



Environmental
Defenders Office

Lutruwita (Tasmania) – Submission on the Draft Aboriginal Heritage Bill 2026

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 40 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Acknowledgement of Country

The Environmental Defenders Office ('EDO') recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as the right of First Nations peoples to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed before colonisation and continue to exist today within all First Nations. These are the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term Tasmanian Aboriginal people/Community. We acknowledge that not all Tasmanian Aboriginal people will identify with that term, and that they may instead identify using other terms, or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. EDO respects all First Laws and values their inherent and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

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Executive summary

EDO has taken the opportunity to comment on the draft Aboriginal Heritage Bill 2026 (**'Draft Bill'**), intended to replace the *Aboriginal Heritage Act 1975* (Tas) (**'1975 Act'**).

We have two primary concerns with the Draft Bill. First, the lack of recognition and authority it gives the Tasmanian Aboriginal Community. A key flaw is in the design of the representative body: the Aboriginal Heritage Council is appointed by the Minister, and its inadequate powers are undermined by Ministerial override powers and exemptions. This is inconsistent with the views of the Tasmanian Aboriginal Community, the United Nations Declaration of the Rights of Indigenous Peoples (**'UNDRIP'**), Dhawura Ngilan Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (**'Dhawura Ngilan'**)¹, the recommendations from the inquiry into the destruction of Indigenous heritage sites at Juukan Gorge,² and the commitments made by the Tasmanian Government. This result reflects the fact that the Tasmanian Aboriginal Community was not included in a co-design process in the development of the Draft Bill.

Second, the extent to which the key provisions of the Draft Bill are undermined by the number and breadth of regulation-making powers, which threaten the effective protection of Aboriginal heritage. It is unsatisfactory for core provisions of the new scheme to be prescribed in regulations – designed to set out operational and administrative detail and subject to less scrutiny. The extent of matters that may later be prescribed in regulations has also made it difficult to assess how the Draft Bill will operate to protect Aboriginal heritage. This approach is anti-democratic, and in addition to being inconsistent with community expectations, international law and best practice standards, is contrary to the approach taken to cultural heritage reforms in other jurisdictions such as Victoria and the Northern Territory.

We are disappointed by the quality of the draft legislation and the failure to include the Tasmanian Aboriginal Community in its development – particularly given the length of time the Tasmanian Government has been working on this reform. There are numerous drafting inconsistencies and deficiencies that mean the Draft Bill falls below an acceptable standard for public consultation. Due to the volume of these, we have focused our recommendations on key issues we have identified to strengthen the intent of the Bill to protect Aboriginal heritage. Our suggestions are not comprehensive and should in no way be taken as an endorsement of what is a fundamentally flawed legislative model.

In our view, the Draft Bill has significant flaws that can only be addressed through a drafting process co-designed with the Tasmanian Aboriginal Community.

¹ Heritage Chairs of Australia and New Zealand, 'Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia' (September 2020) (**'Dhawura Ngilan'**).

² Joint Standing Committee on Northern Australia, 'A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge' (October 2021) (**'Juukan Gorge inquiry report'**).

Summary of recommendations

Recommendation 1: The Tasmanian Government urgently co-design a process with Tasmanian Aboriginal people and their chosen representative organisations to draft new Aboriginal heritage legislation.

Recommendation 2: In good faith, the Tasmanian Government commit to suspending any approvals under the 1975 Act that authorise harm to Aboriginal heritage until new legislation is in place.

Recommendation 3: The new Aboriginal heritage legislation provide the chosen representatives of the Tasmanian Aboriginal Community with ultimate decision-making power for the protection and management of their cultural heritage.

Recommendation 4: The new Act specify that members of the Aboriginal Heritage Council are chosen by the Tasmanian Aboriginal Community.

Recommendation 5: The new Act include a requirement that the Aboriginal Heritage Council consult with the Tasmanian Aboriginal Community.

Recommendation 6: The Tasmanian Government adequately resource the Aboriginal Heritage Council to conduct a systematic survey of Aboriginal heritage in Tasmania.

Recommendation 7: The objects and principles:

- a. refer to and reflect the United Nations Declaration of the Rights of Indigenous Peoples;
- b. recognise that Tasmanian Aboriginal people are the ultimate arbiters of the management of the cultural heritage aspects any proposal that will affect that heritage (including by referring to Tasmanian Aboriginal people/heritage and excluding the term 'primary/primarily' that appears in Draft Bill ss 3(a)–(b) and 8);
- c. affirm that Tasmanian Aboriginal heritage is created by and belongs to the Tasmanian Aboriginal Community (noting that the language used, whether custodianship, ownership or another term, must be chosen by the Tasmanian Aboriginal Community);
- d. clearly recognise that it is an object of the Act to support the living connection between Tasmanian Aboriginal people today, their ancestors and their lands;
- e. clearly state that the Act is to provide for the protection and management of Aboriginal heritage in Lutruwita (Tasmania) in ways that respect the rights, knowledge and cultural practices of Tasmanian Aboriginal people;
- f. outline the mechanisms for protecting Aboriginal heritage, including the Register of Aboriginal Heritage, assessment of activities that have the potential to impact Aboriginal heritage and agreement-making; and
- g. include a definition of intangible heritage and clearly describe how the Act deals with it.

Recommendation 8: The new Act use appropriate language for referring to Tasmanian Aboriginal people, as determined by the Tasmanian Aboriginal Community.

Recommendation 9: The definitions in the new Act clearly reflect the principle that Aboriginal heritage is protected whether known or registered (see Draft Bill s 27(2)).

Recommendation 10: The definition of ‘area’ in the new Act specifically include Tasmanian coastal waters.

Recommendation 11: The new Act include clear pathways for intangible heritage to be recorded on the Register of Aboriginal Heritage.

Recommendation 12: The Tasmanian Government engage with the Tasmanian Aboriginal Community to ensure the new Act appropriately recognises and protects cultural landscapes, including in relation to existing lawful access and use.

Recommendation 13: The new Act include a scheme for the repatriation of Aboriginal human remains and Aboriginal heritage.

Recommendation 14: The new Act include a section outlining the Register of Aboriginal Heritage’s purpose, access and use.

Recommendation 15: The new Act empower the Aboriginal Heritage Council to determine nominations and make entries into the Register of Aboriginal Heritage on its own initiative.

Recommendation 16: The Aboriginal Heritage Council be responsible for determining the access arrangements for the Register of Aboriginal Heritage.

Recommendation 17: The new Act give the Aboriginal Heritage Council the power to veto activities that would have an unacceptable impact on Aboriginal heritage.

Recommendation 18: A failure of the Aboriginal Heritage Council to determine an Aboriginal heritage permit application within the requisite period be deemed a refusal of the permit under the new Act.

Recommendation 19: The statutory presumption restricting the Aboriginal Heritage Council’s powers in relation to the transfer of permits be removed in the new Act.

Recommendation 20: The Aboriginal Heritage Council is empowered to decide whether to approve or refuse to approve a management plan, rather than make agreement – including to decide the level of acceptable harm to Aboriginal heritage, if any.

Recommendation 21: The Minister have no broader discretion or greater powers than the Aboriginal Heritage Council in deciding whether to approve a management plan.

Recommendation 22: The avenue of Ministerial approval for management plans be available only where the Aboriginal Heritage Council chooses not to consider an application.

Recommendation 23: The Tasmanian Government co-design the thresholds for when a permit or management plan is required with the Aboriginal Heritage Council.

Recommendation 24: The Aboriginal Heritage Council is empowered to issue stop, protection and audit orders. In the alternative, the Minister is required to comply with a request or recommendation of the Aboriginal Heritage Council for stop, protection and audit orders.

Recommendation 25: The Aboriginal Heritage Council be given the same powers as the Secretary and authorised officers to issue interim stop orders.

Recommendation 26: A dispute resolution mechanism is included in the new Act, giving the Aboriginal Heritage Council the power to determine any disputes about the appropriate management of Aboriginal heritage.

Recommendation 27: The new Act not contain exemptions from the operation of the Act, and instead give the Aboriginal Heritage Council the power to determine the circumstances where an exemption is appropriate. This includes omitting clauses that exempt activities:

- a. from requiring a permit (Draft Bill ss 40(2)(a)(ii), (c)(iii) and (d)(ii)); and
- b. that disturb ground from requiring a permit or management plan (Draft Bill ss 40(2)(d), 55(2)(b)).

Recommendation 28: All core provisions required for the new scheme be included in the new Act, with matters to be prescribed in regulations limited to genuinely operational detail. This includes omitting regulation-making powers from the new Act that would allow:

- a. exemptions from the operation of the Act or any of its provisions (Draft Bill s 130(2)(c));
- b. for certain land activities to be exempt from the application of the Act (Draft Bill s 54(2)(b));
- c. the meaning of harm to be altered (Draft Bill ss 13(2)(c)-(d)).

Recommendation 29: The new Act provide for the Aboriginal Heritage Council to have a genuine role in co-designing regulations under the Act.

Recommendation 30: The new Act explicitly state that scope to appeal decisions made by the Council is limited to procedural or legal errors, and that assessment by the Aboriginal Heritage Council of the heritage significance of Aboriginal cultural heritage is not subject to appeal.

Recommendation 31: The Tasmanian Government resource the Tasmanian Civil and Administrative Tribunal to recruit and develop the necessary cultural competency to support informed planning decisions, and expand the statutory list of sessional members with specific expertise in Aboriginal cultural heritage.

Recommendation 32: The new Act provide appropriate avenues for Tasmanian Aboriginal people to appeal against the merits of decisions authorising the destruction of Aboriginal heritage where those decisions are made by a person other than a representative of the Tasmanian Aboriginal Community.

Recommendation 33: The new Act provide for the review of any decisions authorising works relating to Aboriginal heritage where new information comes to light that may have affected a decision to approve a permit or management plan, or there has been a substantial change in circumstances not foreseen at the time of the original decision.

