Review of the Aboriginal Heritage Act 1975

Consultation Feedback Report

November 2019
Introduction

The Aboriginal Heritage Act 1975 (the Act) is a stand-alone piece of Tasmanian legislation that defines what Aboriginal heritage is and sets out how Aboriginal heritage must be managed. The Act is administered by the Department of Primary Industries, Parks, Water and Environment (DPIPWE) and was last updated in 2017 to address some of its key inadequacies. While the amendments were not large in number, they addressed some of the most outdated and problematic elements of the Act and were seen as a positive step forward by all stakeholders.

At the time, six key changes were made:

• the name of the then Act (the Aboriginal Relics Act 1975) was changed to the Aboriginal Heritage Act 1975;
• the 1876 cut-off date for what was considered a ‘relic’ was removed;
• the penalties for impacting on, or interfering with Aboriginal heritage were significantly increased to be in line with penalties for non-Aboriginal heritage;
• scaled offences were introduced, including distinguishing between deliberate acts and ‘reckless or negligent’ acts. The ignorance defence was removed, and the time available to commence prosecutions was increased from six-months to two years;
• a statutory Aboriginal Heritage Council was established to advise the Minister; and
• a statutory timeline was set for a full review of the Act.

The amended Aboriginal Heritage Act 1975 commenced on 16 August 2017. The 2017 amendments were an interim step, with the requirement for a full review of the legislation specifying that this occur within three years. Despite the amended provisions, the Act as a whole remains largely outdated and continues to reflect the thinking and attitude from a period close to half a century ago.

On 30 May 2019, the then Minister for Aboriginal Affairs, Jacqui Petrusma MP, announced the commencement of the statutory review of the Act. The review is considering the design and operation of the current legislation through broad consideration of:

• the views and aspirations of Tasmania’s Aboriginal communities;
• the views of non-Aboriginal stakeholders;
• approaches to Aboriginal heritage legislation in other Australian jurisdictions; and
• the interface between Aboriginal heritage management legislation and other legislative processes (primarily relating to resource management and planning processes).

The review will seek to assess the degree to which the Act aligns with contemporary views and frameworks for the protection and management of Aboriginal cultural heritage.

Consultation

A public consultation period commenced on 1 June 2019, accompanied by the release of a Discussion Paper: Statutory Review of the Aboriginal Heritage Act 1975 (the Discussion Paper) as the primary means for guiding initial public and stakeholder consultation on the Review. The Discussion Paper provided background information on the Act, explained its key components, and identified some known issues associated with provisions under the Act. The Discussion Paper also included some accompanying questions designed to stimulate and help guide discussion and comments in responses. The 10 ‘Topics’ in this Report reflect the structure of the Discussion Paper.

1 Public notices appeared in each of Tasmania’s three regional newspapers advising that a review of the Act was underway, and public comment was invited from 1 June 2019 to 21 September 2019.
Tasmanian Aboriginal people, Aboriginal community organisations and groups, local government, industry groups, interested parties, and members of the public were invited and encouraged to participate and have their say on the Discussion Paper. A number of face-to-face meetings were held with interested Aboriginal organisations and groups and with non-Aboriginal stakeholders (nine). Public consultation closed on 21 September 2019, with 39 written submissions being received (refer to Appendix 1)\(^2\).

The responses received were from interested members of the public (four); Aboriginal community organisations and groups (five); local government (ten); Government Business Enterprises (three) industry groups and others (15). Comments were received from two Tasmanian Government agencies.

The public submissions are published on the Department's website in accordance with the Tasmanian Government policy on *Publication of Submissions Received by Tasmanian Government Departments in Response to Consultation on Major Policy Matters*.

**Consultation Feedback Report**

This Consultation Feedback Report summarises the comments, suggestions and ideas outlined in the public submissions received. Some of the suggestions and responses contained in this Report were made and/or supported by multiple submissions, others were made in a single submission. Where similarly themed comments are reiterated in multiple areas within a single submission, or are common to a number of submissions, the comments are summarised and presented in this Paper within the Topic area deemed most relevant for the reader. This Report does not seek to support any particular idea or proposal, nor does it aim to show any preference for specific ideas.

This Report should be read in conjunction with the Discussion Paper and the *Aboriginal Heritage Act 1975*. Both the Discussion Paper and the Act can be easily accessed on the DPIPWE website:


**Next Steps**

Feedback received through the first stage of consultation will be used to inform the second stage of the review where further, more targeted, consultation will be undertaken to explore views on specific issues in more detail, and to identify potential pathways to resolve specific concerns and suggestions. The second stage will commence in early 2020.

Following the second stage of consultation, a Review Report will be prepared presenting the findings of the Review and recommendations relating to options for change. The Review Report is expected to be tabled in each House of the Tasmanian Parliament before the end of the Parliamentary year in 2020.

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\(^2\) On request of some respondents, late submissions to the review were accepted.
KEY THEMES

The following key themes have emerged through the first stage of consultation:

⇒ The Act needs to contain clear statements of its objective and purpose.

⇒ The Act needs to be brought up to a contemporary standard, consistent with modern Aboriginal heritage legislation and legislative processes in other Australian jurisdictions.

⇒ The Act and related processes for managing Aboriginal heritage need to connect better with broader planning and approvals processes in Tasmania.

