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Alan Haig
Policy Branch
Department of Primary Industries, Parks, Water and Environment
GPO Box 44
Hobart TAS 7001

By email: Alan.Haig@dpipwe.tas.gov.au

Dear Mr Haig,

Review of the Aboriginal Relics Act 1975

EDO Tasmania is a non-profit, community based legal service specialising in environmental law. We are committed to supporting Tasmania's Aboriginal communities to protect and manage their cultural heritage, and welcome the opportunity to comment on the proposed amendments to the *Aboriginal Relics Act 1975* (***the Act***).

To simplify the collation of feedback, we have made brief comments directly in response to the questions posed in the online survey. However, some responses have exceeded the 500 character limit allowed by the survey form.

2.1 *In view of the long and unsuccessful history of attempts to replace the Relics Act completely, the Government proposes to remove the most offensive aspects of the Relics Act, and to set a time for a full review of the amended legislation. What is your view on this approach?*

AGREE

We commend the government for recognising that the *Aboriginal Relics Act 1975* is "woefully outdated", "shamefully disrespectful", and in urgent need of reform. Given the acknowledged difficulties experienced with past law reform efforts, we support immediate amendments to address some of the most problematic aspects of the Act. However, it is also critical that the government acts swiftly to commence a more comprehensive review, actively involve the Tasmanian Aboriginal community in setting the scope for that review and establish a clear timeframe for implementing the outcomes of the review.

3.1 Changing the title of the Act. *It is proposed to change the name of the Act to the Aboriginal Heritage Act 1975 (the year does not alter). What is your view on this proposal?*

STRONGLY AGREE

While not enough on its own, re-naming (and thereby reframing) the Act is symbolically important. As Justice Rachel Pepper has noted:

> *Approaches to the concept of Indigenous cultural heritage are, as with everything, reflected in the language we use to describe it. Early attempts to protect Indigenous cultural heritage in the 1960s and early 1970s conceived the process as one emphasising the conservation of 'relics'. The use of this word reflects a range of attitudes that are naturally problematic today. Specifically, that the Aboriginal people are a dying race and that any purpose of preserving their sacred sites is merely archaeological. The term 'relic' and the use of the past tense in reference to Aboriginal occupation in Australia, perpetuated the myth that Indigenous cultural heritage was not relevant to Indigenous groups in the present day. It also allowed for continuing public ignorance of the*

complexity and profundity of Aboriginal peoples' spiritual connection to country and to the Dreamtime or Creation stories that inform and fashion that connection.[1]

For similar reasons, we recommend that the definition of 'relics' and references to that term throughout the Act also be replaced with "Aboriginal cultural heritage".

Significantly, the use of 'relics' also implies protection of tangible heritage only, and fails to acknowledge the cultural significance of intangible and ongoing heritage, including songlines, stories, traditional remedies, ceremonies and other practices. Such concepts are unlikely to be able to be effectively incorporated by mere definitional change as part of this initial review. However, effective mechanisms for the recognition and protection of intangible cultural heritage must be considered in any future comprehensive review.

3.2 The 1876 cut-off date. *It is proposed to remove all reference to 1876 in the Act. In order to prevent the Act then applying to all objects made by, or all activities of, any Aboriginal person up to the present, it is proposed to use a term in the definitions of relic such as 'of significance to the Aboriginal people' of the State, and to specifically exclude items made for sale. What is your view on this proposal?*

STRONGLY AGREE

As with the use of the term 'relic', the current pre-1876 threshold for protection under the Act ignores the ongoing cultural significance of sites, objects and landscapes to contemporary Tasmanian Aboriginal communities. We strongly support removing that date as a prerequisite to establish cultural heritage significance.

We also support a definition of Aboriginal cultural heritage that provides for the Tasmanian Aboriginal community to determine significance. The definition of 'indigenous heritage value' under s.528 of the *Environment Protection and Biodiversity Conservation Act 1999* provides a useful model:

> ***indigenous heritage value*** of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.

Sections 9 and 10 of the *Aboriginal Cultural Heritage Act 2003* (Qld), s.9 of the *Heritage Act 2004* (ACT) and s.5 of the Aboriginal Heritage Act 2006 (Vic), adopt a similar approach.

3.3 Upgraded penalties and revised offences

(i) It is proposed to raise the maximum penalties available in the Act to the same level as comparable offences in the *Historic Cultural Heritage Act 1995* – that is, 10,000 penalty units ($1.54 million) for a body corporate and 5,000 penalty units ($770,000) for an individual. What is your view on this level of penalties?

STRONGLY AGREE

Strong penalties are essential as both a statement of the seriousness with which the government views protection of Aboriginal cultural heritage, and to provide an effective deterrent against non-compliance with the requirements of the Act.

In addition to increased maximum penalties, any comprehensive review of the Act must look at introducing a broader suite of enforcement options, including infringement and stop work notices, suspension of planning permits, cultural heritage management plans and rehabilitation orders, and opportunities for third party civil enforcement. The government must also commit resources to investigation and enforcement activities in order for the increased penalties to provide a meaningful deterrent.

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[1] Justice Rachel Pepper. "Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia" - paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, March 2014). Available at http://www.lec.justice.nsw.gov.au/Documents/not_plants_or_animals.pdf

(ii) It is proposed to separate the minor offences (ie those under sections 10(7), 12(8), 17(3), 18(2) and 18(6)) from the more serious offences under sections 9 and 14. The maximum penalties for the minor offences would be 100 ($15,400) and 50 ($7,700) penalty units respectively for bodies corporate and individuals. What is your view on this approach?

