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27 September 2019

The Honourable Roger Jaensch MP
Minister for Aboriginal Affairs

Copy to:
Simon Willcox
Project Manager
Department of Primary Industries, Parks, Water and Environment

***By email***: ***aboriginalheritageact@dpipwe.tas.gov.au***

Dear Minister

## Review of the *Aboriginal Heritage Act 1975*

Thank you for the opportunity to comment on the review of the *Aboriginal Heritage Act 1975* (**the Act**).

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. Our organisation provides legal advice and representation, community legal education services and engages in law reform to secure best practice environmental regulation outcomes.

Our lawyers give advice to members of the community on a daily basis about the regulation of development in Tasmania. We are well placed to understand and respond to the interaction between development controls through the planning system and the protection and management of Aboriginal cultural heritage.

In making this submission, we do not and cannot purport to represent the views of Tasmanian Aboriginal people/s. Consistent with principles of international law, the starting principle must be that traditional owners are the decision-makers about matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures (Article 18 of the UN Declaration on the Rights of Indigenous Peoples). This includes about matters of cultural heritage significance.

The second point is that, at international law, indigenous peoples have the right to practice and revitalise cultural practices and the right to "maintain, protect and have access in privacy to their religious and cultural sites". Articles 11.1 and 12.1 of the UN Declaration on the Rights of Indigenous Peoples provide:

> *Article 11.1:*
>
> *Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

*Article 12.1:*

*Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*

These principles recognise that indigenous cultural heritage is both tangible and intangible and that cultural heritage of indigenous peoples is continuing, not historical. Further, any decisions taken in respect of indigenous cultural heritage must be by indigenous people/s themselves or with the prior and informed consent of those people/s.

Thirdly, we acknowledge that there is a continuing absence of legal recognition of the rights of Australian Aboriginal people/s to their lands and cultural practices. We acknowledge and support this government for the passing of the *Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016*. We welcome the comments by the Premier and then Minister for Aboriginal Affairs that this was "a very important step on the journey of reconciliation, and… a key part of my Government's commitment to re-set our relationship with Tasmanian Aboriginal people".

However, members of the Tasmanian Aboriginal community have long called for legal recognition that Tasmanian Aboriginal people/s are the State's first people/s through a treaty. We support their right to self-determination and consider this is the necessary first step to "re-setting" our relationship with the Tasmanian Aboriginal people/s.

Finally, the Tasmanian *Aboriginal Heritage Act 1975* has long been criticised for being "woefully outdated" and "shamefully disrespectful" of Tasmanian Aboriginal people/s. Tasmania is a laggard in its treatment of Aboriginal cultural heritage, a position which is within your power to change. A 2018 review identified Tasmania with Western Australia as having the worst Aboriginal cultural heritage laws in the country.

The Premier indicated in his Second Reading Speech to the *Aboriginal Relics Amendment Act 2017* that 'these amendments are an interim step to address areas of immediate concern'. We are buoyed by the Premier's comments in 2017 that the future review would see greater change. Reform of the Act is long overdue. We urge the government to take this review as the opportunity for reform and bring Tasmania into line with modern Indigenous heritage law and practice.

Our approach to the review of the Act should be read in the above context.

Our substantive comments in response to the issues raised in the published *Discussion Paper – Review of Aboriginal Heritage Act 1975* are contained in the attachment to this letter.

Thank you for the opportunity to consider the review of the Act. Should you wish to discuss any aspect of this submission further, please do not hesitate to contact me on 03 6223 2770.

Yours faithfully

Nicole Sommer
CEO & Principal Lawyer
**EDO Tasmania**

## Detailed submission to the Review of the *Aboriginal Heritage Act 1975 (Tas)*

This submission responds directly to the questions raised in the *Discussion Paper: Statutory Review of the Aboriginal Heritage Act 1975*. The headings and dot points below them are taken directly from the discussion paper.

In short, the *Aboriginal Heritage Act 1975* (the Act) needs substantial amendment to bring it up to modern standards and to ensure that it in fact adequately protects and manages Aboriginal cultural heritage. This represents an excellent opportunity to drive improvement, by bringing the Tasmanian law up to a contemporary standard and into line with other jurisdictions.