⇒ The definition of Aboriginal heritage in the Act needs to be amended and expanded to encompass contemporary views of Aboriginal heritage.

⇒ The Act needs to be clear on who the owners and custodians of Aboriginal heritage are, and what this means for managing Aboriginal heritage across Tasmania’s various land tenures.

⇒ Tasmanian Aboriginal culture is a living culture and Tasmanian Aboriginal people need to be able to practice their culture without fear of breaching the Act.

⇒ Aboriginal people should have a greater role and influence in making decisions about how Aboriginal heritage is managed in Tasmania.

⇒ Aboriginal people could, and should, play a more prominent role in education, compliance and enforcement activities, and should be supported to do so.

⇒ The 2017 amendments that increased penalties to bring them into line with those for interfering with or damaging European heritage are a positive step forward in recognising the significance of Aboriginal heritage.

⇒ Education can play a significant role in encouraging voluntary behaviours that are compliant with the Act and that lead to improved outcomes for the protection of Aboriginal heritage.

⇒ Additional enforcement tools such as stop work notices and on-the-spot fines would assist to deliver improved outcomes for the protection of Aboriginal heritage.
Topic 1: What is the Aboriginal Heritage Act 1975 trying to achieve?

Discussion Paper Questions:
- How clear is the Act regarding what it is trying to achieve?
- Could this be improved, and if so, how?

The majority of responses to this topic consistently suggested the Act is out of date and lacks clarity on its overall intended purpose and objective. Submissions noted that in its current form, the Act does not contain any specific information or overarching principles to clarify its purpose and objectives. This is in contrast to Aboriginal heritage legislation in most other Australian jurisdictions. Respondents noted that objectives are a common feature of most modern legislation enacted by parliaments around Australia and are an important tool to help interpret the provisions of the Act. Feedback suggested that the absence of such provisions has contributed to ambiguity and uncertainty on what the Act is seeking to achieve.

A number of submissions indicated that the Act is reasonably clear in its purpose, with one submission suggesting the Act was clear in some areas, however greater clarity is required in others.

Respondents noted that the review provided an opportunity to drive improvement, by bringing the Act up to a contemporary standard that is consistent with other Australian jurisdictions. A number of submissions specifically cited the Aboriginal heritage legislation of Victoria, News South Wales, and Queensland as contemporary examples.

Some submissions suggested the Act should more closely intersect with other relevant legislation, including other parts of Tasmania’s Resource Management Planning System (RMPS). A prominent comment was a criticism that there is a lack of coordination between the Act and other legislative processes, particularly the Land Use Planning and Approvals Act 1993 (LUPAA). It was also suggested the Act needs to provide a better balance between the protection of Aboriginal heritage and the rights and aspirations of private landowners, particularly those with productive activities.

Summary of feedback:
- The Act should include information or overarching principles that clarify its objective, purpose and intention;
- A glossary of terms with clear and unambiguous definitions is an essential component of any new legislation. This will support users of the legislation, including the judiciary to achieve consistency of outcomes;
- The long title of the Act should be changed to better reflect contemporary approaches to Aboriginal heritage management;
- The Act should intersect (integrate) with LUPAA and other planning legislation in Tasmania’s RMPS, including the new statewide planning scheme, to ensure that Aboriginal heritage issues are considered early in the process for considering development applications; and
- The Act should intersect with the Coroners Act 1995 in relation to the return of Aboriginal [ancestor] human remains (which are also considered to be Aboriginal heritage under the Act).
Topic 2: What is Aboriginal heritage?

Discussion Paper Questions:
- How well does the Act define Aboriginal heritage?
- Could this be improved, and how?
- Does the definition of a ‘relic’, adequately capture all elements of Aboriginal heritage that should be protected and managed?
- Should use of the term ‘relic’, and the way Aboriginal heritage is recognised and defined, be changed?

Respondents indicated that the Act’s focus on the definition and terminology of a ‘relic’ does not adequately reflect the full extent of matters that should be protected by the Act. Respondents also indicated general support for expanding and improving the definition of Aboriginal heritage to include elements that are of physical, cultural, spiritual, aesthetic and historical significance to Aboriginal people. Many submissions questioned the appropriateness of the current definition of a relic, which confines the definition of Aboriginal heritage to being made by, or bearing signs of, the activity of Aboriginal people. Some respondents also suggested including broader cultural landscapes and ‘Aboriginal places’ in the definition of Aboriginal heritage. These views were unanimous among Aboriginal respondents.

Victoria’s Aboriginal heritage legislation was cited by a number of respondents as a potential guide to developing an improved, and more comprehensive definition of Aboriginal heritage. Several respondents noted that isolating sacred sites to preserve a physical past may be an appropriate way to respect and manage European heritage, but felt it is not appropriate for managing Aboriginal heritage.

Several submissions made comparison to Tasmania’s Historic Cultural Heritage Act 1995, which provides for preserving both tangible and intangible values. (It is noted that the Historic Cultural Heritage Act 1995 allows for the registration of places, which includes items, where the place has a strong or special association with a particular community or cultural group for social or spiritual reason.)