Recommendation 34: The new Act include simplified scaled offences with reference to the *Aboriginal Heritage Act 2006* (Vic) model.

Recommendation 35: The new Act include an offence to use Register of Aboriginal Heritage information for prohibited purposes.

Recommendation 36: The definition of harm in the new Act not include reference to specific intent, and not allow for acts or omissions to be carved out via regulation.

Recommendation 37: There be no defence for harm caused by action taken for the purposes of an application for a permit or the preparation of a management plan in the new Act.

Recommendation 38: All defences to ‘harm’ offences be provided directly in the new Act with no powers to prescribe these in regulations, Ministerial guidelines, codes, standards or otherwise.

Recommendation 39: The new Act make compliance powers available to the Aboriginal Heritage Council, with appropriate resourcing.

Recommendation 40: The new Act provide civil enforcement opportunities for Tasmanian Aboriginal people in the event that the enforcement action of regulatory authorities is ineffective.

Recommendation 41: The new Act give the Aboriginal Heritage Council and Minister the power to issue orders requiring individuals/organisations to take action to repair damage to Aboriginal heritage.

Recommendation 42: The new Act include restorative justice approaches where Aboriginal heritage is harmed, including to enable a sentencing court to make orders for repair or restoration of Aboriginal heritage.

Recommendation 43: The Tasmanian Government introduce measures to require early consideration of potential Aboriginal heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the *Land Use Planning and Approvals Act 1993*.

Recommendation 44: The new Act be fully integrated with the Resource Management and Planning System in a way that ensures Aboriginal cultural heritage is the first consideration in planning approvals and relevant to decisions made under the *Land Use Planning and Approvals Act 1993* and other RMPS legislation.

Recommendation 45: The Resource Management and Planning System objectives are amended to acknowledge Tasmanian Aboriginal people and the objectives of providing for the United Nations Declaration of the Rights of Indigenous Peoples principles of self-determination and free, prior and informed consent concerning all decisions relating to Aboriginal heritage.

1. Introduction

1.1. EDO's expertise

EDO is a non-Indigenous community legal centre that works on behalf of First Nations peoples around Australia in their efforts to protect their Countries and cultural heritage from damage and destruction. In making this submission, EDO acknowledges that it cannot and does not speak on

behalf of First Nations peoples. We make the following comments as experts in planning and environmental law with experience in seeking to protect First Nations cultural heritage through the law.

We have worked on behalf of First Nations clients who have interacted with cultural heritage laws in many different ways – from litigation and engaging in other State/Territory law reform processes, through to broader First Nations-led environmental governance of on Country projects. EDO lawyers have assisted First Nations clients around Australia, including in Lutruwita (Tasmania), in their efforts to protect their cultural heritage from destruction. Our submission is based on this experience in working with laws designed to provide some level of protection to cultural heritage.

EDO has made three submissions about the 1975 Act and the proposed reforms to it:

- [EDO 2019 submission in response to the Review of the Aboriginal Heritage Act 1975](#) (**‘EDO 2019 Submission’**)
- [EDO 2022 submission on a new Aboriginal Cultural Heritage Protection Act](#) (**‘EDO 2022 Submission’**)
- [EDO 2024 submission responding to the update on a new Aboriginal Cultural Heritage Protection Act](#) (**‘EDO 2024 Submission’**)

EDO acknowledges that First Nations Laws/Lore should be respected in the same way that Western laws are respected. For First Nations, Country is sacred and spiritual, with Culture, Law, Lore, spirituality, social obligations and kinship all stemming from relationships to and with the land.

Out of respect for First Nations self-determination, EDO has provided key recommendations for Western law reform to empower First Nations to protect their Countries and cultural heritage. Our recommendations reflect Australia’s obligations under international law and provide respectful and effective protection of First Nations’ Countries and cultural heritage.

1.2. General comments on the Draft Bill and reform process

The Draft Bill dispenses with outdated language and definitions and introduces contemporary management mechanisms for the protection and management of Aboriginal heritage. It contains positive elements that if adopted, with the amendments recommended in our submission, will promote the protection and management of Aboriginal heritage in Lutruwita (Tasmania). For example:

- Objects and principles section introduced;
- Removal of the term ‘relics’;
- Broader definition of Aboriginal heritage;
- Expanded role and powers of the Aboriginal Heritage Council;
- Contemporary mechanisms for the protection of Aboriginal heritage; and
- A compliance and enforcement regime which introduces stop, protection and audit orders.

There are, however, significant shortcomings in the Draft Bill. It falls far short of accepted best practice standards for cultural heritage protection in Australia and fails to reflect and respect the fundamental rights of Tasmanian Aboriginal people under international law. In some respects, the Bill weakens available protections under the 1975 Act. Despite the Government's statements that the delay in releasing the Draft Bill is the result of its 'careful and considered approach' to 'get the detail right',³ the drafting does not meet a standard appropriate for public consultation. It reflects the Government's flawed process leading up to its release, as set out in section 1.1 below.

On its face, aspects of the Draft Bill appear to bring Aboriginal heritage protection and management in Lutruwita (Tasmania) in line with other jurisdictions in Australia, like Victoria and the Northern Territory. On closer inspection, many of the improvements are undermined by broad carve outs and regulation-making powers. This approach to drafting means that the stated intentions of the Bill can be readily undone, or at least weakened, by the Government of the day and without an appropriate level of scrutiny.

This is especially disappointing and frustrating when considered within the context of the many reviews and consultations that the Tasmanian Aboriginal Community and broader public have invested significant time and effort in over decades. The most recent statutory review of the 1975 Act was in 2019-2020 and involved a discussion paper, extensive consultation period, and consultation feedback report. The process since then has been unnecessarily lengthy and involved considerable delay:

- In July 2021, the 2019-2020 Review Report and Tabling Report were released.
- In March 2022, the Consultation Paper on High-level Policy Directions ('**Consultation Paper**') was released, acknowledging the need for urgent reform.⁴ Public submissions were received on the Government's proposed directions on key elements of the new legislation.
- In March 2023, a Government Member of Parliament told Parliament that a draft exposure bill would be released that year.⁵
- In December 2023, the Government released an update, announcing that the exposure draft would be released in 2024.⁶
- In September 2025, an independent Member of Parliament tabled a motion, passed unanimously, highlighting the continued delay in releasing the exposure draft.⁷ Speaking to the motion, the Minister committed to releasing an exposure draft by 30 March 2025.⁸

³ Department of Premier and Cabinet, *Update on the new Aboriginal Cultural Heritage Protection Act* (December 2023) ('**Update**') 1.

⁴ Department of Natural Resources and Environment Tasmania, *A New Aboriginal Cultural Heritage Protection Act: Consultation Paper on High-level Policy Directions* (March 2022) ('**Consultation Paper**') 6.

⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 30 March 2023, 49 (Simon Wood).

⁶ Update (n 3) 2.

⁷ David Killick, 'Half-century-old Aboriginal heritage laws to be revamped', *The Mercury* (online, 25 September 2025).

⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 24 September 2025, 50 (Bridget Archer, Minister for Aboriginal Affairs).

There is no legitimate justification for the delays to reforming the 1975 Act. The Government's continued inaction has allowed for Aboriginal heritage in Lutruwita (Tasmania) to be fragmented, damaged and destroyed.

Our submission highlights key areas of concern:

- International law and best practice standards for cultural heritage legislation
- Protection of Aboriginal heritage
- Representative body
- Powers
- Exemptions to the operation of the Act
- Appeal rights
- Compliance and enforcement
- Integration with the Tasmanian Planning System

Overall, reform to the Aboriginal heritage legislation presents a significant opportunity to modernise the framework for protecting Aboriginal heritage in Lutruwita (Tasmania) and strengthen the statutory role of Tasmanian Aboriginal people in accordance with their rights and continuing connection to Country and Culture. This opportunity is yet to be realised.

The Tasmanian Government must urgently co-design a process with Tasmanian Aboriginal people and their chosen representative organisations to draft new legislation that empowers Tasmanian Aboriginal people to protect and manage their heritage. The Government should commit in good faith to suspend any approvals under the 1975 Act that authorise harm to Aboriginal heritage until the new legislation is in place.

2. International law and best practice standards for cultural heritage legislation

2.1. Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples is a comprehensive expression of the rights of indigenous Peoples under international law, including:

- the right to self-determination (art 3);
- the right to practise, maintain, protect and transmit their cultural traditions, customs and sites (arts 11, 12, 13);
- the requirement for free, prior and informed consent (arts 10, 19, 32); and
- the right to participate in decision-making (art 18).

UNDRIP places positive obligations on states to protect and uphold these rights, including through cultural heritage and planning laws. In particular, UNDRIP mandates that governments engage in genuine consultation and cooperation with First Nations peoples and their representative organisations to secure their Free, Prior, and Informed Consent ('**FPIC**') before enacting any laws or policies that may impact First Nations peoples, including before undertaking any activities or processes on their lands and waters.

Consistent with UNDRIP, Lutruwita's (Tasmania's) Aboriginal heritage legislation must be co-designed with the Tasmanian Aboriginal Community and provide for its chosen representatives to have ultimate decision-making power in relation to the protection and management of their cultural heritage. This has not been achieved to date. The Tasmanian government repeatedly affirmed its commitment to consult with the Tasmanian Aboriginal Community throughout the process of developing the Draft Bill.⁹ In September 2025, the Minister said the Government was 'not asking Tasmanian Aboriginal people to respond to [their] draft, we are asking them to help us shape the process itself.'¹⁰ Despite this, the process was not co-designed or inclusive of all Tasmanian Aboriginal people.

The Tasmanian Aboriginal Centre ('TAC'), established in the 1970s to represent the Tasmanian Aboriginal Community, was excluded from discussions prior to the release of the exposure draft.¹¹ Given this, the Government's comments that the Draft Bill reflects 'previous and recent engagement with Tasmanian Aboriginal people and submissions from the broader community in earlier consultation rounds' appear disingenuous.¹² The time spent has not resulted in a Draft Bill that meets the Government's commitments to centre the Tasmanian Aboriginal Community in its design or substance, or the obligation to obtain FPIC.