We provide detailed comments on the main areas that require attention in the submissions below. Should any part of our comments be unclear or require more detail, we are able to meet with the review team.

The main issues we have identified are:

- The Act should be amended to provide for meaningful decision-making by the traditional owners and custodians of Aboriginal cultural heritage as to its identification, management and protection;
- The Act should be amended to include a purpose and objects, to recognise Tasmanian Aboriginal people/s' continuing connection to country and the need to protect and appropriately manage Aboriginal cultural heritage in all its forms;
- The Act should be amended to refer to "Aboriginal cultural heritage" to replace "relics" and that term should be given a meaning which captures both tangible and intangible "living" heritage;
- Decision-making by traditional owners and custodians about their heritage should be through a representative body, whether the Aboriginal Heritage Council or other representative body(s) or both. Decisions about the appropriate model should be made by the Tasmanian Aboriginal people/s.
- The guidelines issued under s21A of the Act are woefully inadequate, are unenforceable and should be immediately replaced.
- Section 21(1)(a) providing a complete defence to any offence should be repealed.
- The enforcement provisions of the Act should be amended to ensure offence provisions are clear and unambiguous and therefore capable of enforcement, including reverse onus provisions where appropriate.
- Likewise, statutory defence provisions should be reasonable and proportionate and the defences in s21 should be reviewed.
- The Act should be amended to integrate decision-making under that Act with development decision-making under the *Land Use Planning and Approvals Act 1993*;
- The Act should ensure that decisions made to rezone or develop land identify and respect the Aboriginal cultural significance of or connected with that land, and any authority to harm Aboriginal cultural heritage is made with knowledge and the prior and informed consent of Aboriginal people.
- The Act should provide for proactive and holistic management of heritage through cultural heritage management plans as part of the approvals process.
- The Act should include provision for voluntary Aboriginal cultural heritage agreements to be registered on title between landowners and traditional owners to provide for protection of Aboriginal cultural heritage.

## 1. What is the Aboriginal Heritage Act 1975 trying to achieve?

⇒ *How clear is the Act regarding what it is trying to achieve?*
⇒ *Could this be improved, and if so, how?*

We strongly recommend that the Act include objects and purpose statements. The Act is not clear about what it is trying to achieve. This is consistent with all other jurisdictions, for instance, the Victorian *Aboriginal Heritage Act 2006* sets out the purposes of the Act (s.1) and it objectives (s3). In NSW, the government has released a draft *Aboriginal Cultural Heritage Bill 2018* which includes objects (cl. 3). Queensland was the first jurisdiction to recognise Indigenous peoples as "the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage" in its objects in 2003.[1]

Objects and purpose statements are important components of any legislation. They ensure that the interpretation of the Act achieves what Parliament intends it to achieve. Section 8A of the *Acts Interpretation Act 1931* says:

> *In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.*

While this applies whether the object or purpose is expressly stated, legislative purpose and object statements provide the clarify of purpose needed to ensure that the administration of any legislation is consistent with that purpose.

Such statements must be for the primary purpose of ensuring protection and management of Aboriginal cultural heritage in accordance with the will of Tasmanian Aboriginal people/s. We recommend that the Victorian legislation be looked to for guidance.

At a minimum, the purpose and objects of the Tasmanian Act must:

- Provide for the protection and management of Tasmanian Aboriginal cultural heritage;
- Recognise that Aboriginal people are the custodians of Aboriginal cultural heritage;
- Adopt the rights of indigenous people with respect to their cultural heritage as set out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), in particular Articles 11 and 12;
- Provide for offences and sufficient penalties to prevent harm to and protect Aboriginal cultural heritage.

## 2. What is Aboriginal heritage?

⇒ *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?*

Any respectful, contemporary Aboriginal cultural heritage framework needs to recognise the significance not just of tangible objects and defined sites, but of landscapes, knowledge, custom, belief and values.

We refer to our previous submission which deals with this issue succinctly at 3.1 (copy **attached**).