“The concept of Aboriginal heritage goes further than just a ‘relic’ and must include the landscape surrounding the tangible or non-tangible item which needs to be protected. Additionally, landscapes which may not contain ‘relics’ are still important places for Aboriginal people as there are many locations where Aboriginal people have a spiritual connection and where our people travelled, hunted and conducted ceremonies” – South East Tasmanian Aboriginal Corporation

Summary of feedback:
- The definition of Aboriginal heritage in the Act needs to be expanded to include things of ‘intangible’ cultural and spiritual value – language, song, stories, landscapes, places, traditions;
- The definition of a relic should not be confined to the relic being of significance to Aboriginal people, but should also account for technical and scientific evidence;
- Use of the words ‘relic’ and ‘preserve’ in the Act perpetuate the power imbalance of colonial dispossession and the perception of an extinct culture; and
- It is proposed that Victoria’s Aboriginal Heritage Act 2006 be used to inform a revised definition of Aboriginal heritage which includes places, objects and ancestral remains.
Topic 3: Ownership of Aboriginal heritage

Discussion Paper Questions:

- How well does the Act describe ownership of Aboriginal heritage?
- Are provisions in the Act providing for ownership reasonable?
- Who should own Aboriginal heritage?
- Is the concept of 'ownership' the right way to think about who is responsible for Aboriginal heritage?
- Should the 'rules' in the Act apply to everyone in every situation?
- Should land tenure on which Aboriginal heritage exists make any difference to who owns / how the heritage is to be managed?

The complexity of the issue of ownership was noted by most respondents. Respondents also acknowledged the difficulty presented by sometimes competing aspirations of industry, private land owners and Aboriginal people.

All respondents to this topic supported a need to improve how 'ownership' is defined and accounted for under the Act. Some cited that existing references to ownership are outdated and should be revisited. Two respondents suggested the current Act is inconsistent with the preamble to the Tasmania Constitution, where it acknowledges Tasmanian Aboriginal people as the traditional and original owners of Tasmanian lands and waters.

A number of submissions asserted that the notion of ownership is a European construct and there should be no owners of Aboriginal heritage. These respondents suggested that the Act should reflect a contemporary understanding of Aboriginal people’s view of themselves as custodians of Aboriginal heritage and cultural landscapes. Approaches to recognising and defining ‘ownership’, ‘custodianship’ and ‘possession’ in other jurisdictions, such as in Queensland, were cited by some respondents as representing a desirable approach. The Victorian approach, which establishes ‘principles of ownership’ where ownership clearly rests with the local Aboriginal people with traditional or familial links to the cultural heritage, was also highlighted.

The majority of respondents supported the notion that Aboriginal people are the custodians or owners of Aboriginal heritage, and that this should be reflected in Tasmania’s Aboriginal heritage legislation. Some submissions noted that clarity was required around how the existence of various regional Aboriginal groups should be considered in terms of ownership under the Act. Two submissions noted that in some circumstances, it may be appropriate for the Crown to hold (or jointly hold) Aboriginal heritage. However, some submissions challenged the suitability and ethics of the Act’s current provisions for the Crown’s automatic ownership of Aboriginal heritage on Crown lands.

Another submission indicated that Aboriginal heritage is not a tradeable commodity and as such, the issue of ownership is irrelevant.

The issue of land tenure affecting ownership of Aboriginal heritage was raised by a number of respondents, many of whom suggested the Act’s provisions regarding ownership of Aboriginal heritage on privately owned land requires clarification to provide certainty. There was a general preference for Aboriginal people to be recognised as the custodians of Aboriginal heritage, regardless of the tenure of the land where the heritage is located. A number of respondents suggested a need to clarify who may access Aboriginal heritage on private land, and who has responsibility for appropriately managing that heritage.
Some respondents noted that a ‘right to farm’ approach was desirable where land was purchased in good faith for productive activities. However, it was noted that such a ‘right’ should not preclude reasonable steps to protect Aboriginal heritage. Some submissions suggested education for land owners is critical to the success of any new or revised legislation – with a suggestion that the rights of the owner/occupier of the land should not be adversely affected by the rights of the custodians/owners of the heritage.

One submission suggested removing provisions under the current Act requiring compensation to be paid to a person who is recognised as the owner of Aboriginal heritage in the event the Crown compulsorily acquires Aboriginal heritage on their property – suggesting that compensation should not be provided, as the heritage belongs to Aboriginal people.

“The [current] Act vests the ‘ownership’ of Aboriginal heritage with the title holder of a parcel of land. This ownership excludes Tasmanian Aboriginal people who are the creators and Indigenous intellectual property rightsholders of the Aboriginal heritage. The basis of this ‘ownership’ centres on a colonised principle that the Aboriginal heritage has been abandoned and therefore becomes the property of the title holder of the land. This colonial view does not recognise that Aboriginal people were forcibly dispossessed from their lands through colonisation and invasion” – Tasmanian Regional Aboriginal Communities Alliance

Summary of feedback:

- The Act should have clear principles and/or definitions for ‘ownership’, ‘custodianship’ and ‘possession’;
- The Act should acknowledge Tasmanian Aboriginal people as either the owners, or the custodians of Aboriginal heritage regardless of land tenure. This should not extinguish the obligations of private landowners or the Crown in their responsibility to protect Aboriginal heritage on their lands;
- Clarity is required around how custodianship/ownership of Aboriginal heritage applies across Tasmania’s various Aboriginal communities and across Tasmania’s range of land tenures. Such clarification needs to consider who owns the surface of the land versus the resources buried beneath the surface;
- Compensation should not be provided to owners of Aboriginal heritage when that heritage is compulsorily acquired, nor should there be any compensation for landowners who experience a loss from the exercise, on their land, of any powers conferred by the legislation (current or future);
- The Act should intersect with the Coroners Act 1995 to provide clarity around ownership of Aboriginal ancestral human remains;
- The Act should establish a right for Aboriginal people to be able to access Aboriginal heritage sites on private land where those sites are of cultural significance to the Aboriginal community; and
- The Act should provide a balance between the rights of private land owners, particularly those with productive pursuits, and the aspirations of Aboriginal people regarding Aboriginal heritage management on private land.
Topic 4: Making decisions about what happens to Aboriginal heritage

Discussion Paper Questions:
- Is the way the Act describes who makes decisions, and how decisions must be made, adequate and reasonable?
- How can decision making be improved?
- Who should make decisions under the Act?
- Are there circumstances where different people, or parties, should make decisions about how to manage Aboriginal heritage? How should decisions be made?

There was significant feedback from all respondents on this topic. The majority of Aboriginal respondents suggested the current decision-making provisions in the Act are unsuitable. In general, submissions suggested the current provisions are not consistent with contemporary national and international principles for managing Indigenous heritage, which generally empowers traditional owners/custodians to be the decision makers through management plans or land management agreement models. There was broad support for improvements in the role of Aboriginal people in the decision-making processes by non-Aboriginal respondents.

Many submissions stated that the Minister’s decision-making powers under the Act are too great, and they called for increased role for Aboriginal people. Submissions suggested a number of different decision-making processes that involved a combination of Aboriginal people, the Aboriginal Heritage Council (AHC) and the Director of National Parks and Wildlife. A number of submissions maintained that the Minister should retain ultimate decision-making responsibility.

Some respondents pointed to an apparent disparity between how Aboriginal heritage and historic (European) cultural heritage is managed in Tasmania – that is, the statutory Tasmanian Heritage Council (THC) is a decision-making Council under legislation, while the AHC is purely advisory under legislation. Multiple submissions suggested the AHC should have a greater role in the decision-making process – either making decisions itself, or by making it mandatory that advice be sought from the AHC prior to decisions being made. It was noted that the Victorian equivalent of Tasmania’s AHC has the power to make decisions in relation to issue of cultural heritage permits.

One submission suggested the need for a decision-making matrix, with criteria for determining where it is accepted that at times, it may be appropriate for decision making powers to be conferred to Aboriginal people, or to the AHC. It was noted that there may also be some instances where it is beneficial for some decision-making powers to remain with the Minister.

A need for defined pathways and timeframes relating to decision making was identified by a number of respondents as important to providing support and clarity for developers and proponents. It was suggested that timeframes and processes should align with Tasmania’s planning legislation, particularly with LUPAA.

It was suggested that a tiered approach to engagement with Tasmania’s Aboriginal people would be appropriate, noting there may be circumstances where proponents would not necessarily need to engage with Aboriginal people about their projects, and other circumstances where different levels and types of engagement may be necessary.

One respondent argued that should the AHC be given decision making powers, it would result in a detrimental bias in favour of Aboriginal considerations and views to the exclusion of those of other parties.
Another submission suggested the creation of a subcommittee comprising non-Aboriginal-representatives be utilised to incorporate and account for a wider range of views.

It was suggested that the Australia ICOMOS Charter for Places of Cultural Significance and the Burra Charter 2013 (Burra Charter) provide a best practice standard for managing cultural heritage places in Australia and should be used as a guide to inform the development of evidence-based decision making under the Act.

“Tasmanian Aboriginal people need to have a genuine voice and genuine decision making powers. This will require a significant change from the present Act where the Aboriginal Heritage Council has only limited, and then largely advisory, powers, with most of the decision making powers resting with the Minister” – Australia ICOMOS Inc. (the Australian national committee of ICOMOS [International Council on Monuments and Sites])

Summary of feedback:

- The Act should provide Aboriginal people with a greater role in making decisions on the management and protection of Aboriginal heritage, with input from other experts as required;
- Decision making should be consultative, transparent and published in the public interest;
- The Act should clarify that decision making in relation to Aboriginal heritage should only consider the protecting of Aboriginal heritage values, and that decisions should not take into account consideration of other competing matters;
- The Minister’s decision-making role under the Act should be reduced from what it is currently;
- The Minister’s role as the primary decision-making authority under the Act should remain;
- The Act should be amended to bring Tasmania’s current statutory decision-making processes into line with contemporary approaches in other Australian jurisdictions and internationally;
- The Act should require that the reasons for acceptance or refusal of advice/recommendations provided by the AHC be communicated back to the Council;
- The Act should include appeal provisions to better reflect contemporary decision making that is open and transparent;
- The Act should empower the AHC to have a greater decision-making role;
- The AHC should have equivalent statutory decision-making powers to that of the Tasmanian Heritage Council;
- Any new statutory decision-making body would need to be adequately resourced to ensure it is able to perform its functions adequately;
- The Act should mandate consultation taking place with affected stakeholders;
- There is a concern that having Aboriginal people as exclusive decision makers under the Act is likely to advantage one side of a contested situation to the exclusion of others;
- Decision making under the Act should be guided by evidence-based principles and a best practice approach, as recommended and increasingly adopted by the Australia ICOMOS Burra Charter;
- The Act should include provisions for dealing with Aboriginal ancestral remains that are not interred in a marked grave;