Australia's international obligations require states to allow and encourage First Nations peoples' participation in the design and implementation of laws and policies that affect them, including those related to cultural heritage.¹³ The Tasmanian Government must work with the Tasmanian Aboriginal Community to establish reform approach that meets their needs, and must deliver a Bill that centres their authority, experience and knowledge.

2.2. Best practice standards for cultural heritage laws

The Heritage Chairs of Australia and New Zealand released 'Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation' in 2020 to provide a roadmap for improving Aboriginal heritage management in Australia and 'facilitate Aboriginal and Torres Strait Islander cultural heritage legislation and policy across the country that is consistently of the highest standard'.¹⁴ In 2021, the findings of the inquiry into the destruction of Indigenous heritage sites at Juukan Gorge were released. The report assessed the effectiveness and adequacy of the cultural heritage laws in each Australian jurisdiction and made recommendations for improving

⁹ For example, Update (n 3); Department of Natural Resources and Environment Tasmania, 'Preparing new Aboriginal cultural heritage legislation', (Webpage, 2026).

¹⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 24 September 2025, 49 (Bridget Archer, Minister for Aboriginal Affairs).

¹¹ David Killick, 'Shut out of new heritage laws', *The Mercury* (Hobart, 16 March 2026) 4.

¹² Bridget Archer, '[New legislation to deliver stronger protections for Aboriginal heritage](#)' (Media Release, 31 March 2026).

¹³ Committee on Economic, Social and Cultural Rights, *General Comment No.21: Right of Everyone to Take Part in Cultural Life (Art 151(a) of the International Covenant on Economic, Social and Cultural Rights (Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples)*, 43rd sess, UN Doc E/C.12/GC/21 (12 December 2009) [55(e)].

¹⁴ Dhawura Ngilan (n 1) 15.

these laws to guarantee the protection of Aboriginal heritage.¹⁵ The Draft Bill should be measured against Dhawura Ngilan and the findings of the Juukan Gorge inquiry.

Dhawura Ngilan Best Practice Standard 3 relates to the incorporation of the principle of self-determination in the management of Indigenous cultural heritage ('**ICH**'). It states that the principle 'requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage'.¹⁶

In some respects, the Draft Bill makes improvements to the 1975 Act. However, it falls far short of rights and principles of UNDRIP and Dhawura Ngilan, and does not incorporate all of the Juukan Gorge inquiry recommendations relevant to Lutruwita (Tasmania). In our submission, we make recommendations aimed at addressing these shortcomings in the Draft Bill.

Recommendation 1: The Tasmanian Government urgently co-design a process with Tasmanian Aboriginal people and their chosen representative organisations to draft new Aboriginal heritage legislation.

Recommendation 2: In good faith, the Tasmanian Government commit to suspending any approvals under the 1975 Act that authorise harm to Aboriginal heritage until new legislation is in place.

Recommendation 3: The new Aboriginal heritage legislation provide the chosen representatives of the Tasmanian Aboriginal Community with ultimate decision-making power for the protection and management of their cultural heritage.

3. Representative body

The Draft Bill establishes a new statutory body, the Aboriginal Heritage Council ('**the Council**'), to replace the existing council. The Council will have an expanded role with both advisory and regulatory functions. It will continue to provide advice to the Minister, and has new powers in relation to Aboriginal heritage permits, management plans, and Aboriginal heritage agreements. The Council is the proposed vehicle through which the Tasmanian Aboriginal Community exercises control and decision-making in relation to its cultural heritage. It is therefore essential that the body represents the Tasmanian Aboriginal Community (as determined by that community) and is empowered to be the ultimate arbiter of the protection and management of Aboriginal heritage.

Best practice standards tell us that '[t]he identification of a legitimate 'representative organisation' capable of exercising an Indigenous community's rights and responsibilities with respect to their [cultural heritage] is a fundamental component in any comprehensive [cultural heritage] legislation. It is for the Indigenous community to decide who represents them, consistent

¹⁵ Juukan Gorge inquiry report (n 2) xix.

¹⁶ Dhawura Ngilan (n 1) 35.

with FPIC.¹⁷ Contrary to this, the Draft Bill proposes that the Council will be made up of 5–7 members (instead of 10 currently) that are broadly representative of Aboriginal people generally and all regions of the State.¹⁸ Under the Draft Bill, the Minister, rather than the Tasmanian Aboriginal Community, appoints members and must be satisfied those appointees are Aboriginal people.¹⁹

According to the Consultation Paper, the Government does not have a fixed view on how Council members are chosen.²⁰ We reiterate our previous comments that, in line with best practice standards and the right to self-determination, who represents Aboriginal people and interests is a matter for the Tasmanian Aboriginal Community to decide.²¹ This means the representative arrangements under the new legislation must be determined by the Tasmanian Aboriginal Community. At a minimum, Council membership should be drawn from nominations made by the Tasmanian Aboriginal Community. The election process in place for the Aboriginal Land Council of Tasmania,²² and the process for appointing the Aboriginal Areas Protection Authority under the *Northern Territory Aboriginal Sacred Sites Act*²³ are examples of alternative models that would significantly improve the Draft Bill, which as drafted leaves the process to be established by the Government in subsidiary documents.

It is also concerning that the current requirement for the Council to consult with Tasmanian Aboriginal people in the performance of its functions under the Act²⁴ has not been carried over to the Draft Bill. This should be reinstated. Empowering the Tasmanian Aboriginal Community to choose their representatives will also address the lack of accountability of the proposed Council to that community.

The introduction of explicit and expanded functions and powers of the Council is a positive step. However, the Council's powers are limited (as discussed in section 4 below), and are significantly undermined by exemptions, the power to make regulations (see section 5 below), and the power of the Minister.

Recommendation 4: The new Act specify that members of the Aboriginal Heritage Council are chosen by the Tasmanian Aboriginal Community.

Recommendation 5: The new Act include a requirement that the Aboriginal Heritage Council consult with the Tasmanian Aboriginal Community.

¹⁷ Ibid.

¹⁸ Aboriginal Heritage Bill 2026 – Consultation Draft (30 March 2026) (**'Draft Bill'**) s 17.

¹⁹ Ibid.

²⁰ Consultation Paper (n 4) 16.

²¹ EDO, 'Submission responding to the update on the new Aboriginal Cultural Heritage Protection Act (Tasmania)' (February 2024) (**'EDO 2024 Submission'**) 16.

²² *Aboriginal Lands Act 1995* (Tas) s 6.

²³ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (**'Northern Territory Act'**) s 6.

²⁴ *Aboriginal Heritage Act 1975* (Tas) s 3(6) (**'1975 Act'**).

4. Protection of Aboriginal heritage

The Draft Bill maintains a ‘prohibition of harm unless authorised’ model²⁵ for protecting and managing Aboriginal heritage. It introduces a system of authorisations that allows for approvals proportionate to the scale and risk the activity presents to Aboriginal heritage.²⁶ The thresholds for each approval will be prescribed in the regulations, but the government has indicated that permits will be required for activities with a low risk of harming Aboriginal heritage, and management plans for activities that pose a higher risk or raise complex issues for the avoidance or mitigation of harm.²⁷ The Draft Bill also introduces a range of other mechanisms for the protection of Aboriginal heritage, discussed below, including protection orders to replace the ‘protected site’ provisions of the 1975 Act,²⁸ and Aboriginal heritage agreements for arrangements to protect or manage Aboriginal heritage.²⁹

The new Act does not address the criticisms levelled at the 1975 Act for being a ‘permit-to-destroy’ model³⁰ that fails to protect Aboriginal heritage. These were made in the context of a series of high-profile approvals or proposals to harm Aboriginal heritage, such as: the development of Arm End³¹ (the only registered Aboriginal heritage place in Lutruwita (Tasmania))³²; the Pilitika/Robbins Island wind farm;³³ and the West Coast Off-Road Vehicle Strategy.³⁴ Each of these proposals are progressing despite strong opposition from the Tasmanian Aboriginal Heritage Council.³⁵

The Tasmanian Aboriginal Heritage Council has expressed concern that its advice is ‘consistently not sought at all, overridden, or not adequately legislated for on matters with cultural heritage impacts’.³⁶ In particular, the Council observed the:

- consistent prioritisation of other interests over the protection of Aboriginal heritage; and
- inadequate recognition of Aboriginal cultural values at a landscape scale in the current legislation and planning system.³⁷

For approval-based models to be effective, the legislation must contain a comprehensive definition of Aboriginal heritage and provide for an Aboriginal representative body with a strong remit and powers to ensure that Aboriginal heritage receives adequate consideration and

²⁵ Dhawura Ngilan (n 1) 33.

²⁶ Update (n 3) 4.

²⁷ Consultation Paper (n 4) 17.

²⁸ Aboriginal Heritage Bill 2026 Draft Exposure Bill Explanatory Clause Notes, Clause 33, 9.

²⁹ Ibid Clause 93, 22.

³⁰ [Letter from Tasmanian Aboriginal Centre to Bridget Archer, Minister for Aboriginal Affairs](#), 20 May 2026, 3.

³¹ Adam Holmes, ‘[Aboriginal relics ‘squashed’ by Mary Ann’s Island golf course developer, court hears](#)’, *ABC News* (News article, 15 May 2025).

³² Email from Aboriginal Heritage Tasmania to EDO, 17 June 2026.

³³ Adam Holmes, ‘[Robbins Island wind farm off Tasmania gets environmental approval after years of delays](#)’, *ABC News* (News article, 29 August 2025).

³⁴ Sandy Powell, ‘[Tasmanian government releases 4WD track management plan, as Aboriginal groups flag legal fight](#)’, *ABC News* (News article, 21 May 2025).

³⁵ Tasmanian Aboriginal Heritage Council, [Position Statements](#): West Coast Off-Road Vehicle Strategy (22 January 2026); Arm End Development (22 January 2026); Pilitika/Robbins Island wind farm (30 April 2026).