[1] Section 5(b) of the Aboriginal Cultural Heritage Act 2003 (Qld).

In summary, we recommend that references to "aboriginal heritage" and "relics" be replaced with "Aboriginal cultural heritage". The term "relic" is outdated and offensive,

We also recommend that "objects" in s.7 of the Act be replaced with "aboriginal cultural heritage" and "protected sites" be changed to recognize the diverse cultural significance of both tangible and intangible heritage.

As we stated in our previous submission:

> *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.*

The Act must be altered to recognise the breadth of cultural significance, and that it is more than "objects" or "relics".

## 3. Ownership of Aboriginal heritage

⇒ *How clearly 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 underlying principle should be that indigenous people should be the custodians of their cultural heritage and that any decisions with respect to that heritage be made by them or with their prior and informed consent.

The Act should be amended to allow for use of, access and repatriation of cultural heritage as appropriate and determined by Tasmanian Aboriginal people/s, consistent with Articles 11 and 12 of the UNDRIP.

We do not comment on whether the concept of "ownership" is appropriate, although understand that the concept does not fit neatly with the custodianship cultural heritage is viewed by Aboriginal people. We further note that the labels the settler legal system places may not be relevant within or respectful to indigenous legal systems.

Nevertheless, the Act does currently allow for ownership of "relics" as defined in the Act, in a way that is inconsistent with Aboriginal people/s as the custodians of their heritage. Currently, the Act does not make any provision for relics to vest in Tasmanian Aboriginal people/s or any representative body(s).

In our submission, Tasmania's legislation is out of step with contemporary practice of returning ownership or custodianship of Aboriginal cultural heritage to traditional owners.

The Act provides that Aboriginal "relics" found on Crown land after the commencement of the Act vest in the Crown (s11), unless attached to or forming part of the land. It also provides for

the Crown to acquire "relics". "Relics" discovered on Crown land become the property of the Crown, "relics" found on private land remain the property of the landowner.

Yet, there is no provision for repatriation, return or other dealing with cultural heritage to Aboriginal people/s. This should be remedied. The law should allow for return of ownership and possession of tangible and intangible Aboriginal cultural heritage, including cultural heritage owned or held by the Crown in the right of Tasmania. This is required by Article 12.2 of the UNDRIP.

Nor is there general recognition that Aboriginal cultural heritage belongs to the Aboriginal people/s. For instance, songs, stories and cultural practices cannot be "acquired" in a legal sense, but form a fundamental part of Aboriginal cultural heritage. This should be recognised and there should be an offence for commercial exploitation of such heritage.

As an example of the approach in other jurisdictions we refer you to s.12 of the Victorian Aboriginal Heritage Act, which sets out principles of ownership of Aboriginal cultural heritage. It provides for Aboriginal ancestral remains and secret or sacred objects to be "owned by and returned to" the traditional owners of the area, and intangible heritage should be "owned by" any traditional owner group. While this is a limited return, it provides an example of how far behind the Tasmanian legislation is in this respect.

Section 10 of the Act deals with "relics" owned or in the possession of third parties. We note that s10 does not allow for the Director to do anything other than be notified. Section 11(6) says:

> *The Director may, by agreement with a person who owns a relic or has a relic in his custody or under his control, take such action as he considers necessary for the preservation, exhibition, study, or scientific or other investigation of the relic.*

This provision does not give effect to the principle that Aboriginal people/s should be the custodians of their own heritage. This provision does not allow for return and/or transfer of ownership of aboriginal cultural heritage for use as a continuing cultural practice, only that action can be taken for the "preservation, exhibition, study, or scientific or other investigation". The purposes of the agreement are not consistent with contemporary practice and use language that is problematic today.

This provision is a good example of why this Act needs stated objects or purposes. It should be reviewed.

Further, where agreements are made in relation to Aboriginal cultural heritage they should be made with Aboriginal people/s, not with the Crown. Such agreements should be ensure that the prior and informed consent of indigenous people has been gained entering into that agreement. We recommend consideration be given to voluntary conservation agreements found in other jurisdictions.