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3 The Australia ICOMOS Charter for Places of Cultural Significance, The Burra Charter, 2013 (Burra Charter) and the associated series of Practice Notes provide a best practice standard for managing cultural heritage places in Australia.
• The Act should set timely contingency measures (where agreement between a proponent and a decision-making body is unable to be reached);
• The Act should specify reasonable timeframes for designated regulatory functions to provide certainty and confidence to industry, and avoid any stifling of investment; and
• Timeframes in the Act could be aligned with those in Section 58 of the Historic Cultural Heritage Act 1995.

**Topic 5: The Aboriginal Heritage Council – what it is and what it does**

**Discussion Paper Questions:**

- How should members for the Aboriginal Heritage Council be chosen?
- Should the Act specify criteria for Council membership, and what criteria should apply?
- How clearly does the Act describe the role and function of the Aboriginal Heritage Council?
- Is the role of the Aboriginal Heritage Council adequate and appropriate?
- Could this be improved, and if so, how?

Both Aboriginal and non-Aboriginal respondents supported an independent statutory decision-making body with Aboriginal membership. A number of different approaches for selection and appointment of members of an AHC were suggested, however many respondents supported continuation of the current legislated process whereby the Minister selects and the Governor appoints, members.

A common theme among submissions was support for an open and transparent process for the appointment of members to the AHC, with increased engagement with Aboriginal people, together with a selection process based on established skill and experience criteria. It was suggested that the process and criteria should be included in the Act. Some submissions supported the limited inclusion of non-Aboriginal people on the AHC, or a new sub-committee thereof, suggesting that an exclusively Aboriginal body potentially excludes other important/relevant perspectives and areas of expertise.

Some submissions suggested Victoria’s *Aboriginal Heritage Act 2006* – which includes requirements of: being a traditional owner; being a resident of the State; and having relevant experience or knowledge of Aboriginal cultural heritage – provides a useful model for prescribing membership criteria that could be applicable to a Tasmanian Aboriginal Heritage Council.

A number of respondents suggested that the Act should aspire to achieve general parity between the roles and functions of the Aboriginal Heritage Council and the Tasmanian Heritage Council (which is the statutory decision making body for European heritage).

Some submissions also noted that current representation on the Council is not inclusive of all Aboriginal community organisations in Tasmania.

“A key matter is the constitution of an Aboriginal representative body. Australia ICOMOS is aware that currently there are issues around representation on the Tasmanian Aboriginal Heritage Council that have resulted in a situation where a significant part of the Tasmanian Aboriginal community has chosen not to be represented on the Council. This is not tenable in the long term, and for any new legislation to be
Summary of feedback:

- The Aboriginal Heritage Council (or like body) should be retained under the Act;
- The Aboriginal Heritage Council should be inclusive, have transparent processes and be supported by the wider Tasmanian community;
- Appointment processes for the Aboriginal Heritage Council should be open and transparent;
- The Act should provide for the Aboriginal Heritage Council to appoint members, or for membership to be chosen by other means, independent of the Minister and Government politics;
- Nominations for membership on the Aboriginal Heritage Council should come from Tasmania’s Aboriginal communities;
- The Act should specify that members of the Aboriginal Heritage Council are to be Aboriginal and have appropriate skills and knowledge. The Council should strive for gender balance;
- Inclusion of non-Aboriginal experts or people with other stakeholder perspectives should be considered for membership on the Aboriginal Heritage Council;
- The term of appointment of members of the Aboriginal Heritage Council should be offset to ensure continuity of knowledge and function.
- The criteria in Victoria’s Aboriginal Heritage Act 2006 for appointing Aboriginal Heritage Council members could be adopted in Tasmania;
- It was suggested that the Minister should be able to remove members of the Aboriginal Heritage Council and appoint interim, or acting members;
- The Government should ensure that the Aboriginal Heritage Council is appropriately resourced to adequately carry out any statutory functions that it is responsible for under the Act;
- It was suggested that the existing role and functions of the Council are adequate and appropriate;
- The Act should aspire to achieve general parity, to the extent relevant, between the roles and functions of the Aboriginal Heritage Council and the Tasmanian Heritage Council;
- An election process for appointments to the Aboriginal Heritage Council is not supported; and
- The Act should define stakeholder engagement requirements of the Council.

Topic 6: Offences under the Act and penalties for doing the wrong thing

Discussion Paper Questions:

- How well does the Act describe and manage offences?
- Are the penalties adequate?
- Could the offences and penalties provisions in the Act be improved, and if so, how?
- Are there circumstances where the ‘rules’ of the Act should apply differently to different people?

Many submissions supported the changes made to offences and penalties in 2017 to bring them into line with those for historic cultural heritage. One submission noted, however, that the provisions remain untested at this point in time. There were also some differences of opinion among submissions as to the
adequacy of the offence and penalty provisions in the Act, with some asserting that they are not strong enough while others indicating that they are now adequate.

