted following the 2018 discovery of Aboriginal skeletal remains found at Lauderdale. The Attorney-General did not consult with the Aboriginal Heritage Council whom has a statutory function under the Act to provide advice in relation to 'relics' which includes Aboriginal human remains, before making the decision to hand the remains over to an Aboriginal organisation.

Ownership of Heritage

'Ownership' is a European construct and there should be no 'owners' of Aboriginal heritage. Aboriginal peoples' belief is that they are 'custodians' of Aboriginal heritage and cultural landscapes – that is we have the responsibility to care for it and protect it for future generations and should be the decision-makers on its future.

However, under Anglo-European legislation the definition and meaning of 'ownership' does not align with Aboriginal interpretations. This needs to be more clearly and better defined:

- Currently under the Act, 'ownership' of Aboriginal heritage occurring on property is vested in the landowner (private property) or the Crown. Tasmanian Aboriginal people as Indigenous Intellectual Property rights and knowledge holders should not have any rights diminished under the legislation through interpretations of 'ownership' or 'custodianship' of Aboriginal heritage. Similarly, landowners or the Crown should not have any of their obligations to manage and protect Aboriginal heritage diminished either if their 'ownership' ceases.
- The Act provides a provision whereby the Crown can compulsorily acquire 'relics' under the Act and pay private landowners compensation. The Council does not believe this compensation should be paid as the relics are not the property of landowners, they belong to Tasmanian Aboriginal people.
- With Aboriginal heritage on both public land and private land, there should be the ability for Aboriginal people to gain access to and be consulted with cultural/land management plans to manage and protect sites.
- The Act needs to define 'custodianship' and what this means – how is it exercised and what rights it implies. This should be determined in consultation with community consultation.
- The 'ownership' of underground resources needs to be considered. The Council believes that these should not lie with the landowner or the Crown, as it is recognised that Tasmanian Aboriginal people undertook mining activities - rights which have never been ceded.
- Similarly, Tasmanian Aboriginal people have never ceded their rights or ownership to water resources that are controlled by relevant management authorities. Water and the control of water is important for the maintenance of cultural landscapes, such as the drainage of wetland areas for farming has destroyed many valuable cultural landscapes and ecosystems.

Making decisions about what happens to Aboriginal Heritage

As previously mentioned, the decisions on management and protection of Aboriginal Heritage and Cultural Landscapes should be made by Tasmanian Aboriginal people.

- Aboriginal people should be the decision-makers on Aboriginal heritage issues in consultation with local Aboriginal groups and organisations, and other relevant parties.

- No Minister should make decisions on what happens to Aboriginal Heritage as they are influenced by current policy, electioneering, developers, and political issues. They should accept and endorse decisions made by Aboriginal people, and if necessary, negotiate acceptable and appropriate outcomes.
The Tasmanian (Historic) Heritage Council is a statutory decision-maker under the *Historical Cultural Heritage Act 1995*, giving it the ability to totally protect heritage that could be up to 220 years old. In contrast under the Act, Tasmanian Aboriginal people are not allowed to be the decision-maker with their heritage which can be over 40,000 year old and represent some of the world's rarest and finest sites of the longest surviving people in the southern hemisphere. Why is there this difference in heritage decision making? The inequity in this decision-making process implies that Aboriginal heritage has a lesser value – all we are asking is to have the same importance and value placed on managing our sites.
- If under the review of the Act the Minister retains the right to be the decision-maker, the Minister (and Director) should be required to publish reasons for their decision and why they did or did not accept advice from the Aboriginal Heritage Council. The Council notes that the Act refers to the Minister as 'him' – this should be gender neutral.

Role of the Aboriginal Heritage Council

The Aboriginal Heritage Council has an important and vital role within Tasmania and should continue as a statutory Council, but with extended powers to be a decision-making body. To be an effective Council undertaking its statutory role and function, it needs to comprise of a broad membership that includes a variety and diversity of knowledge and expertise related to Aboriginal heritage management.

Criteria for membership of the Council should include:

- Tasmanian Aboriginal people.
- Knowledge of Aboriginal heritage, issues, and legislation.
- Specialised knowledge and skillsets in areas that are related and relevant to Aboriginal heritage management such as Aboriginal Heritage Officers, policy and government, planning, spatial sciences, Aboriginal (and colonial contact history).
- Diversity of gender, life and cultural experiences.
- Regional representation.

Appointment of the Council should be through a process that is:

- Publicly advertised with appointment made by the Governor on the recommendation of the Minister.
- Through a transparent process to ensure its integrity.
- Framework for selection must be in the legislation.

