A new Aboriginal Cultural Heritage Protection Act

Consultation Paper on High-level Policy Directions

Department of Natural Resources and Environment Tasmania

Tasmanian Government

Department of Natural Resources and Environment Tasmania

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www.nre.tas.gov.au

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Cover photos (clockwise from top):
Cox Bight, Southwest National Park, Photo Jillian Mundy
Shell Midden, Southwest National Park
Tasmanian Aboriginal cultural site, Southwest National Park

Letter from the Minister for Aboriginal Affairs

Tasmania's Aboriginal cultural heritage is vitally important to Tasmanian Aboriginal people and is also a central part of the heritage of all Tasmanians. It is rich and unique, stretching back over the many tens of thousands of years. It continues as a living cultural heritage under the custodianship of Tasmanian Aboriginal people and it is vital that it continue as a strong living culture into the future. It deserves to be covered by respectful, effective and modern law which promotes its significance and supports Aboriginal Tasmanians' custodianship of their heritage.

This Paper marks the beginning of the Government's action to introduce long-overdue new legislation to properly support appropriate protection and management of their heritage by Tasmania's Aboriginal people.

On 1 July last year I was pleased to table in the Parliament a report detailing the outcome of the statutory Review of the *Aboriginal Heritage Act 1975* (the **Review Report**) carried out on my behalf by the Department of Primary Industries, Parks, Water and Environment (now the Department of Natural Resources and Environment Tasmania – NRE Tas). With it, I tabled also the Government's response.

The Government accepted the key findings of the Review Report. The Review Report itself was based on substantial prior consultation, as well as taking into account analysis of issues and experience elsewhere in Australia. The most important aspect of the Government's response was that a new Act is needed, and we have committed to developing one as a matter of priority.

In the Tabling Report I outlined a simple two-stage consultation and engagement process would be undertaken to support the development of the new Act. This Paper sets out a high-level outline of policy directions the Government proposes to use when drafting the new Act and marks the commencement of the first part of the process.

As well as seeking written feedback on this Paper, we will also be supporting direct engagement and, where practicable, meeting people who prefer face-to-face (including virtual) discussion. These discussions will continue as feedback is considered and drafting of the new Act progresses.

The Government understands legislation on Aboriginal cultural heritage is never easy to draft or to introduce. But we are committed to continuous improvement, and to develop a framework that acknowledges and appreciates our rich and unique Aboriginal cultural heritage. This includes learning from and being part of discussions at a national level, where there is encouraging momentum and, increasingly, a convergence of approaches around the country.

There will, of course, be different views among interested parties owing to Tasmania's own circumstances. In this Paper we are clear and transparent about our favoured approaches on conflicted issues, and the Government will welcome feedback that presents clear arguments for or against the directions we propose.

Feedback will be used to guide the drafting of the new legislation, which we will release in the form of a draft exposure Bill for further consultation. My intention is to introduce new legislation as soon as possible to begin a new era in the recognition, protection and promotion of Aboriginal cultural heritage in Tasmania, with the leading role to be played by Tasmanian Aboriginal people themselves.

Roger Jaensch MP
Minister for Aboriginal Affairs

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This Consultation Paper is designed to facilitate a conversation with all interested parties – Tasmanian Aboriginal people, heritage professionals, farmers, miners, foresters, developers and the broader Tasmanian community. It puts forward the Government's proposed approaches and directions on key elements of the new legislation. On some matters the Government does not have a firm proposed policy position and we are seeking views on possible options.

Providing feedback on this Consultation Paper

Feedback can be provided either in written submissions, or at meetings, which will be recorded in agreed notes of the discussion. The intention is to conduct meetings with Tasmanian Aboriginal people and Aboriginal community organisations, as well as with interested stakeholders.

We are accepting submissions that can be made until Sunday 24 April:

- Via email to: aboriginalheritageact@nre.tas.gov.au
- Via post to: Review of the *Aboriginal Heritage Act 1975*
  NRE Tasmania
  GPO Box 44
  Hobart TAS 7001
- By requesting a face-to-face meeting via the above email address.
- By completing an online survey

Consistent with Tasmanian Government policy, all submissions will be treated as public information and published on the Department of Natural Resources and Environment Tasmania website at Review of the *Aboriginal Heritage Act 1975* | Department of Natural Resources and Environment Tasmania (nre.tas.gov.au).

Important information to note:

- In the absence of a clear indication that a submission is intended to be treated as confidential (or parts of the submission), the Department will treat the submission as public.
- No personal information other than an individual's name will be published. Further information on confidentiality and the *Right to Information Act 2009* can also be found here.
- If you would like your submission treated as confidential, whether in whole or in part, please indicate this in writing at the time of making your submission clearly identifying the parts of your submission you want to remain confidential and the reasons why. In this case, your submission will not be published to the extent of that request.
- Copyright in submissions remains with the author(s), not with the Tasmanian Government.
- Defamatory or offensive material will not be published.