## 4. Making decisions about what happens to Aboriginal heritage

- ⇒ *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?*

The Tasmanian Aboriginal people/s must ultimately be the decision-makers in the management and custodianship of their heritage.

In other jurisdictions, the traditional owners of Aboriginal cultural heritage are involved in all levels of decision-making. In Victoria, registered native title holders, traditional owner group entities and registered aboriginal parties (as relevant), each have a role to play under the relevant Act. For instance, a registered aboriginal party can elect to make decisions on cultural heritage management plans and is the approval body for issuing of cultural heritage permits.

In the Tasmanian Act, permits to "interfere" with relics are issued by the Minister on the recommendation of the Director (s14). There is no role for Aboriginal people in the permit process.

We make the following observations about s14 permits:

- Section 14 is limited to "relics". Permission should be required for any action taken in relation to Aboriginal cultural heritage, defined as both tangible and intangible heritage.
- Section 14 does not envisage any input by the Tasmanian Aboriginal people/s in decisions. Permission should involve traditional owners of that cultural heritage in a manner agreed to by the Tasmanian Aboriginal people/s. For instance, this could be through a representative body such as the AHC making the decisions, if informed consent is given by the Tasmanian Aboriginal people/s to any such proposal.
- There is no timeframe on when a permit is required. This is because it is drafted as a defence to an offence provision. Permits should be required before any development permit is issued. This should include a requirement to ensure the land is not or does not contain items of Aboriginal cultural heritage significance and a plan for holistic and proactive management of heritage, for instance, by requiring a management plan.
- There is currently no criteria guiding the exercise of discretion by the Minister in the granting of a permit. The Act should specify criteria as to when a permit will be issued, and on what conditions. For instance, there will be occasions when a permit should not be issued due to the cultural significance of the heritage concerned, and there may be others when it requires management measures by way of conditions. The scope of these decisions should be clear in the legislation. This provides certainty to all parties.
- There is no mechanism for an agreement to be reached with traditional owners, whether through approval of a management plan or voluntary agreement.

There are obvious deficiencies in the decision-making under the Act, not least of which is the absence of control or input by the Tasmanian Aboriginal people/s over decisions affecting their heritage.

In other states, the following approach to Aboriginal cultural heritage is taken:

- Traditional owners or a representative body are decision-makers as to when any action is taken in relation to Aboriginal cultural heritage;
- There is an integrated approach between approvals under the Act and permit application under the planning legislation;
- Development of land or an area of cultural heritage significance be undertaken in accordance with a management plan approved by traditional owners or a representative body;
- It is an offence to carry out development in the absence of such a management plan;
- A cultural heritage agreement can be entered into voluntarily by a landowner and traditional owner group, which can, amongst other things, include:
    - recognition of Aboriginal cultural heritage values of the land (both tangible and intangible);
    - provide for access for traditional owners;
    - provide for protection, conservation or other management actions in relation to the cultural heritage.

We recommend that these at a minimum be adopted in the Act.

## 5. The Aboriginal Heritage Council – what it is and what it does

⇒ *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?*

We support the inclusion of the Aboriginal Heritage Council (**AHC**) in the Act, as a representative body that gives the Aboriginal people a voice in decision-making under the Act.

As a representative body, the membership criteria and selection of the Aboriginal Heritage Council should be determined by the Tasmanian Aboriginal people/s.

The AHC is the only statutory body that gives the Tasmanian Aboriginal people/s a voice under the Act. As such, the role of the AHC is an important one. We recognise there can be issues arise with centralised decision-making bodies such as the AHC, for instance, the ability of such a body to speak on behalf of all Tasmanian Aboriginal people/s. The role and composition of the AHC should reflect the principle that Tasmanian Aboriginal people/s have a decision-making role about their heritage. The appropriate representative model is a decision for the Tasmanian Aboriginal people/s.

We recommend that the AHC or any representative decision-making body(s) constituted under the Act be given broader functions and powers than those of the AHC as presently prescribed.