The role and function of the Council:

- The Council should be established as an independent statutory body like the Historic Heritage Council. This would enable the Council the ability to fore fill its statutory function free of any conflicts of interest that may exist with the Minister and/or Director with government policy and the protection of Aboriginal heritage.
- Need to strengthen the role so the Council's advice is more influential and binding, with powers that aren't limited to the Act.
- Currently the Council is under resourced with part-time administrative support. The statutory AHC Council was formed approximately 2-years ago - presently it is still waiting on getting a functioning website that is critical for the Council's communications. Staff from Aboriginal Heritage Tasmania are unwilling/unable to provide any support, resources or infrastructure for any work that might go against government policy. At times it has been problematic using the Councils government email address.
- The Council should be resourced with appropriate facilities and staff at a level sufficient to enable it to undertake its legislative responsibilities, with a degree of independence from AHT. The Council notes that staffing numbers within AHT has increased over the past couple years. Proper staff resourcing of the Council would include several staff such as an executive office, a couple policy officers whom are able to prepare and review policy documents for Council members.
- There should be overlapping appointment of Council members as this will provide continuity and successional plans for the continued operation of the Council.
- The Council must have more say in future land/cultural management plans and should be an active participant in the development of these master/management plans. Plans shouldn't be finalised and released without the Council being offered the opportunity to provide final comment or endorsement. The failure of this process was highlighted with the recently released Freycinet Peninsula Master Plan 2019 in which Council had been poorly engaged and the plan released before the Council was able to review the final version.
- Education has been identified as a key need – to the wider Tasmanian community, organisations, businesses and political parties. The Council can have a role in this but also there are cultural awareness programs and educational resources in the community that can be accessed and advertised.

Offences and penalties under the Act

The Council acknowledges that there has been a significant increase in the maximum penalty for offenses under the Act under the 2017 amendments to the Act. Despite there being 6-7 cases currently going through the judicial process, at present no case has been through the legal system under the 2017 amendments that has led to a prosecution (or dismissal). As the new legislation is untested, it

is difficult to determine to what extent penalties under the Act will be enforced. Whilst there are a couple offenses and penalties detailed under the Act, the number of these are limited.

The Council believes that the Act is poor in this regard and can be improved upon:

- For certain types offences, these should attract special penalties – guilty or innocent no discretion on penalty.
- The Council is open to explore different enforcement options such as issuing on-the-spot fines for minor offenses. Issuing of on-the-spot fines would allow enforcement officers under the Act to issue fines where a small or minor infringement might not be prosecuted. If this option was adopted, there would need to be a set of standards / guidance that has been determined and agreed upon by Aboriginal communities:
 - What would constitute a minor offence.
 - By heritage type
 - Sliding scale
- The Council and affected parties should be invited to provide an Aboriginal Heritage Interference Impact Statement (similar to a victim of crime statement) to be taken into account when sentencing. The Act is unclear with sentencing - it can't be expected that a magistrate presiding over a case can have a full understanding of the value and significance of Aboriginal heritage when applying a penalty.
- Penalties should be more than just a monetary fine that can simply and easily be paid off by large business. Under the Act there should be a range of other penalties that can act as a strong deterrent and be applied that can hold executives accountable. These should include:
 - The ability to issue stop work notices.
 - Loss/cancellation of relevant licences like development approvals, construction, building permits.
 - Public humiliation.
 - The ability to impose custodial sentences on decision makers.
- Penalties under the Act should not go into the governments consolidated revenue – these monies should go into the management and protection of heritage sites.

The Council recognises that Tasmanian Aboriginal people should have the right to connect and engage with their heritage sites as part of their obligations to Country and Caring for Country, and that this engagement could cause some damage to sites. Whilst the Council does not condone damaging of sites, a set of agreed cultural protocols should be established that outlines what could be considered as being minor and acceptable behaviour for Tasmanian Aboriginal people. Penalties should apply under the Act where there are breaches of these cultural protocols.

When can heritage be interfered with?

In a perfect ideal world Aboriginal heritage should not be interfered with. However in reality there is the necessity in some certain circumstances such as emergency situations or the maintenance of critical service infrastructure which has previously caused disturbance/impacts. As well, there are the increasing effects of climate change (storm and fire events) that is having a greater impact on a number of heritage sites, in particular those that are on coastal margins or remote areas that have large dry fuel loads. All these factors need to be taken into account in how Aboriginal heritage is managed. The Aboriginal Heritage Council should be the decision-making body. Their decision should be through an informed process where there has been a comprehensive assessment by an Aboriginal Heritage Officer, with adequate community engagement and consultation.