³⁶ Tasmanian Aboriginal Heritage Council, ‘[Year in Review 2022-2023](#)’.

³⁷ Ibid.

protection. In particular, a reformed model should provide First Nations with the power to veto activities that would have an unacceptable impact on Aboriginal heritage, as do the cultural heritage protection regimes in Victoria³⁸ and the Northern Territory.³⁹

Effective measures for protecting Aboriginal heritage also require comprehensive and accurate information. EDO reiterates our previous comments that:

- Simply requiring a proponent for a development or use proposal to first undertake a search of a statutory Aboriginal Heritage Register is not an effective measure for protecting Aboriginal cultural heritage.⁴⁰ There are significant variances in the quality of information contained in the existing non-statutory register and ‘its coverage of the State is highly uneven’.⁴¹
- Consistent with the Juukan Gorge inquiry recommendations,⁴² a systematic survey of Aboriginal heritage in Lutruwita (Tasmania) is required to complete the proposed register and support the early identification and consideration of Aboriginal heritage.⁴³ The Aboriginal Heritage Council should be resourced to undertake this work.

We comment on the framework for Aboriginal heritage protection under the Draft Bill in the following subsections.

4.1. Objects and principles

The introduction of objects and principles in the Draft Bill is welcome. Objects and principles provide a clear statement of what an Act is designed to achieve. They assist with interpreting the Act,⁴⁴ and underpin statutory decisions.⁴⁵ The proposed drafting states that the Act is to recognise and protect Aboriginal heritage, which is a positive step. However, amendments are required to strengthen the recognition and rights of Tasmanian Aboriginal people and more clearly set out the mechanisms adopted to achieve that objective.

The objects and principles do not refer to or reflect the rights of Tasmanian Aboriginal people or the obligations of the State set out in UNDRIP. The drafting in ss 3(a)–(c) and s 8 does not confer appropriate status to Tasmanian Aboriginal people. For example, they are referred to as ‘**primary** custodians’ (s 3(b)) ‘**primarily** in control of the management of’ Aboriginal heritage (s 3(c)) (emphasis added). This suggests Tasmanian Aboriginal people do not have full ownership and authority of their own cultural heritage. We recommend that ss 3(a) and (b) and s 8 refer specifically to Tasmanian Aboriginal people and heritage, not Aboriginal people and heritage

³⁸ *Aboriginal Heritage Act 2006* (Vic) (**‘Victorian Act’**) s 52.

³⁹ Northern Territory Act s 10(f).

⁴⁰ EDO, *Submission on a new Aboriginal Cultural Heritage Protection Act* (May 2022) (**‘EDO 2022 Submission’**) 19.

⁴¹ Department of Primary Industries, Parks, Water and Environment, *Review of the Aboriginal Heritage Act 1975: Review Report* (March 2021) 14.

⁴² Juukan Gorge inquiry report (n 2) 199.

⁴³ EDO 2022 Submission (n 40).

⁴⁴ *Acts Interpretation Act 1931* (Tas) s 8A.

⁴⁵ For example, Draft Bill ss 67(2), 74(1)(e), 97(3)(a)(i).

generally, and that the qualifiers that Aboriginal people are ‘primary’ custodians and ‘primarily’ in control are removed.

The Bill should also adopt language that accurately represents the relationship of Tasmanian Aboriginal people with their heritage, including that it is a living connection that continues to be nurtured for present and future generations. The Juukan Gorge inquiry report states that a ‘fundamental problem of the Tasmanian Aboriginal cultural heritage protection framework is that Aboriginal people are not acknowledged as owners of their own heritage. This omission undermines the capacity of the Aboriginal community of Tasmania to manage, protect or conserve their own cultural heritage’.⁴⁶ It is for the Tasmanian Aboriginal Community to determine how the relationship is stated, so our recommendations about amendments to the objects and principles in Parts 1 and 2 of the Draft Bill are mostly general in nature. They are intended to ensure the Act upholds their rights and best practice. Overall, the new legislation should:

- refer to and reflect UNDRIP;
- empower Tasmanian Aboriginal people to be self-determining and exercise their rights in relation to their heritage by recognising as a fundamental principle that Tasmanian Aboriginal people will be the ‘ultimate arbiter of the management of the [cultural heritage] aspects any proposal that will affect that heritage’;⁴⁷
- affirm that Tasmanian Aboriginal heritage is created by and belongs to the Tasmanian Aboriginal Community (noting that the language used, whether custodianship, ownership or another term, must be chosen by the Tasmanian Aboriginal Community);
- accurately describe the Tasmanian Aboriginal Community’s relationship to their cultural heritage and their rights and obligations to protect, maintain and transmit it, as determined by them;
- clearly state that the Act is to provide for the protection and management of Aboriginal heritage in Lutruwita (Tasmania) in ways that respect the rights, knowledge and cultural practices of Tasmanian Aboriginal people;⁴⁸
- expand the objects and principles to outline the mechanisms for protecting Aboriginal heritage including the Aboriginal Heritage Register (**‘Register’**), assessment of activities that have the potential to impact Aboriginal heritage and agreement-making;⁴⁹ and
- insert a definition of intangible heritage and clearly describe how the Act is intended to deal with it. See, for example, the *Aboriginal Heritage Act 2006* (Vic) (**‘Victorian Act’**), s 3(k).

4.2. Recognition of Connection to Country

In this part (Part 2), and throughout the Draft Bill, the general term ‘Aboriginal people’ is used, rather than a more specific term such as ‘Tasmanian Aboriginal people’. This does not seem to

⁴⁶ Juukan Gorge inquiry report (n 2) 133.

⁴⁷ Dhawura Ngilan (n 1) 35.

⁴⁸ For example, see Victorian Act s 3(a).

⁴⁹ For example, Victorian Act ss 3(f)-(k).

reflect the unique relationship Tasmanian Aboriginal people have with their Country. We recommend the Tasmanian Aboriginal Community decide how they wish to be referred to.

4.3. Definitions

The Draft Bill provides a broader and updated definition of Aboriginal heritage. The use of the outdated term ‘relic’ has been replaced with a new definition that covers objects, places, sites, Aboriginal human remains and cultural landscapes.⁵⁰ This is a step towards recognising the unbroken, living connection between Tasmanian Aboriginal people and their cultural heritage. However, the definitions are unclear and do not include intangible heritage or a holistic definition of cultural landscapes.

The definition of Aboriginal heritage covers objects and places that are entered into the Register. Given that Aboriginal heritage is protected whether it is registered or not,⁵¹ it is unclear what is intended by the reference to registration in ss 11(1)(a), (c) and (e) or why sites are treated differently (that is, not required to be registered). Adding further confusion, the definition of ‘Aboriginal heritage place’ is treated differently: registration is a requirement in the definition of that term, rather than in the definition of Aboriginal heritage at s 11(1)(b). It is also not clear whether this drafting impacts the level of protection provided by the Act. Aboriginal heritage places and cultural landscapes are ‘areas’ – defined to include both land and/or water. This definition should include Tasmanian coastal waters. We recommend clearer drafting that reflects the principle in s 27(2) that Aboriginal heritage is protected, whether known or registered.

The Tasmanian Government committed to formally recognising intangible Aboriginal heritage in the new Act,⁵² a position that is congruent with the Juukan Gorge inquiry report.⁵³ However, intangible heritage is not referred to in the objects and principles or definitions in the Draft Bill. Instead, intangible heritage appears in s 97(2)(c), which provides that the Register may include records of ‘intangible matters such as knowledge, traditions, practices and rituals that are significant to the Tasmanian Aboriginal people’. This affords no particular protection under the new Act, and the Government has instead proposed that intangible heritage be protected under Federal intellectual property laws.⁵⁴

At a minimum, intangible Aboriginal heritage must be comprehensively defined and recognised in the Act with pathways for it to be recorded on the Register, as appropriate. The inclusion of intangible heritage in the new Act is an important way to raise the public’s awareness of Aboriginal heritage to its fullest extent (an object of the Draft Bill – s 3(e)) and recognise that the tangible and intangible elements of Aboriginal heritage are inseparable.⁵⁵ This is particularly important for the adequate protection of cultural landscapes.

⁵⁰ Draft Bill s 11(1)(a).

⁵¹ Ibid s 27(2).

⁵² Consultation Paper (n 4) 10; Update (n 3) 3.

⁵³ Juukan Gorge inquiry report (n 2) 199.

⁵⁴ Consultation Paper (n 4) 12.

⁵⁵ Dhawura Ngilan (n 1) 16.

The recognition of cultural landscapes is a progressive step that requires further development to ensure the approval process and level of protection are appropriate. According to the Explanatory Clause Notes, cultural landscapes will be an instrument that requires approval of Parliament under s 121. It is difficult to assess whether this level of approval is warranted, but it seems likely that such a high threshold will limit the application and effectiveness of this provision. How cultural landscapes are recognised and protected is a matter that requires further engagement with the Tasmanian Aboriginal Community to determine the appropriate strategy for their management, including to give consideration to whether restrictions should be imposed on existing lawful access and use.⁵⁶ The Victorian Traditional Owner Cultural Landscapes Strategy may provide a useful framework for these discussions.⁵⁷

4.4. Repatriation

UNDRIP Article 12 recognises the right of indigenous peoples to the use and control of their ceremonial objects, the right to the repatriation of their human remains, and the obligation of states to enable these things ‘through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned’.