The AHC has specified functions in s3 of the Act, but the only formal function it has is to make recommendations with respect to the removal of human remains (s8(7)), with respect to investigations, dealing with or disposing of relics vested in the Crown (s13(1)&(3)) or any other matter the Minister or Director refers to it (s3(3)). In our opinion, an Aboriginal decision-making body(s) should be involved in decisions relating to:

- identifying tangible and intangible Aboriginal cultural heritage, including protocols for survey as part of development or rezoning applications;
- measures to protect Aboriginal cultural heritage;
- developing land containing Aboriginal cultural heritage or of cultural heritage significance;
- approving management plans to allow rezoning and development;
- entering into voluntary Aboriginal cultural heritage agreements;
- approval of permits to harm Aboriginal cultural heritage.

Further, we note that the Director has a role under the Act which is not prescribed by the legislation whereas the role of the AHC is prescribed. For instance, the AHC is empowered to make recommendations to the Director on matters the Act provides for it to make a recommendation on to him. The function and powers of the Director (if maintained) should be express.

## 6. Offences under the Act and penalties for doing the wrong thing

⇒ *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?*

We applaud the increase of penalties under the Act in 2017. However, we are concerned that, to our knowledge, there have not been any prosecutions under these provisions.

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.

We repeat the submission we made in 2015 that 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.

Stop work orders, infringement notices, rehabilitation orders and third party civil enforcement are necessary elements of the powers required in order to ensure adequate protection of Aboriginal cultural heritage.

The AHT needs to have sufficient powers to ensure that an action that is or is suspected of impacting on Aboriginal cultural heritage can be stopped. This is consistent with the powers under the Heritage Act 1995 and the LUPA Act. Secondly, it is important that there is the ability for third party civil enforcement in the RMPAT, in particular, so that Aboriginal people can bring their own proceedings to enforce the provisions of the Act.

The government must also commit resources to investigation and enforcement activities in order for the increased penalties to provide a meaningful deterrent.

We make the following additional comments on specific provisions.

<u>Protected sites</u>

- The Act is drafted in such a way as to make offences difficult (if not impossible) to prosecute.
- For instance, to prove that an offence has occurred under s9(1), the Director must establish that the person in fact damaged a protected object and that they knew the object was protected when they did so. This is a high hurdle to meet to successfully prosecute and presumably is one of the reasons there have been no prosecutions under the Act.
- There are simpler methods to drafting offences, commensurate to other jurisdictions. For instance, where a site containing ACH is declared a "protected site", entering that site or carrying out works on the site without a permit could be an offence. Damaging Aboriginal cultural heritage could be another offence, with different penalties for damaging heritage knowing it was or could be ACH or reckless to that fact.
- The review should also consider "reverse onus" provisions. For instance, if a person is on a protected site and ACH is found to be damaged, the person is guilty of an offence. Or, if the person is carrying out works on the site, and ACH is damaged, the person is guilty of an offence. Defences can be provided such as taking all reasonable steps to ensure the land did not contain ACH or was not of ACH significance.

<u>Interfering with relics</u>

The same criticisms can be made of offences under s14 of the Act. To prove that a relic has been interfered with, the Director must be aware of the existence of the relic and prove that the person caused damage to it. This means that development of land might occur without any physical survey required (as none is required under the practices of AHT). Development of the land may destroy Aboriginal cultural heritage, without the person knowing that it exists.

In those circumstances, it would be impossible to prove an offence has occurred under s.14 of the Act.

There are two solutions to this. First, amend the Act to ensure that reasonable searches have been undertaken prior to development permits being issued. We have suggested that the cultural heritage management plan process in the Victorian legislation be adopted. Second, adopt offence provisions that allow enforcement. For instance, development without an approved management plan, or development on land without conducting a survey, in addition to the destruction of a relic offence.

Other offences

The Act currently only prescribes offences in relation to interfering with relics (ss.9 and 14) or failing to notify the Director that they possess a relic.

We have made recommendations that new development be required to prepare and undertake development in accordance with a management plan for managing cultural heritage, and that this be integrated with the LUPA Act. The better systems are where this obligation be within the AH Act, rather than in LUPA Act. For instance, Victoria "stops the clock" for determining permit applications until a cultural heritage management plan is approved.