Defence provisions provided under the Act provide a starting point but they are limited and poorly defined. These need to be both expanded upon to provide broader range of applications of what should be considered as being appropriate defence actions. The interpretations of these defence provisions need to be more clearly defined so that they provide some protection in bona fide cases but are not that broad that they can be used as a loophole. Similarly the use of Guidelines provide a useful function but they too could be improved with more clarity on what constitutes being "*so far as is practicable*" and "*it was reasonable*".

Enforcement of the legislation

Enforcement of legislation is limited. Prosecution of a case is dependent upon resourcing available to investigate and prepare a case, before an assessment is made on the strength of the case to stand up in court. This is an expensive and time-consuming process. Consequently, there is the potential that some minor or less certain cases may not lead to prosecution.

The Council supports other compliance measures being introduced provided that they do not diminish the level of importance placed on breaches under the Act. These include:

- The ability to issue on-the-spot or infringement notices for minor offences. As detailed above, the definition of what constitutes a minor offence would need to be determined by Aboriginal communities with an appropriate sliding scale of penalties.
- There should be the ability to issue Stop Work Notices in cases where a developer for example may choose to continue working and further impact a heritage site.
- There needs to be an increase in compliance resourcing that could include:
 - Increased education/cultural awareness training
 - Increased number of compliance officers such as Aboriginal Police Officers, AHC Members as notional wardens.

Other ways the legislation protects Aboriginal heritage

There are a number of other methods to increase the protection of Aboriginal heritage. They can be summarised as:

- There needs to be better protection of protected sites. The current legislative framework just deals with administrative decision-making.
- There needs to be increased education with resources to aid with the interpretation and understanding of Aboriginal heritage and cultural values. This should be across the board and include decision makers, judiciary, enforcement officers, teachers, community, government agencies, local government, politicians, and police.
- Need to ensure legislation keeps up with technology such as GPS tagging of images.
- Should allow declaration of 'no access' areas
- More Aboriginal people should be trained as compliance officers, with a focus on younger generation.

Other matters covered by the legislation

The Aboriginal Heritage Council suggests the following fundamental principles that should be covered under the Act:

- Tasmanian Aboriginal people are acknowledged as the true and rightful 'owner' or 'custodian' of their heritage. This should not extinguish the obligations of private landowners or the Crown in their responsibility to protect Aboriginal heritage on their lands.
- Tasmanian Aboriginal people are the decision-makers on the management and protection of their heritage, with input from other experts as required.
- Aboriginal heritage must be recognised and valued much more highly by the whole community, both for its tangible and intangible values.
- That there is proper and meaningful consultation and engagement with Aboriginal community groups. Regional groups should be consulted on heritage issues related to sites in their area.
- Legislation needs to have real standing – not be subordinate.
- We seek to introduce the best Act in Australia that provides new and higher standards, which is supported by the best enforcement.
- Two strikes and your out – applies to councils and developers.
- Protecting Aboriginal heritage has priority over economic development - once destroyed can't be replaced.
- No offsets.

There need to be:

- A comprehensive and clear glossary of key terms and definitions.
- Improved clarity on how the Act intersects with other relevant federal legislation such as the *Aboriginal and Torres Strait Islander Heritage*

Protection Act 1984 and the Environmental Protection and Biodiversity Conservation Act 1999.

- A set of standards and procedures developed on how to undertake meaningful engagement and consultation with Aboriginal communities, that are developed in consultation with these community groups. We are one people in many communities - consultation is not just by an email/website or talking to the Aboriginal Heritage Council. The Council view is that proper and authentic consultation is an important component of the permit application process.
- Better clarity on how the Act integrates with *Land Use Planning and Approvals Act 1993* to ensure early consideration in the planning process of potential Aboriginal heritage issues.
- Better clarity on how the Act integrates with the *Coroners Act 1995* in relation to the return of Aboriginal human remains. There needs to be improved clarity on how and what organisation is 'approved' under the Coroners Act – currently the Attorney-General makes a determination in a process that appears to lack transparency. What is the process under this act to determine for example, if 200-year old human remains are Aboriginal or not?
- Improved clarity on the decision-making process and management of sacred artefacts and Aboriginal human remains that have been repatriated from national and international museums and institutions - no one organisation should have the say. These precious objects should be protected under the Act, with wide community consultation in the decision-making process, particularly with regional organisation if they have been identified as originally coming from.
- Definition of roles and responsibilities of professional officers such as Aboriginal Heritage Officers (AHO's) need to be defined under the Act. Like professions under other acts, the Act should detail how professionals who operate under the Act are accredited and regulated. AHO's undertaking an Aboriginal Cultural Heritage Assessment should have the right under the Act to enter any lands for the purpose of carrying out their assessment – this ensures that heritage sites extending over multiple land title holder can have it full extent mapped and the sites significance assessed in its entirety.