It was noted that education plays a major role in any compliance and enforcement framework. Some submissions suggested that, irrespective of the recent increases in penalties, the wider Tasmanian community is yet to place an equal value on Aboriginal heritage relative to European heritage. Respondents suggested this ongoing difference in how the broader community values Aboriginal heritage, relative to European heritage, has potential to impact decisions of the court regarding application of penalties for interfering with or damaging Aboriginal heritage. Many submissions noted that penalties for actions that destroy, damage or interfere with Aboriginal heritage should reflect the seriousness of actions that can result in the irretrievable loss of non-renewable and therefore irreplaceable heritage values.

Several Aboriginal respondents supported introducing additional scaling of offences to differentiate between minor and non-minor. The definition of what constitutes a minor offence would need to be determined by Aboriginal communities with an appropriate sliding scale of offences and penalties.

One Aboriginal respondent said that any monies received by the Government as a result of successful prosecution of offences under the Act should be directed to improving compliance and management outcomes for Aboriginal heritage.

“The Act should look to adopt a more contemporary model and move away from a compliance model into a more proactive space, acknowledging current international principles for managing heritage that enfranchise traditional owners/custodians and supports negotiated management arrangements, such as Cultural Heritage Management Plans and Land Management Agreements, for specific areas or activities” - Hydro Tasmania

Summary of feedback:

- Some respondents asserted that the current Act manages offences poorly and the penalties are still grossly inadequate, while others advise that they are appropriate and do not require improvement;
- The 2017 amendments to offence and penalty provisions in the Act are supported as being appropriate and providing a balance between penalising those doing the wrong thing and those disturbing Aboriginal heritage inadvertently. However, it is noted that these remain untested in a court of law;
- Sufficient resources, including dedicated and experienced Aboriginal heritage compliance officers, should be available to ensure proper investigation of breaches under the Act;
- Any monies received from fines or penalties under the Act should be directed to increasing the protection and management of vulnerable Aboriginal heritage sites;
- The definitions of offences in the current Act are inconsistent with other Australian jurisdictions, which increasingly invoke the concept of ‘harm’, rather than actions that may or may not result in actual harm or loss of significance;
- The Act should require a record of impacts to Aboriginal heritage resulting from interference to be kept, whether the harm is as a result of Aboriginal people practicing their culture or as a result of other processes;
- Raising awareness and educating the wider Tasmanian community about the significance and importance of Aboriginal heritage in Tasmania is key to minimising offences under the Act;
- The Act should include compulsory cultural awareness and cultural competency training for offenders;
• Offences under the Act should apply to everyone, in the same way as environmental offences under the *Environmental Management and Pollution Control Act 1994* are applied; and

• Cultural institutions (museums) should be exempt from offence provisions under the Act.

**Topic 7: When can Aboriginal heritage be interfered with?**

**Discussion Paper Questions:**

• Are the defence provisions in the Act adequate and reasonable?

• Could the defence provisions be improved, and if so, how?

• Do the Guidelines provide adequate protection for Aboriginal heritage?

• Could the Guidelines be improved, and if so, how?

Submissions relating to this topic indicated general concern that the current defence provisions in the Act are unclear and may inadvertently undermine enforcement action resulting in eroded protection of Aboriginal heritage. Some submissions noted that the defence provision relating to the carrying out of emergency work should be expanded to provide a greater protection to public sector parties (e.g. power, water, sewerage, communications) carrying out emergency work.

In addition, some submissions noted that access to timely, and out of hours Aboriginal heritage advice is critical to supporting emergency management and utilities personnel in their effective management or avoidance of impacting on Aboriginal heritage. Similarly, education and cultural awareness were noted as important tools in mitigating any unintentional impacts on Aboriginal heritage as part of any emergency works.

It was suggested that the Act should allow for Aboriginal people to impact some Aboriginal heritage values as a result of engaging in cultural activities without a permit. One submission suggested that a set of agreed cultural protocols should be established that outline minor and acceptable site impacts that may be caused as a result of Tasmanian Aboriginal people practicing culture. It was also suggested that such provisions should include experts and authorities who are undertaking assessment works that may have a minor impact on a heritage site.

There was significant feedback in relation to the form and operation of the Guidelines under the Act. Overall, submissions indicated that the Guidelines, in their current form, are ambiguous, inadequate and may inadvertently undermine the protection of Aboriginal heritage in Tasmania. Many respondents suggested that if the Guidelines are retained, they should be substantially redrafted to ensure they are clear, consistent and support compliance with obligations under the Act, as well as provide a realistic balance between managing Aboriginal heritage and providing for economic opportunities. Some submissions indicated that acting in accordance with the Guidelines should be mandatory to support the protection of Aboriginal heritage. Several respondents suggested that Guidelines (and the Act) should reflect the Tasmanian Government position on reducing red tape.