We recommend that there be consequential offences, for instance, carrying out development without an approved management plan, carrying it out other than in accordance with the approved management plan or carrying out development (including works such a digging or excavating) on protected sites.

The current processes of AHT are opaque with respect to when further investigation including physical survey work is required.

We understand that a person is only required to do a Dial before you Dig request, which presumably only identifies land which is known to possess items of Aboriginal cultural heritage. We expect there are circumstances where there is unknown tangible or intangible Aboriginal cultural heritage significance which are not identified through this system.

The potential for harm is therefore very great, and while many developers might think they are doing the right thing unknowingly impact on places or items of cultural heritage significance. We consider this can easily be avoided with better systems in consultation with the Aboriginal community.

Different rules for different people

The Discussion Paper asks whether there are rules that should apply differently to different people. We do not think there should be without a good policy reason.

The Act does not currently distinguish between people, although we note the guidelines treat existing activities differently to new activities. We consider that offences should apply the same to everyone, in the same way as environmental offences under the *Environmental Management and Pollution Control Act 1994*. In practice, if the management plan approval process is adopted and it is integrated with the planning system, approval will be triggered when a new activity or substantial intensification of an existing activity occurs.

There should remain an obligation to report any new item of cultural heritage and the ability to enter into voluntary agreements for existing activities, including farming.

## 7. When can Aboriginal heritage be interfered with?

⇒ *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?*

We consider that:

- the defence in s21(1)(a) is not reasonable and should be repealed;
- the defences in s21(1)b) and (c) are not specific enough and should be reviewed.

Guidelines

Section 21(1)(a)(i) only require that the defendant show that "in so far as is practicable…complied with the guidelines" (s21(a)(i)).

First, it should not be a defence to an offence under the Act to rely on guidelines issued by the Minister. Offence provisions – and any defences – should be clear and sufficiently certain to allow enforcement. We do not consider that non-statutory guidelines issued by the Minister, and capable of amendment from time to time, ought be used as a defence. Any exemptions or limitations should be prescribed whether in the principal Act or by regulation.

By way of example, the Guidelines indicate that a person carrying farming activities or normal dwelling activities are exempt from the offence provisions unless they have reason to believe that the activity might impact relics. This appears to be inconsistent with the Act. If a policy decision has been made that some activities should be able to impact relics, that should be specified in the Act, not in Guidelines produced by the Minister which are capable of amendment from time to time.

Secondly, it is very difficult to understand what constitutes compliance with the guidelines as presently drafted. The guidelines are very poorly drafted and will be impossible to enforce. The poor drafting of the guidelines undoes any good work in increasing penalties. What is the point of penalties if you can never enforce the Act? We recommend that the guidelines be replaced immediately.

By way of example, consider the provisions with respect to protected sites. The guidelines "require":

> *Anyone entering one of these areas should, as far as practicable, always seek out signage or other available explanations (including online) of how to act appropriately in the protected area, and should specifically seek to understand what actions are prohibited. All persons should ensure they then act in accordance with the information provided. More generally, their status as protected sites means that people in these areas should be mindful of the need to respect the wishes and sensitivities of Aboriginal people in regard to appropriate actions in the protected site.*

There is nothing in the guidelines that stops a person from interfering with a relic. The offence is interfering with a relic. Under the guidelines, a person is permitted to destroy or deface rock art but comply with the guidelines by saying that they sought out signage and sought to understand what actions are prohibited.

Finally, and perhaps most damningly, a person wanting to develop land is required to do nothing unless the activity requires an authorisation under another Act and disturbs the ground or that person forms a positive view that the activity might "impact relics". We question when that obligation arises, and for instance, if it applies to rezoning of land. Where an obligation is triggered the only requirement is that the person "should first make a preliminary inquiry to

Aboriginal Heritage Tasmania online or by phone". It does not require any further follow up, for advice to be followed. The phonecall alone forms a complete defence to destroying Aboriginal relics.

This process identified in the guidelines is inconsistent with the actual process Aboriginal Heritage Tasmania has in place. We understand that currently there are two requirements:

- A person developing land can use either AHT or dial before you dig to identify whether there is any further requirement. A further requirement may simply be providing more information.
- Following the Unanticipated Discovery form.