The Draft Bill does not provide for the repatriation of Tasmanian Aboriginal heritage or ancestral remains, despite the Government’s acknowledgment that repatriation and return of Aboriginal heritage must be addressed in the new laws in line with best practice.⁵⁸ The Draft Bill protects Aboriginal human remains by including them in the definition of Aboriginal heritage. Section 8 provides that Aboriginal heritage should be in the custody of Aboriginal people and should be protected by the State while in its custody (the drafting in ss 8(c)-(d) should be amended to replace ‘Aboriginal’ people and heritage with ‘Tasmanian Aboriginal’ people and heritage and ‘should’ with ‘must’). However, no provision is made for returning stolen ancestral remains and Aboriginal heritage to the custody of Tasmanian Aboriginal people, for example to a keeping place as suggested in the Government’s 2023 update on the new legislation.⁵⁹

The Draft Bill’s failure to provide for a repatriation scheme perpetuates the ongoing harm to the Tasmanian Aboriginal Community of colonialist and racist attitudes and processes which have treated ancestral remains as objects of study. The repatriation scheme introduced in Victoria should be considered, and consultation undertaken with the Tasmanian Aboriginal Community on required amendments to the Draft Bill to integrate a repatriation scheme into the new Act.

4.5. Register of Aboriginal Heritage

The Draft Bill formalises the Aboriginal Heritage Register under statute. The Register will contain information about Aboriginal heritage, Aboriginal heritage permits and agreements, management

⁵⁶ EDO 2022 Submission (n 40) 10.

⁵⁷ Federation of Victorian Traditional Owner Corporations, [Victorian Traditional Owner Cultural Landscapes Strategy](#) (August 2021).

⁵⁸ For example, *Aboriginal Heritage Act 1975* Review under s 23 Tabling Report: Government Commitment in Response to the Review Findings, 2.

⁵⁹ Update (n 3) 3.

plans, stop, protection and audit orders, and assessment information.⁶⁰ The Register may also include records of intangible heritage.⁶¹ The Register will hold all existing records of Aboriginal heritage⁶² and new additions as they are identified.⁶³ Registered information is intended to inform decision-making and support compliance and enforcement activities.⁶⁴

The Secretary, rather than the Council, controls the Register, including entry of records into it and decisions about who can access it. In addition, detail of how the Register will operate and for what purpose is largely left to be prescribed in regulations. These matters to be prescribed later include whether the Minister or Parliament should be required to approve an entry into the Register.⁶⁵ This approach vests a key element of control over Aboriginal heritage in the Executive and Legislature rather than in the Council, and prevents clarity, transparency and accountability. It does not reflect the approach taken to the Register of Tasmanian Heritage under the *Historic Cultural Heritage Act 1995* (Tas) (**'Historic Cultural Heritage Act'**) or by other jurisdictions like Victoria.

The purpose of the proposed Register is discussed in consultation documents but is not clear from the text of the Draft Bill.⁶⁶ It is encouraging that the Council will have a role in developing the policies and guidelines for the operation of the Register.⁶⁷ It is appropriate that operational and procedural details are contained in subsidiary documents that can easily evolve over time. However, the purpose of the Register and rules for accessing and using registered information should be outlined in the legislation to ensure it is used appropriately, consistently and transparently. This is imperative given the importance of preserving the information in the Register in perpetuity. The Historic Cultural Heritage Act outlines the purpose of the Register it establishes,⁶⁸ as does the Victorian Act.⁶⁹ We recommend that the Register is referred to in the objects of the new Act and a section is inserted outlining the Register's purpose, access and use.

The Government has stated that the Council will play a key role in overseeing the Register, including assessing nominations for listing.⁷⁰ Again, this role is not reflected in the Draft Bill or accompanied by decision-making powers. The Secretary of the Department keeps the Register⁷¹ and must be satisfied that an object or area is Aboriginal heritage for it to be entered in the Register.⁷² In keeping and performing their responsibilities in relation to the Register, the Secretary is to consider, among other things, the recommendations of the Council;⁷³ and the Council has a role in advising the Minister on the registration of Aboriginal heritage.⁷⁴ These

⁶⁰ Draft Bill s 97(1).

⁶¹ Ibid s 97(2)(c).

⁶² Ibid sch 4 s 7.

⁶³ Ibid s 26.

⁶⁴ Update (n 3) 8.

⁶⁵ Draft Bill s 97(4)(c).

⁶⁶ For example, Update (n 3) 8.

⁶⁷ DNRET, '[Aboriginal Heritage Act Frequently Asked Questions](#)', (Webpage, 30 March 2026).

⁶⁸ *Historic Cultural Heritage Act 1995* (Tas) (**'Historic Cultural Heritage Act'**) s 15.

⁶⁹ Victorian Act ss 3(k), 144A.

⁷⁰ Update (n 3) 8.

⁷¹ Draft Bill s 97(1).

⁷² Ibid ss 26(2), 97(3)(b).

⁷³ Ibid s 97(3)(a)(ii).

⁷⁴ Ibid s 18(1)(e)(i).

provisions go part way to recognising that it is for Aboriginal people to determine what objects and areas are part of their heritage, but do not grant the Council sufficient power.

We query the extent of control given to the Secretary over the Register, including the requirement that the Secretary, not the Council, must be satisfied that objects or areas are Aboriginal heritage before they are entered into the Register. This choice does not appear to be related to administrative processes or power, given the Tasmanian Heritage Council is empowered to both keep and register places or areas in the Tasmanian Heritage Register.⁷⁵ The Aboriginal Heritage Council must be similarly empowered to make entries into the Register on its own initiative. At a minimum, the Secretary must be required to seek and accept the views of the Council before entering objects or areas on the Register. The Council should also be made responsible for determining the settings for access to information in the Register expressed in both the new Act (as recommended above) and the guidelines.⁷⁶ As a basic principle, Tasmanian Aboriginal people and/or their representative bodies are entitled to access information in the Register about their heritage.⁷⁷

Recommendation 6: The Tasmanian Government adequately resource the Aboriginal Heritage Council to conduct a systematic survey of Aboriginal heritage in Lutruwita (Tasmania).

Recommendation 7: The objects and principles:

- a. refer to and reflect the United Nations Declaration of the Rights of Indigenous Peoples;
- b. recognise that Tasmanian Aboriginal people are the ultimate arbiters of the management of the cultural heritage aspects any proposal that will affect that heritage (including by referring to Tasmanian Aboriginal people/heritage and excluding the term ‘primary/primarily’ that appears in Draft Bill ss 3(a)–(b) and 8);
- c. affirm that Tasmanian Aboriginal heritage is created by and belongs to the Tasmanian Aboriginal Community (noting that the language used, whether custodianship, ownership or another term, must be chosen by the Tasmanian Aboriginal Community);
- d. clearly recognise that it is an object of the Act to support the living connection between Tasmanian Aboriginal people today, their ancestors and their lands;
- e. clearly state that the Act is to provide for the protection and management of Aboriginal heritage in Lutruwita (Tasmania) in ways that respect the rights, knowledge and cultural practices of Tasmanian Aboriginal people;
- f. outline the mechanisms for protecting Aboriginal heritage, including the Register of Aboriginal Heritage, assessment of activities that have the potential to impact Aboriginal heritage and agreement-making; and
- g. include a definition of intangible heritage and clearly describe how the Act deals with it.

⁷⁵ Historic Cultural Heritage Act ss 15(1), 16(1).

⁷⁶ For example, Victorian Act s 146(2).

⁷⁷ For example, Victorian Act s 146(1)(a).

- Recommendation 8:** The new Act use appropriate language for referring to Tasmanian Aboriginal people, as determined by the Tasmanian Aboriginal Community.
- Recommendation 9:** The definitions in the new Act clearly reflect the principle that Aboriginal heritage is protected whether known or registered (see Draft Bill s 27(2)).
- Recommendation 10:** The definition of ‘area’ in the new Act specifically include Tasmanian coastal waters.
- Recommendation 11:** The new Act include clear pathways for intangible heritage to be recorded on the Register of Aboriginal Heritage.
- Recommendation 12:** The Tasmanian Government engage with the Tasmanian Aboriginal Community to ensure the new Act appropriately recognises and protects cultural landscapes, including in relation to existing lawful access and use.
- Recommendation 13:** The new Act include a scheme for the repatriation of Aboriginal human remains and Aboriginal heritage.
- Recommendation 14:** The new Act include a section outlining the Register of Aboriginal Heritage’s purpose, access and use.
- Recommendation 15:** The new Act empower the Aboriginal Heritage Council to determine nominations and make entries into the Register of Aboriginal Heritage on its own initiative.
- Recommendation 16:** The Aboriginal Heritage Council be responsible for determining the access arrangements for the Register of Aboriginal Heritage.

5. Powers

Power is shared under the Draft Bill by the Minister, Secretary and the Council. Granting the Council statutory powers to determine permit applications, assess management plans and enter into Aboriginal heritage agreements is an important development. Nevertheless, the Council’s proposed powers are limited and substantially undermined by exemptions, the Executive’s power to make regulations, and Ministerial override powers. The Council is empowered to make decisions in relation to low risk, low impact activities, while the Minister retains ultimate decision-making authority in relation to major developments that have the greatest potential to impact cultural heritage. This falls far short of FPIC standards and the findings of the Juukan Gorge inquiry.⁷⁸

5.1. Permit applications

Proponents seeking to carry out an activity that ‘involves or is reasonably likely to involve harm to Aboriginal heritage’ are required to apply for a permit.⁷⁹ The Council decides permit applications,

⁷⁸ Juukan Gorge inquiry report (n 2) 199.

⁷⁹ Draft Bill s 41(a).

unless it fails to determine the application within 42 days.⁸⁰ In those cases, the Minister is empowered to determine the application if requested by the applicant, or to refer the application back to the Council.⁸¹ By contrast, the Victorian Act provides that a failure (of the approval body) to determine a cultural heritage permit application within the requisite period is a deemed refusal of the permit.⁸² We recommend that approach be adopted in the new Act, to strengthen the authority of the Council in determining permits. There is otherwise a significant risk of frequent Ministerial override of the Council's role, for example where the Council is not adequately resourced to process applications in a timely manner.