“It is FIAT’s view that the defence provisions established in the 2017 amendments are suitable and contemporary in nature. It is vital that such pragmatic provisions apply to ensure a sensible approach to protecting heritage without acting as a disincentive to investment.” – Forrest Industry Association of Tasmania
Summary of feedback:

- A greater focus on education and awareness to improve knowledge and understanding of Aboriginal cultural heritage among emergency service and utilities ground crews would result in improved outcomes for identifying Aboriginal heritage and managing these sites;
- Aboriginal Heritage Tasmania should be available 24/7 to provide advice to emergency services and utilities ground crews;
- The defence provisions in the Act should be broadened to allow all emergency services and utilities workers to undertake essential emergency works;
- The current Guidelines provide a realistic and balanced approach between managing heritage and providing for economic opportunities. A more stringent approach to defence provisions would increase red tape, frustration and potentially deter investment;
- The defence provisions in the current Act are ambiguous and may undermine the ability to successfully prosecute offences under the Act;
- In their current form, the Guidelines are inadequate and unclear, and undermine the protection of Aboriginal cultural heritage in Tasmania and should be removed from the Act. If they are retained, the current Guidelines should be substantially redrafted to ensure that they are clear, consistent and support enforceable obligations imposed by them;
- The Guidelines rely on pre-existing knowledge of what Aboriginal heritage is and how it can be damaged. This is an unrealistic expectation;
- Acting in accordance with the Guidelines does not guarantee protection of Aboriginal heritage;
- General defence provisions in the Act could be enhanced by clearly specifying reasonable duty of care actions;
- The defence provisions in the Act, particularly the defence of complying with the Guidelines and where the onus of proof lies, could make prosecution of offences difficult;
- The Act should be amended to recognise that an Aboriginal person’s interaction with their own heritage when practicing culture or undertaking other community authorised activities is not an offence; and
- The defence provisions in the Act should make allowances for the technical assessment of Aboriginal heritage which may result in minor impacts to that heritage.

Topic 8: Enforcement of the legislation

Discussion Paper Questions:

- How well does the Act provide for enforcement of its provisions?
- Could this be improved, and if so, how?
- Should the Act include stop-work provisions?
- Should the Act include provision for infringement notices and associated on-the-spot fines?
- Should offence in the Act be further scaled to distinguish between minor and non-minor offences?

Submissions responding to this topic noted that few convictions have occurred under the Act and that preparations for prosecution require substantial resources.

Some submissions supported inclusion of provision for stop work notices and infringement notices as effective tools for protecting of Aboriginal heritage. It was suggested that these would allow immediate action to be taken where Aboriginal heritage was being directly threatened, and would also encourage compliance through discouraging unethical and dubious work practices. It was noted that such provisions may need to cover matters such as: how long stop work notices remain in effect for; who would issue them; appeal rights; and compensation for improper application. It was noted that ‘stop work’ provisions
are contained in Aboriginal heritage legislation in several other Australian jurisdictions, as well as Tasmania’s *Historic Cultural Heritage Act 1995*.

Conversely, some submissions expressed a view that stop work notices may not be particularly effective and they may in fact encourage potentially fraudulent or manipulative behaviour by persons opposed to certain activities. It was also noted that a stop work notice is a blunt tool. One respondent questioned the need for a stop work notice noting that bringing the presence of Aboriginal heritage to the attention of someone undertaking ground disturbing works effectively changes the likely offence from negligent to deliberate, and the penalty from 1,000 penalty units to 10,000 penalty units, which is deterrent enough. This respondent also expressed a view that compliance actions taken through the current legal process have a level of assurance that a fair and just process will be followed, where on the spot compliance tools may not have the same assurance of integrity of process.

“By review of the structure, referral and application processes [of the Act], 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.” – Planning Institute Australia.

**Summary of feedback:**

- Some respondents suggested that enforcement of the legislation is limited by the availability of resources required to investigate and prosecute an alleged offender. Allocation of sufficient resources is required to maximise compliance and enforcement outcomes;
- Enforcement activities provide an opportunity to train and employ more Aboriginal people, particularly as compliance officers;
- Education, and an emphasis on voluntary compliance, have an important role to play in encouraging compliance;
- The Act should include a broader suite of enforcement options, including on-the-spot Infringement Notices, stop work notices, suspension of planning permits, Cultural Heritage Management Plans and Rehabilitation Orders, as well as opportunities for third party civil enforcement;
- Stop work notices would need to have checks and balances, including finite and reasonable periods of effect, clarity on who is authorised to issue a notice, appeal rights and compensation for improperly imposed orders;
- Stop work notices are recognised as effective tools contained within Tasmania’s *Historic Cultural Heritage Act 1995* and in Aboriginal heritage legislation in several other Australian jurisdictions;
- Additional tools to achieve better Aboriginal heritage protection outcomes could include additional caveats on developers undertaking further development, reservation of significant areas, protection through State ownership, restrictions on trade or sale of items, warning signs at Aboriginal sites and access restrictions to Aboriginal sites;
- Scaling, and clear definition of offences as minor and non-minor, would help to guide what type of compliance action was appropriate. Determination of what constitutes a minor or non-minor offence should be worked on and agreed by the wider Tasmanian Aboriginal community;
- The compliance and enforcement framework should allow for the AHC and/or affected parties to provide an Impact Statement (similar to a victim of crime statement) to be taken into account by the courts when sentencing for offences under the Act;
The AHC (or any new representative Aboriginal body) should have the power to investigate potential breaches of the Act on private land; and
Local Aboriginal communities should be resourced and given the appropriate authority to protect local heritage sites.

**Topic 9: Other ways the legislation protects Aboriginal heritage**

**Discussion Paper Questions:**
- How well does the Act protect and manage Tasmania’s Aboriginal heritage?
- Could this be improved, and if so, how?
- Are ‘protected sites’ a useful mechanism for protecting Aboriginal heritage?
- Is the provision for the making of Regulations useful?