We do not consider these are sufficient. However, if that is the process to follow and guidelines are to form a defence to offence provisions under the Act, it is this process that should be proscribed in the guidelines. And yet, they do not.

The guidelines are poorly drafted. The guidelines are full of discretionary language, for instance, saying "should" instead of "must" or using qualifiers like "as far as practicable". The guidelines rely on people to form a positive view that what they're doing might impact Aboriginal heritage before the guidelines are even triggered. This requires that people know about Aboriginal heritage, what it is and how it might be damaged, which is an unreasonable expectation.

The guidelines do not inform people what Aboriginal cultural heritage is or why it is important. They do not inform people what they are meant to do if they find an item of Aboriginal cultural heritage significance, are in a place of significance or are appropriating a story or practice. They tell people simply to call Aboriginal Heritage Tasmania.

For these reasons, we recommend that the guidelines simply be removed from s.21(1)(a) of the Act. If they are retained, the guidelines must be substantially redrafted to ensure there are clear, consistent and enforceable obligations imposed by them. They are currently woefully inadequate and undermine the protection of Aboriginal cultural heritage in this State.

<u>Other defence provisions</u>

The remaining defence provisions are so unclear as to undermine the offence provisions of the Act. It is not clear what purpose it is intended they serve.

Where a person damages Aboriginal cultural heritage, it should not be a defence that they did so relying on someone else's information. It is not clear what is intended by s.21(1)(c). If the Act intends to allow a person to make enquiries through proper channels – eg, the AHC or AHT – then it should provide express provision for this. For instance, a certificate issued which indicates that there are no cultural heritage values, or a decision that no approval is required.

Moving to s.21(1)(b), it is unclear what is intended by this provision. If it is intended that a person can prove that someone else committed the offence, then this should be stated. Further, a person should be vicariously liable if a Director or employer, or when contracting a person to carry out works. This is provided for in subsection (2). However, we recommend that the drafting of this provision be reviewed. Further, a person should not be able to escape penalty by shifting blame to another person where they had knowledge of the offence.

## 8. Enforcement of the legislation

⇒ *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 offences in the Act be further scaled to distinguish between minor and non-minor offences?*

We have addressed this in our response to questions 6 and 7 above.

## 9. Other ways the legislation protects Aboriginal heritage

⇒ *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?*

We have previously congratulated the government for recognising that the Act is "woefully outdated", "shamefully disrespectful", and in urgent need of reform. We maintain this position. The reforms of 2016 have done little to improve the protection and management of Aboriginal cultural heritage in Tasmania, and any advance is undermined by the unenforceable s21A guidelines.

The Act does not manage or protect Aboriginal cultural heritage. At best, it provides guidance as to what is hoped will be done, but it does not require that anything in particular be done. The guidelines are a "get out of gaol free" card for anyone who damages Aboriginal cultural heritage; it is any wonder there have been no prosecutions under the Act.

The Act does not interact with planning legislation, such that land can be rezoned or a permit approved without any consideration of the place's significance for Aboriginal cultural heritage. Proponents are told to comply with an unanticipated discovery notice, but in practice protection of Aboriginal heritage is voluntary and dependant on the good will of individual developers. Indeed, that the only "requirement" under the Guidelines is that proponents call Aboriginal Heritage Tasmania to have a "preliminary discussion" is indicative. This is bad practice both for developers and Tasmanian Aboriginal people/s.

The introduction of the Aboriginal Heritage Council as a representative body is a positive step. However, as we have indicated, it's functions and therefore powers under the Act are limited. Decisions are made by the Director, who has no statutory role and in practical terms is not even a part of Aboriginal Heritage Tasmania. Decision-making under the Act should be made by Tasmanian Aboriginal people/s or a representative body.

We encourage the government to follow through on its commitment to "re-set" the relationship with Tasmanian Aboriginal people/s and to bring the Act up to a contemporary standard by including our recommendations in the review of the Act.

## 10. Other matters covered by the legislation and other considerations

⇒ *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?*

This question has been answered in response to other questions.