Section 50(3) obliges the Council to approve the transfer of permits unless certain circumstances apply. This does not reflect the need to obtain FPIC before every decision that has the potential to impact Aboriginal heritage. We recommend that this statutory presumption restricting the Council's powers be removed. The equivalent provision in the Victorian Act, for example, is a simpler approach that achieves this and should be considered.⁸³

5.2. Management plans

Management plans are required for activities that pose a serious risk of harm to Aboriginal heritage.⁸⁴ The Council can consider and reach agreement with the proponent about a management plan, with both parties required to 'make all reasonable efforts to reach agreement on the matters specified' for consideration.⁸⁵ This power is diluted, however, by the following factors.

First, the Council does not have the power to refuse to approve a management plan – only to reach agreement with the proponent. This inappropriately casts the Council's role as party to a negotiation about protection of Aboriginal heritage, rather than decision-maker. It is contrary to UNDRIP, including FPIC, the principles in Dhawura Ngilan, and the Juukan Gorge inquiry recommendations.⁸⁶ The Council should be empowered to decide whether to approve or refuse to approve a management plan, as it is for permits.

Second, the relevant considerations for the Council include 'whether the management plan provides for the relevant land activity to be carried out in a way that avoids, or minimises **as much as possible**, harm to Aboriginal heritage' (emphasis added).⁸⁷ This provision weighs in favour of the proponent with a presumption that some level of harm can be justified by the activity. This is

⁸⁰ Ibid ss 44(2) and 46 (referral by applicant to Minister).

⁸¹ Ibid s 46.

⁸² Victorian Act s 40(3E).

⁸³ Ibid s 41B.

⁸⁴ Draft Bill s 54(1).

⁸⁵ Ibid s 65(2)(b).

⁸⁶ Juukan Gorge inquiry report (n 2) 200.

⁸⁷ Draft Bill s 65(3)(a)(i).

not an acceptable basis for agreement: it should be for the Council to decide whether any level of harm to Aboriginal heritage is acceptable.⁸⁸

Third, the Council's role as decision-maker is effectively subject to a Ministerial override power. If the Council and the proponent do not agree on the matters specified in s 65(3), for example because the Council is not satisfied about the level of harm the activity poses to Aboriginal heritage, the proponent can apply to the Minister for approval of the management plan.⁸⁹ The Minister has broader discretion than the Council in deciding whether to approve a management plan, and can consider 'such other matters as the Minister considers appropriate'.⁹⁰ Unlike the Council, the Minister also has the power to apply conditions to a management plan, and to approve or refuse to approve.⁹¹ This is concerning, as it would allow the Minister to approve management plans the Council considers would have unacceptable impacts to Aboriginal heritage, based on the Minister's subjective assessment of what constitutes 'other appropriate matters'. There is nothing preventing such decisions being made, for example, on the basis of the pecuniary interests of a developer.

Proponents should not be given recourse to a separate decision-maker with broader powers after failing to satisfy the Council that Aboriginal heritage will be acceptably managed. EDO recommends that s 67(2)(g) is removed from the new legislation and that the Minister has the same powers as the Council. The avenue of Ministerial approval should only be available if the Council chooses not to consider a management application. This would be consistent with UNDRIP, Dhawura Ngilan and other jurisdictions in Australia, such as Victoria.⁹²

The Draft Bill provides for the issue of guidelines for the administration of the Act,⁹³ and for thresholds and processes for permits and management plans to be prescribed in regulations.⁹⁴ There is no safeguard that requires the materials to be prepared with the Council, or for recommendations of the Council to be implemented (and not just considered). In particular, the Council and the Tasmanian Aboriginal Community should play a determinative role in developing the tests for whether a permit or management plan is required.

The limitations and potential limitations on the powers of the Council created by exemptions and regulation-making powers are discussed in section 6 below.

⁸⁸ See Dhawura Ngilan (n 1) 36: 'consistent with the principles of UNDRIP, the ultimate decision regarding whether interference with [Indigenous cultural heritage ('ICH')] is acceptable or not, must rest with the affected Indigenous community. However, a jurisdiction's ICH regime can maximise the likelihood of consent to a development proposal being granted if the management regime within ICH legislation identifies interference with ICH as the last resort in regime that requires identification, recognition, conservation and protection as preferable approaches to the management of ICH'.

⁸⁹ Draft Bill s 66(1).

⁹⁰ Ibid s 67(2).

⁹¹ Ibid ss 67(1)(a), 67(7).

⁹² Under the *Aboriginal Heritage Act 2006* (Vic) Registered Aboriginal Parties (RAPs) approve or refuse management plans (s 63), and proponents may only apply to the Secretary for approval where the RAP does not elect to evaluate the plan (s 65(1)(b)(ii) or (iii)) or determine the application within the specified timeframe (s 65(1)(b)(iv)).

⁹³ Draft Bill ss 98(3), 120.

⁹⁴ Ibid ss 41(h), 54(1)(a).

5.3. Protection, stop and audit orders

The Council is not empowered to take action to protect Aboriginal heritage at risk of harm. The introduction of stop, protection and audit orders is encouraging; however, the Council does not have the power to issue these orders – only to be consulted by the Minister⁹⁵ and to request or recommend that the Minister make orders. It is not specified that the Minister is required to consider or agree to such requests or recommendations of the Council,⁹⁶ and the Minister can also vary or revoke stop and protection orders on their own initiative.⁹⁷ The Council should be empowered to issue stop, protection and audit orders. In the alternative, the Minister should be required to comply with a request or recommendation of the Council for stop, protection and audit orders.⁹⁸

The Council should also, at a minimum, be granted the same powers as the Secretary and authorised officers to issue interim stop orders.⁹⁹ This is appropriate given the Council's role as both heritage owners and experts with responsibility for protecting Aboriginal heritage on behalf of the Tasmanian Aboriginal Community. It is logical and essential that the Council has the same powers as the Tasmanian Heritage Council to step in and act quickly to prevent harm as it becomes aware of risks to Aboriginal heritage.¹⁰⁰

5.4. Dispute resolution

The Draft Bill does not specify a process for resolving disputes under the Act. We reiterate our previous comments that, consistent with the right to self-determination, the Council must ultimately determine any disputes about the appropriate management of Aboriginal heritage.¹⁰¹ We recommend that consideration is given to how disputes are handled under the Victorian Act.

5.5. Register of Aboriginal Heritage

We reiterate our comments above at subsection 4.5 that the Council is the appropriate body to determine nominations for registration and must be empowered to make entries into the Register on its own initiative.

Recommendation 17: The new Act give the Aboriginal Heritage Council the power to veto activities that would have an unacceptable impact on Aboriginal heritage.

Recommendation 18: A failure of the Aboriginal Heritage Council to determine an Aboriginal heritage permit application within the requisite period be deemed a refusal of the permit under the new Act.

⁹⁵ For example, Draft Bill ss 32(3).

⁹⁶ Draft Bill ss 34(2), 74(2)(b), 84(2)(b).

⁹⁷ Ibid ss 35(1)(a), 91(1)(a).

⁹⁸ For example, *Aboriginal Heritage Act 1988* (SA) s 13(2).

⁹⁹ Draft Bill ss 85, 86.

¹⁰⁰ *Historic Cultural Heritage Act* s 57(1).

¹⁰¹ EDO 2022 Submission (n 40) 17-18.

Recommendation 19: The statutory presumption restricting the Aboriginal Heritage Council's powers in relation to the transfer of permits be removed in the new Act.

Recommendation 20: The Aboriginal Heritage Council is empowered to decide whether to approve or refuse to approve a management plan, rather than make agreement – including to decide the level of acceptable harm to Aboriginal heritage, if any.

Recommendation 21: The Minister have no broader discretion or greater powers than the Aboriginal Heritage Council in deciding whether to approve a management plan.

Recommendation 22: The avenue of Ministerial approval for management plans be available only where the Aboriginal Heritage Council chooses not to consider an application.

Recommendation 23: The Tasmanian Government co-design the thresholds for when a permit or management plan is required with the Aboriginal Heritage Council.

Recommendation 24: The Aboriginal Heritage Council is empowered to issue stop, protection and audit orders. In the alternative, the Minister is required to comply with a request or recommendation of the Aboriginal Heritage Council for stop, protection and audit orders.

Recommendation 25: The Aboriginal Heritage Council be given the same powers as the Secretary and authorised officers to issue interim stop orders.

Recommendation 26: A dispute resolution mechanism is included in the new Act, giving the Aboriginal Heritage Council the power to determine any disputes about the appropriate management of Aboriginal heritage.

6. Exemptions to the operation of the Act

The Draft Bill includes provisions that exempt certain activities from the operation of the Act, as well as broad powers that allow for further exemptions to be made by regulation. If not appropriately restricted, the exemptions and regulation-making powers have the potential to undermine Aboriginal heritage protection and the authority and powers of the Council. While we acknowledge the Government's intention to share Regulatory Impact Statements for consultation before the Bill is introduced to Parliament, we are concerned that the Government's factsheet on the Aboriginal Heritage Regulations¹⁰² underplays the significant role and potential impact of regulation-making powers in the Bill, which go well beyond 'operational detail and administrative details'.¹⁰³

EDO is concerned that the key provisions of the statutory scheme the Draft Bill seeks to implement are undermined by the number and breadth of regulation-making powers in the Draft Bill. The Draft Bill is replete with 'Henry VIII clauses' which allow for the making of regulations which could significantly undermine the protection of Aboriginal heritage. The Bill allows key matters to be

¹⁰² DNRET, '[Aboriginal Heritage Regulations Factsheet](#)' (March 2026).

¹⁰³ Ibid 1.

provided for in subsequent regulations rather than in the substantive provisions of the Act. These clauses circumvent the ordinary process of parliamentary scrutiny and debate that applies to legislation. Although regulations are disallowable instruments,¹⁰⁴ they are subject to less scrutiny and consultation than primary legislation. A preferable, clearer and more transparent approach would be to include all core provisions required of the new scheme in the Bill itself (as has occurred in the Victoria Cultural Heritage reforms) and to limit regulations to genuinely operational detail.

Instead, the Draft Bill provides for exemptions to be prescribed in regulations: see sections 6, 13, 15, 28, 40, 54, 97 and 98. We outline key exemptions as follows.