Next steps

The outcomes of this consultation process will inform the development of a Draft Exposure Bill. While it is not possible to be certain of its release date, which will be determined by the drafting complexity of the final policy proposals, the intention is to release it for comment later in 2022, with a view to its introduction in Parliament in mid-2023.

Introduction

The *Aboriginal Heritage Act 1975* (the Act) is old and, despite some changes in 2017, generally regarded as inadequate. It has undergone several reviews since the late 1990s, all of which recommended its replacement.

This Paper takes forward the process of review and looks to the drafting and introduction of new legislation as a priority. Changes made to the Act in 2017 required the recent review to be undertaken. This saw a report on the outcome of the Review (the **Review Report**) tabled in the Parliament on 1 July 2021. The Review involved public consultation and targeted engagement with Tasmanian Aboriginal people, Aboriginal community organisations, and stakeholders. The Review Report is a useful published resource. It includes background information, as well as 17 findings. When tabled in Parliament, the Review Report was accompanied by a Government response (the **Tabling Report**).

For decades, Aboriginal cultural heritage in Tasmania has been protected and managed despite the shortcomings of the Act. What happens in Tasmania is in many ways similar to what happens in other jurisdictions. It occurs largely as a consequence of goodwill and good practice owing to the work of many Tasmanian Aboriginal people (including Aboriginal Heritage Officers, the former Tasmanian Aboriginal Land and Sea Council and the members of the Aboriginal Heritage Council), as well as those Aboriginal people and community organisations that have taken an active role in seeking to improve the ongoing protection of their heritage. Likewise, Aboriginal Heritage Tasmania (which includes staff who are also Aboriginal people) and a large number of proponents and heritage professionals, have adopted national and international good practice procedures.

While the amendments to the Act in 2017 addressed some of its most outdated and problematic aspects, it was recognised that the Act still lacked critical elements of modern legislation seen elsewhere.

This Consultation Paper puts forward the Government's proposed approaches and directions on key elements of the new legislation. Like the Review itself, this takes account of recent and proposed legislation in other jurisdictions, the principles outlined in the national policy directions paper, the 2020 ***Dhawura Ngilan***, and the accompanying Best Practice Standards.

Importantly, the recent ***Pathway to Truth-Telling and Treaty*** report stated, after its extensive and intensive consultations with Tasmanian Aboriginal people: 'The views we heard tended to reiterate those reported in the Review Report'. The Government agrees with the further comment from the authors:

> *Clearly, there is a need for reform of the Act to be progressed as a matter of urgency. Reform should not wait for a truth-telling or treaty process. There is also merit in proceeding immediately with the measures mentioned in the Tabling Report as interim steps independently of the introduction of the new legislation.*

The Government allocated funding, in the 2021-22 State Budget, to facilitate rapid progression of the much-needed new legislation and the Department of Natural Resources and Environment Tasmania (NRE Tas) is already well underway in progressing this critical work.

Several other States are also currently reviewing their Aboriginal cultural heritage legislation.[1] While the results of those reviews will inevitably reflect the distinctive history and organisation of each jurisdiction, it seems likely that there will be more and more similarities in the fundamental underpinning principles as each

[1] In Western Australia, the *Aboriginal Cultural Heritage Act 2021* was passed in December 2021 after a three-year review process. Queensland and New South Wales are both intending in the next year or two to complete reviews that have been under way for some years.

resolves its own modern and contemporary legislation. There is also likely to be a revised approach by the Commonwealth, and possibly new national legislation. The relevant Ministers have announced a partnership with the First Nations Heritage Protection Alliance and a commitment to 'strengthen safeguards' for Aboriginal heritage[2].

The Government anticipates that its proposed approach for many of the key elements of new legislation is likely to be relatively uncontentious. However, it is clear, and acknowledged, that there remain important questions where views differ – sometimes sharply. These differences cannot be minimised or avoided, and care has been taken to show where other options have been proposed, so that feedback may be properly informed.

[2] See **https://minister.awe.gov.au/ley/media-releases/government-signs-first-alliance-partnership** of 29 November 2021.

Proposed elements of new Tasmanian legislation

The Consultation Paper outlines the Government's proposed key elements of a new Aboriginal Cultural Heritage Act. It is deliberately brief and is presented in this form so that the fundamental principles and structure of the new legislation be set out for discussion in a clear, succinct outline.

The finer technical and legal detail, which will ultimately form the new legislation, will be developed informed by feedback received in response to this Consultation Paper. An Exposure Bill, which will provide further detail, will then be developed and shared for further consultation.