AGREE

We agree that it is appropriate to provide lower penalties for minor / more procedural offences. However, we urge the government to consider whether lower penalties should apply to an offence against s.10(3) (failure to report discovery of an Aboriginal relic). It is important to provide clear incentives to report Aboriginal heritage finds so that appropriate management plans (including, where appropriate, compensation to landowners or acquisition by the government) can be enacted to protect the heritage.

Currently, the Act does not make any provision for relics to vest in the Aboriginal community - relics discovered on Crown land become the property of the Crown, relics found on private land remain the property of the landowner. Consideration must be given to this issue in the comprehensive review of the Act.

(iii) It is proposed to remove the 'ignorance defence', at section 21(3). In order to avoid creating potentially unreasonable 'strict liability' offences, it is proposed that for the more serious offences there will be three grades of offence with different levels of maximum penalty. In descending order of seriousness, they would be:

- *if the person **knew** that the action in question related to a relic (with top level of penalties);*
- *if the person **was reckless** as to whether the action in question related to a relic; or*
- *if the person **was negligent** as to whether the action in question related to a relic.*

What is your view on this proposal?

STRONGLY AGREE

We strongly support replacing the ignorance defence with a graded penalty framework. The current defence renders the existing offence provisions largely meaningless and has proven a significant impediment to enforcement. Long-term observers have estimated that at least 50% of Tasmania's Aboriginal rock art sites have been vandalised without penalty – the most recent incident occurring several months ago.[2]

The introduction of graded penalties will allow deliberate destruction to be punished strongly, while removing the current disincentive to undertake appropriate assessments and action to avoid damage to Aboriginal cultural heritage.

The government must provide support for an effective transition away from reliance on ignorance of the presence of Aboriginal heritage. This will require developing resources and undertaking community engagement to assist landowners to be able to identify Aboriginal heritage, or key indicators for potential presence of Aboriginal heritage, and to take action to avoid and minimise impacts.

Significantly more work must also be done to integrate management of Aboriginal heritage into planning and development assessments. The current planning reforms do not address this issue, instead deferring to the *Aboriginal Relics Act 1975*, despite its acknowledged weaknesses. Requiring consideration of impacts on Aboriginal heritage early in the planning / assessment process will be essential to improve consistency in the protection and management of cultural heritage.

(iv) It is proposed to ensure that offences can be prosecuted more than six months after the offence was committed. This would be done by overriding the Justices Act to allow five years to prosecute, and also making the start date the discovery of the damage. What is your view on this proposal?

STRONGLY AGREE

We support extending the statutory limitation on prosecution to five years. As outlined above, we would also support the introduction of civil enforcement provisions, including third party enforcement, as part of the comprehensive review.

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[2] For example, see R Bednarik. 2012. Submission to the draft Aboriginal Heritage Protection Bill 2012 (Submission #7), available at www.aboriginalheritage.tas.gov.au

3.4 Replacing the Aboriginal Relics Advisory Council (ARAC) with the Aboriginal Heritage Council. *It is proposed to delete all reference to the ARAC and provide for an Aboriginal Heritage Council with high-level advisory functions, to the Minister. What is your view on this proposal?*

AGREE

The Aboriginal Relics Advisory Council, as currently enacted, comprised of largely academic and government interests, with only one member required to be endorsed by a body representing Tasmanian Aborigines. This lack of representation resulted in the Aboriginal community boycotting the Advisory Council in 1984, and the Advisory Council ceased operation shortly after.

Lack of Aboriginal involvement in the management and protection of Aboriginal cultural heritage will continue to compromise the achievement of those aims. We strongly support the transfer of the ARAC's statutory responsibilities to a representative Aboriginal Heritage Council.

However, Aboriginal involvement must not be limited to advising the Minister – the Tasmanian Aboriginal community must ultimately play a decision-making role in the management and custodianship of their heritage. As outlined above, better integration with planning legislation will also be essential to ensure that the Aboriginal Heritage Council has input into development decisions with the potential to impact on Aboriginal cultural heritage.

3.5 Statutory review. It is proposed to require a review of the Act to be completed within a defined period after the amendments come into force. What is your view on this proposal?

STRONGLY AGREE

As outlined above, this initial review is important to address immediate inadequacies in the Act but must be seen as a first step towards a far more comprehensive review.

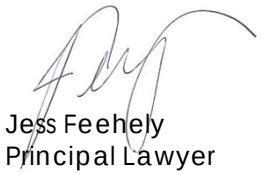
We support the introduction of a statutory requirement to review the Act, however the terms of reference for the review must be clear. The review must not be limited to whether the Act meets its existing aims (protection of Aboriginal relics), but extend to whether it achieves more contemporary objectives in relation to protection of Aboriginal cultural heritage. The review should address, at a minimum:

- broad definition of Aboriginal cultural heritage
- meaningful involvement of the Tasmanian Aboriginal community, and a stronger decision-making role for the Aboriginal Heritage Council
- formalising the process / requirements for Aboriginal heritage assessments, including provisions for Aboriginal heritage management plans
- integration of Aboriginal heritage assessments with planning
- additional suite of monitoring and enforcement tools to protect Aboriginal heritage

To allow sufficient time for such a review to be undertaken with meaningful consultation, three years is an appropriate timeframe for introduction of new legislation, not just for a review to be commenced. Discussion regarding the terms of reference for the review should commence with the Tasmanian Aboriginal community immediately.

Thank you for the opportunity to make these brief comments. Please do not hesitate to contact me if you would like to discuss any of the comments in more detail.

Kind regards,
EDO Tasmania



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