Non-application of the Act (s 6). This section allows for the regulations to exempt certain land activities (development or use of an area¹⁰⁵) from the application of the Act. Land activities that will not have ‘more than a temporary impact’¹⁰⁶ on Aboriginal heritage may be exempt from requiring approval under the Act. The broad scope of this provision cannot be justified, especially given that the construction, maintenance and replacement of service infrastructure is already exempt from the operation of the Act.¹⁰⁷ We recommend that s 6(1)(a) is deleted. We further recommend that the phrase ‘or other thing prescribed to be service infrastructure’ is deleted from s 6(3)(b).

Meaning of harm (s 13). This section includes a significant carve out that provides for acts or omissions to be prescribed in the regulations as not being an act or omission that falls within the definition of harm. This is unnecessary and has the potential to significantly weaken a core element of the Act. We recommend that proposed subsections 13(2)(c)–(d) be deleted. We expand on this aspect of the draft Bill further at 8.1 below.

Certain activities require permits (s 40). The exemptions in s 40(2) are too broad:

- Section 40(2)(a)(ii) exempts a person from holding a permit where an activity is not intended or likely to harm Aboriginal heritage. This does not provide adequate protection to Aboriginal heritage, particularly where a person does not have the expertise to identify the likelihood or severity of the risk to Aboriginal heritage. This provision should be removed from this subsection and s 40(2)(d)(ii).
- Section 40(2)(c)(i) provides an exemption for activities that are a ‘necessary and proportionate response to an actual or impending emergency that threatens human life or property or threatens to injure any person’. Given this broad exemption, the further exemption in (c)(iii) for activities in response to ‘prescribed circumstances’ is too broad and should be removed.
- Section 40(2)(d) provides an exemption for activities that disturb ground: that has been disturbed in a similar manner previously; and in a manner that is not intended or likely to

¹⁰⁴ *Acts Interpretation Act 1931* (Tas) s 47.

¹⁰⁵ Draft Bill s 11.

¹⁰⁶ *Ibid* s 6(2)(a)(ii).

¹⁰⁷ *Ibid* s 6(1)(b)(ii).

harm Aboriginal heritage. We reiterate our previous comments disagreeing with the apparent premise of this proposal that once disturbed, places with Aboriginal cultural heritage will no longer hold any Aboriginal cultural heritage significance. This is partly because it assumes all Aboriginal cultural heritage is of a tangible form and capable of being damaged or destroyed. EDO therefore recommends that prior disturbance not be a circumstance that enables exemption from the requirement for a permit or management plan (s 54), and that the power be given to the Council to determine the circumstances where an exemption is appropriate.¹⁰⁸

Certain land activities require management plans (ss 54 and 55). Leaving the scope of activities requiring management plans to the regulations or the discretion of the Minister makes it an uncertain and potentially weak mechanism. Further, the role of the Council in administering management plans is significantly undermined by the broad power to exempt, via regulations, classes of land activities (s 54(2)(b)), and by the default presumption in favour of granting exemptions for prior ground disturbance (s 55(2)(b)). EDO recommends the power to exempt activities via regulation is removed and the default presumption in s 55(2)(b) is replaced with a list of criteria to guide decisions of the Council.

Regulations (s 130). Proposed s 130 provides broad Executive power to make regulations extending to whether or not there is a right to appeal decisions made under the regulations; and significantly, exemptions from the application of the Act itself. Section 130(2)(c) states that regulations ‘may provide for exemptions, in whole or in part, from the operation of this Act or any of its provisions’. This is particularly concerning. EDO strongly recommends that this section be removed. At a minimum, the Draft Bill should provide for the Council to have a genuine role in co-designing regulations under the Act. To retain the regulation-making power in its current form would be contrary to the Government’s commitment to ensuring Aboriginal authority under the Act, and the Tasmanian Aboriginal Community’s right to FPIC.

There are also a number of exemptions in the offence and defence provisions, which are discussed in section 8 below.

Recommendation 27: The new Act not contain exemptions from the operation of the Act, and instead give the Aboriginal Heritage Council the power to determine the circumstances where an exemption is appropriate. This includes omitting clauses that exempt activities:

- a. from requiring a permit (Draft Bill ss 40(2)(a)(ii), (c)(iii) and (d)(ii)); and
- b. that disturb ground from requiring a permit or management plan (Draft Bill ss 40(2)(d), 55(2)(b)).

Recommendation 28: All core provisions required for the new scheme be included in the new Act, with matters to be prescribed in regulations limited to genuinely operational detail. This includes omitting regulation-making powers from the new Act that would allow:

- a. exemptions from the operation of the Act or any of its provisions (Draft Bill s 130(2)(c));

¹⁰⁸ EDO 2024 Submission (n 21) 13.

- b. for certain land activities to be exempt from the application of the Act (Draft Bill s 54(2)(b));
- c. the meaning of harm to be altered (Draft Bill ss 13(2)(c)-(d)).

Recommendation 29: The new Act provide for the Aboriginal Heritage Council to have a genuine role in co-designing regulations under the Act.

7. Appeal rights

The Draft Bill introduces explicit rights to appeal decisions made under the Act to bring it in line with other legislation in the Resource Management and Planning System ('**RMPS**'). Under s 129, appeals of administrative decisions, as specified in the Act or prescribed in regulations, are to the Tasmanian Civil and Administrative Tribunal ('**TASCAT**'). Subject to the qualifications below, EDO supports such appeal rights, and recommends their scope be clarified.

There is a broad availability to appeal decisions, including most decisions within the remit of the Council. To provide certainty, we recommend that the scope to appeal decisions made by the Council be limited to procedural or legal errors. This is reflected in the Explanatory Clause Notes, which state that appeals will be on 'process and natural justice grounds, rather than seeking to have TASCAT reconsider the decision afresh, on its merits'.¹⁰⁹ It is important that this is reflected in the text of the new Act, rather than the regulations. We are supportive of the proposal barring appeals disputing an assessment by the Council of the heritage significance of Aboriginal cultural heritage, which should be made explicit in the new Act.¹¹⁰

EDO recommends that consideration be given to whether the *Tasmanian Administrative and Civil Appeals Tribunal Act 2020* (Tas) should be amended to explicitly require Aboriginal representation and Aboriginal heritage expertise on TASCAT to hear appeals under the new Act,¹¹¹ or if a First Nations-led merits review body should be established to undertake this function in its place. Regardless, we recommend that the Tasmanian Government provide resourcing for TASCAT to recruit and develop the necessary cultural competency to support informed planning decisions, and expand the statutory list of sessional members with specific expertise in Aboriginal cultural heritage.

The Draft Bill does not separately deal with decisions made by the Council or others. We reiterate our earlier recommendation that if a decision-maker other than the Council is permitted to authorise the destruction of Aboriginal cultural heritage, all Tasmanian Aboriginal people must have standing to appeal against the merits of decisions.¹¹² That is, appeals should not be limited to the formal parties to the permit or management plan. In addition, the Act should provide an opportunity for the review of any decisions authorising works relating to Aboriginal heritage where new information comes to light that may have affected a decision to grant a permit or there has

¹⁰⁹ Explanatory Clause Notes s 129, 28.

¹¹⁰ Consultation Paper (n 4) 23.

¹¹¹ Including, for example, by amending Part 8, s 4(1)(b).

¹¹² EDO 2022 (n 40) 22.

been a substantial change in circumstances not foreseen at the time of the original decision.¹¹³

Recommendation 30: The new Act explicitly state that scope to appeal decisions made by the Council is limited to procedural or legal errors, and that assessment by the Aboriginal Heritage Council of the heritage significance of Aboriginal cultural heritage is not subject to appeal.

Recommendation 31: The Tasmanian Government resource the Tasmanian Civil and Administrative Tribunal to recruit and develop the necessary cultural competency to support informed planning decisions, and expand the statutory list of sessional members with specific expertise in Aboriginal cultural heritage.

Recommendation 32: The new Act provide appropriate avenues for Tasmanian Aboriginal people to appeal against the merits of decisions authorising the destruction of Aboriginal heritage where those decisions are made by a person other than a representative of the Tasmanian Aboriginal Community.

Recommendation 33: The new Act provide for the review of any decisions authorising works relating to Aboriginal heritage where new information comes to light that may have affected a decision to approve a permit or management plan, or there has been a substantial change in circumstances not foreseen at the time of the original decision.

8. Compliance and enforcement

The Draft Bill purports to strengthen compliance and enforcement by establishing a framework with clear compliance obligations and enforcement powers, including:

- new lower-level offences related to actions ‘likely to harm’ Aboriginal heritage;¹¹⁴
- broader enforcement powers through an audit system,¹¹⁵ stop orders (for preventing or stopping harm in urgent cases)¹¹⁶ and protection orders (for sensitive or significant Aboriginal heritage);¹¹⁷ and
- penalties for continuing offences.¹¹⁸

We support these provisions in principle. We also welcome the introduction of an infringement notice scheme and a scaled penalty regime to reflect the subjective intent of the offender.¹¹⁹ We consider that the Victorian model of scaled offences provides a clearer and stronger model and recommend that proposed s 28 be redrafted to reflect the Victorian approach.¹²⁰ We also

¹¹³ Ibid.

¹¹⁴ Draft Bill s 28.

¹¹⁵ Ibid Part 6, Division 5.

¹¹⁶ Ibid Part 7.

¹¹⁷ Ibid Part 6, Division 2.

¹¹⁸ See, for example, *ibid* s 28.

¹¹⁹ Draft Bill s 28.

¹²⁰ See Victorian Act s 27.

recommend that the new Act include an offence to use Register information for prohibited purposes, similar to that in the Victorian Act.¹²¹

Despite the proposed improvements, the core compliance and deterrence mechanism under the Draft Bill – the offence provision in s 28 – is, in our view, drafted in a way that will make successful prosecutions for harm to Aboriginal heritage unlikely. Unless the issues set out below are addressed via changes to proposed s 13 (the definition of harm) and s 28, the compliance framework will be weaker than that under the 1975 Act.