Submissions responding to this topic generally noted that the Act could be substantially improved. Many submissions repeated suggestions made in response to earlier questions and are not repeated here. The majority of Aboriginal respondents suggested that enforcement activities should be undertaken by Aboriginal people, which would create opportunities to train and employ more Aboriginal people in protecting their local sites and their heritage values. This view was also supported by a number of non-Aboriginal respondents.

Some submissions supported more power being given to Parks and Wildlife Service Rangers and to Aboriginal Heritage Officers to issue on-the-spot fines as a means of improving outcomes for the management of Aboriginal heritage. It was also suggested that joint management or co-management arrangements for certain lands or land types may also lead to better outcomes, including through more Aboriginal people being involved on-country. Empowering a greater range of Aboriginal people to participate in compliance roles, including Aboriginal police officers and members of the AHC was also suggested.

Again, feedback suggested the *Land Use Approvals Act 1993* and the *Aboriginal Heritage Act 1975* should interact more closely and integrate the consideration of Aboriginal heritage aspects alongside European heritage though the Resource Management and Planning System. Submissions suggested the Act should move away from a permit-based system to a proactive system that utilises Management Plans and Land Management Agreements tailored to proposed developments or ongoing activities, and that allows for greater involvement of Aboriginal parties in decision making and implementation.

“Aboriginal heritage management should be incorporated into the Tasmanian statutory planning system if it is to be meaningfully effective. This is already recognized in the Southern Tasmanian Regional Land Use Strategy (STRLUS) under policy 9.3 CV” – Brighton Council

**Summary of feedback:**
- Adequate support and resources should be allocated to engage Aboriginal Heritage practitioners to assist Councils, developers and the like in the process of identifying and managing Aboriginal heritage sites prior to any works commencing;
- All known Aboriginal heritage sites should be recorded on the Aboriginal Heritage Register to allow for proponents to develop and implement tailored avoidance and mitigation strategies when conducting activities in the vicinity of the heritage sites;
• There is a broader need for better protection of Protected Sites declared under the Act. The current legislative framework focuses on administrative decision-making; and
• The Act should move away from a reactive, permit-based system to encompass a more proactive system that utilises tools such as Management Plans and Management Agreements.

### Issue 10: Other matters covered by the legislation

**Discussion Paper Questions:**
- Is there anything else you would like to see included in Aboriginal heritage legislation in Tasmania?
- Are there any other comments that you would like to make with regard to Aboriginal heritage management in Tasmania?

A large number of submissions responded to this topic. A common theme was to acknowledge the importance of education and the power that broad community understanding and appreciation of the significance of Tasmania’s Aboriginal heritage can have in encouraging voluntary compliance with the Act. The importance of building capacity within the Aboriginal community and empowering Aboriginal people to participate in consultation, education, compliance and enforcement activities was also emphasised.

Another common theme, and one that is reflected throughout this document, is the need for a significant overhaul of the current Act, with the aim of creating new legislation that is clear, simple and unambiguous and that can be considered to be in line with contemporary practices for managing Aboriginal heritage. Some respondents have an aspiration that any such new legislation should be the best of its type in the country.

> “The significance of education is paramount to enable Tasmanian Aboriginal people to move forward in relation to their respective local Aboriginal heritage. The wider community needs to broaden their knowledge on understanding and how to protect our heritage sites to enable them to work alongside Aboriginal people for better outcomes” – Circular Head Aboriginal Corporation

**Summary of feedback:**
- Timeframes for consultation, particularly with Aboriginal people, should be improved;
- The Act should include a clearer definition of the roles and responsibilities of Officers that are authorised under the Act. Aboriginal Heritage Officer and Aboriginal Heritage Advisor roles should be defined in the Act;
- Tasmanian Aboriginal people should be provided with increased opportunities for training to become Compliance Officers under the Act, and provided with opportunities to apply their cultural knowledge to improve the effectiveness of compliance activities;
- Education to foster understanding and recognition of the value of Aboriginal heritage among the broader Tasmanian community including: local government; State Government agencies; decision makers; enforcement officers and the judiciary (including police and the legal system); teachers; the wider community and politicians is critical;
- An Aboriginal heritage liaison and education role should be created to assist and educate local councils, planning bodies, proponents and the general public regarding procedures under the Act;
• Any new Tasmanian Aboriginal Heritage Act should seek to be the best example of its type in Australia – one that provides new and higher standards of protection and management, which is supported by improved enforcement;

• The protection of Aboriginal heritage should have priority over economic development;

• Future Aboriginal heritage legislation should provide clarity around how it will intersect with Tasmania’s planning legislation and other relevant legislation such as the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and the Environmental Protection and Biodiversity Conservation Act 1999;

• The Act should include clarification around the decision-making and management processes for sacred artefacts and Aboriginal human remains that have been repatriated from national and international museums and institution back to Tasmania;

• The Act should support Aboriginal groups and Aboriginal people to be actively engaged in management of their heritage; and

• The majority of local government submissions propose bringing the consideration of Aboriginal heritage into Tasmania’s Resource Management and Planning System.
## Appendix 1


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[^4]: Submissions are numbered chronologically, in order of their receipt by DPIPWE
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