8.1. The definition of harm

The key offence provision in proposed s 28 requires proof (according to the criminal standard) of *harm* to Aboriginal heritage. Harm is defined:

- by one definition to include specific intent to harm (s 13(1)(c)).
- to exclude acts/omissions, or classes of acts/omissions which are prescribed by (as yet unpublished) regulations (ss 13(2)(c)) & (d)).

We are not clear on why specific intent is included in the definition of harm, when s 28 separately sets out requirements for state of mind to prove an offence. By contrast, neither the 1975 Act¹²² nor the corresponding definition in the Victorian Act¹²³ include an element of subjective intention and carve-outs within the definition of harm.

We recommend that the definition of harm in proposed s 13 be simplified and limited to the elements set out in ss 13(1)(a)–(b). Proposed subsections 13(c) and (d) should be deleted.

8.2. Defences

Further, the effectiveness of s 28 is significantly undermined by a lengthy list of available defences, including broadly drafted defences. We note that the suite of available defences in the Draft Bill is significantly wider than under the 1975 Act.¹²⁴

Of particular concern are the following proposed defences in circumstances where:¹²⁵

- **harm to Aboriginal heritage is caused in the context of an application for a permit, or the preparation of a management plan, including an associated Aboriginal heritage assessment** (s 28(4)(b)(i)). This defence undermines the scheme of the Act which promotes prevention and due diligence; it effectively reintroduces a defence of ignorance.
- **the action which harms Aboriginal heritage was taken in accordance with regulations** (s 28(4)(d)). This means that a regulation could provide for a new defence. Offence elements and defences should be clear on the face of the legislation, so that the public is

¹²¹ Ibid s 147A.

¹²² 1975 Act s 9.

¹²³ Victorian Act s 4: ***harm***, in relation to Aboriginal cultural heritage, includes damage, deface, desecrate, destroy, disturb, injure or interfere with.

¹²⁴ 1975 Act ss 20 and 21.

¹²⁵ Draft Bill s 28(4).

aware of the applicable law. We refer to our concerns about regarding Executive regulation-making powers above.

- to similar effect, **the action which harms Aboriginal heritage was taken in accordance with the Ministerial guidelines; or the codes, standards, guidelines or documents adopted under the regulations** (ss 28(4)(d)(ii) and (iii)). These extraordinarily broad and unjustified carve-outs mean that, for example, Ministerial guidelines could ultimately undermine the integrity of the offence provisions – and the very heart of the Act’s protection regime. We note that Ministerial guidelines are not subject to Parliamentary oversight.
- **the action was a necessary and proportionate response to prescribed circumstances that existed at the time at which the action was taken** (s 28(e)(iii)). This provision would enable the Government of the day to introduce a regulation that retrospectively exonerates otherwise criminal acts harming Aboriginal heritage.

We recommend that the defences in proposed ss 28(4)–(5) be significantly narrowed. At a minimum, proposed defences which rely on regulations, Ministerial guidelines, codes, standards or similar should be removed from the Draft Bill. Such matters do not fall in the category of administrative or operational details that are appropriately left to delegated legislation or administrative guidelines.

Together, proposed ss 13 and 28 significantly weaken the key deterrent mechanisms designed to protect Aboriginal heritage in Lutruwita (Tasmania). In our view, if they are retained in their present form, successful prosecutions for harm to Aboriginal cultural heritage will be unlikely.

8.3. Enforcement powers

The Draft Bill proposes that the Secretary appoint authorised officers under the Act, with the powers prescribed in Part 10, Division 2. There is no role for the Council in this process, or indeed any role in compliance, such as a scheme for Aboriginal Heritage officers.

EDO submits that the compliance powers should be available to the Council, with appropriate resourcing.¹²⁶ Further, civil enforcement opportunities should be provided for Tasmanian Aboriginal people in the event that the enforcement action of regulatory authorities is ineffective.¹²⁷

8.4. Stop orders

The Draft Bill makes provision for activities harming or likely to harm Aboriginal heritage to be halted (Part 7). We support in principle the stop order provisions.

However, crucially, it does not provide for the remediation of harm to Aboriginal heritage that has already occurred. This is key to deterring harm. Contrastingly, the Historic Cultural Heritage Act empowers the Tasmanian Heritage Council to issue a notice requiring owners to take action to

¹²⁶ EDO 2022 Submission (n 40) 23.

¹²⁷ Ibid.

repair damage, as well as stop works.¹²⁸ We recommend that a similar provision be included in the new Act.

8.5. **Sentencing**

The new Act must also keep in step with best practice by including restorative justice principles in sentencing provisions that allow for compensation to be paid to the affected Aboriginal community. This is the case in Victoria, where the legislation empowers courts to order a person convicted of an offence under the Act to pay to the state, Aboriginal Heritage Council or local Aboriginal organisation the cost of any repair or restoration of Aboriginal heritage and take steps to restore land.¹²⁹

Recommendation 34: The new Act include simplified scaled offences with reference to the *Aboriginal Heritage Act 2006* (Vic) model.

Recommendation 35: The new Act include an offence to use Register of Aboriginal Heritage information for prohibited purposes.

Recommendation 36: The definition of harm in the new Act not include reference to specific intent, and not allow for acts or omissions to be carved out via regulation.

Recommendation 37: There be no defence for harm caused by action taken for the purposes of an application for a permit or the preparation of a management plan in the new Act.

Recommendation 38: All defences to ‘harm’ offences be provided directly in the new Act with no powers to prescribe these in regulations, Ministerial guidelines, codes, standards or otherwise.

Recommendation 39: The new Act make compliance powers available to the Aboriginal Heritage Council, with appropriate resourcing.

Recommendation 40: The new Act provide civil enforcement opportunities for Tasmanian Aboriginal people in the event that the enforcement action of regulatory authorities is ineffective.

Recommendation 41: The new Act give the Aboriginal Heritage Council and Minister the power to issue orders requiring individuals/organisations to take action to repair damage to Aboriginal heritage.

Recommendation 42: The new Act include restorative justice approaches where Aboriginal heritage is harmed, including to enable a sentencing court to make orders for repair or restoration of Aboriginal heritage.

¹²⁸ Historic Cultural Heritage Act s 60(1)(a).

¹²⁹ Juukan Gorge inquiry report (n 2) 200; Victorian Act s 30.

9. Integration with the Tasmanian Planning System

Dhawura Ngilan's Best Practice Standard 4 on process emphasises the importance of ensuring Indigenous cultural heritage 'is included as a first component in [...] development proposal approval regimes such as town planning, environmental assessment and National Heritage considerations'.¹³⁰ In Lutruwita (Tasmania), Indigenous cultural heritage protection is an afterthought: an add-on to the planning process, considered inconsistently. At worst, Aboriginal heritage is irrelevant because it is not enlivened by planning standards or performance criteria, and at best, it is protected through a condition on a permit.

EDO has highlighted on several occasions that genuine and effective protection of Aboriginal cultural heritage can only be achieved through the Tasmanian planning system.¹³¹ The new Act needs to be fully integrated into the RMPS suite of legislation, with clear requirements for the early consideration of Aboriginal heritage and Tasmanian Aboriginal people's involvement in all planning and development decisions under the *Land Use Planning and Approvals Act 1993* ('**LUPA Act**').

The Government has committed to a new approach that 'shift[s] the focus from being about decisions concerning authorisations of disturbance or destruction of heritage, towards early consideration of Aboriginal cultural heritage in all relevant planning processes so that impacts on Aboriginal cultural heritage can be avoided wherever possible'.¹³² One of the objectives in the Draft Bill is 'to provide for the protection and management of Aboriginal heritage as an integral part of the resource management and planning system as set out in Schedule 1 to the *Land Use Planning and Approvals Act 1993*'.¹³³ On the face of it, this appears to indicate the government intends to follow through with its commitment.

We are not encouraged, however, by the absence of provisions in the Draft Bill that would ensure full integration with the RMPS. EDO reiterates that the previously proposed 'light-touch' integration that relies on searches of the Aboriginal Cultural Heritage Register¹³⁴ will not deliver adequate protection of Aboriginal cultural heritage. As acknowledged in the Review of the *Aboriginal Heritage Act 1975*, there are significant variances in the quality of information contained in the existing register and 'its coverage of the State is highly uneven'.¹³⁵

To give full effect to government's stated intention, Schedule 1 of the LUPA Act must be amended to include a new objective that acknowledges Tasmanian Aboriginal people and provides for the UNDRIP principles of self-determination and FPIC concerning all decisions relating to Aboriginal heritage. The Tasmanian Planning Scheme must also be amended to ensure the new Act integrates fully with the LUPA Act so that cultural heritage is the first consideration in planning

¹³⁰ Dhawura Ngilan (n 1) 36.

¹³¹ EDO 2019 Submission & EDO 2022 Submission (n 40) Part 6; EDO 2024 Submission (n 21) 7–9.

¹³² Consultation Paper (n 4) 18.

¹³³ Draft Bill s 3(d).

¹³⁴ Consultation Paper (n 4) 20.

¹³⁵ Department of Primary Industries, Parks, Water and Environment (n 41) 14.

approvals and relevant to decisions made under the LUPA Act and other RMPS legislation.

Recommendation 43: The Tasmanian Government introduce measures to require early consideration of potential Aboriginal heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the *Land Use Planning and Approvals Act 1993*.

Recommendation 44: The new Act be fully integrated with the Resource Management and Planning System in a way that ensures Aboriginal cultural heritage is the first consideration in planning approvals and relevant to decisions made under the *Land Use Planning and Approvals Act 1993* and other RMPS legislation.

Recommendation 45: The Resource Management and Planning System objectives are amended to acknowledge Tasmanian Aboriginal people and the objectives of providing for the United Nations Declaration of the Rights of Indigenous Peoples principles of self-determination and free, prior and informed consent concerning all decisions relating to Aboriginal heritage.

*Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.*