The sections below are based on the key topics identified in the Government's response to the findings of the 2019-21 statutory review of the Act. The first section is largely an introduction but deals also with the issue of objectives; key matters of principle are dealt with in sections 2 to 6; and sections 7 and 8 cover mechanisms and processes.

1: A new Act with explicit purposes and objectives:

The Review has confirmed that the Act is out of date and that new legislation is required. The Government is committed to preparing new and contemporary legislation as a matter of priority.

What is proposed:

It is proposed that the new legislation would have explicit objectives that include:

- recognition of the age and significance of Tasmania's Aboriginal cultural heritage;
- recognition of Tasmania's Aboriginal cultural heritage as an enduring and living cultural heritage;
- acknowledgement that Tasmania's Aboriginal people are the custodians of their cultural heritage;
- acknowledgement of the need to give appropriate consideration to the management and protection of Tasmania's significant Aboriginal cultural heritage in broader Tasmanian Resource Management and Planning System processes; and
- encouragement of compliance through promotion of awareness about Aboriginal cultural heritage, as well as through practical procedures and very strong penalties.

It is proposed that the new Act's expanded scope would be supported by clear articulation of these points in a 'Purpose' and/or 'Objectives' section(s).

Context:

One issue that was raised in the public consultation and discussed in the Review Report related to the absence of clear statements of objective or purpose. There are examples in other legislation:

- the Queensland *Aboriginal Cultural Heritage Act 2003* has sections 4, 5 and 6 titled respectively: 'Main purpose of Act', 'Principles underlying Act's main purpose', and 'How main purpose of Act is to be achieved'; and
- the Victorian *Aboriginal Heritage Act 2006* includes 'Purposes' (s.1), 'Objectives' (s.3), and 'Principles' at the start of Part 2 (s.12);

The 2013 *Tasmanian Aboriginal Heritage Protection Bill 2013* (hereafter, 'the 2013 Bill') included a clause called 'Objects and principles of Act'. While there is some doubt about the strictly legal impact of such statements of intent or principle in terms of how specific provisions are interpreted, the Government considers that it would be appropriate to include clear indications of the intent and direction of the new legislation.

The text in the 2013 Bill was brief, and in some respects clearly inadequate. But it offers a starting place. A very slightly edited version of that text is:

The objects and principles of this Act are as follows:

- *It is acknowledged that Aboriginal people are the primary custodians and knowledge holders of Aboriginal heritage.*

The objects of this Act are –

- *to recognise, provide for and further the protection of Aboriginal heritage;*
- *to provide for the involvement of the Aboriginal community in the management and protection of Aboriginal heritage;*
- *to promote the management of Aboriginal heritage as an integral part of the State's Resource Management and Planning System;*
- *to establish workable and effective procedures for the Aboriginal heritage assessment, conduct and oversight of land activities and other activities with regard to Aboriginal heritage impacts;*
- *to provide appropriate sanctions and penalties to prevent harm to Aboriginal heritage;*
- *to promote public awareness and understanding of Aboriginal heritage.*

It is important to note national-level processes and discussions in 2020 and 2021 which have highlighted some critical issues: the inconsistencies between Australia's multiple legislative regimes for Aboriginal cultural heritage protection; the age and questionable performance of most of them; and also the potential for a different and greater role for the Commonwealth in enforcing standards and/or acting as a more effective regulator and protector of last resort[3].

The Commonwealth's final response on these issues is not yet clear, but the assumption of this Paper is that the States and Territories will continue to legislate for their own jurisdictions, and that changes at the Commonwealth level are unlikely to determine the direction of the State's new legislation, even if ultimately there may be some different or additional roles for the Commonwealth.

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[3] See footnote 2 above, and also the **Final Report** of the independent Samuel Review of the *Environment Protection and Biodiversity Conservation Act 1999*, delivered in October 2020.

2: Better definitions:

Inclusion of expanded and more appropriate definitions of Aboriginal cultural heritage in the Act is an expected change that will require strong input from Tasmanian Aboriginal people, as well as reference to examples from interstate and national law.

What is proposed:

It is proposed that the new legislation would have expanded and more appropriate definitions which include:

- removal of the term 'relic' in the definition of Aboriginal cultural heritage;
- provision for recognition and registration of intangible heritage (songs, language, stories, landscapes, customs etc);
- retention of the recognition that significance to the Aboriginal people of Tasmania is the defining characteristic of Aboriginal cultural heritage;
- retention of the exclusion of objects made, or likely to have been made, for sale; and
- potential specification of other categories of heritage (e.g. secret and sacred), on consideration of advice from Tasmania's Aboriginal people.

Context:

All the many reviews of the current legislation over the past 25 years have agreed that use of the term 'relic' is unacceptable, as it gives the impression that an object is evidence of something that no longer exists. It fails to acknowledge that the physical evidence is indicative of a long, rich, and ongoing, association of Tasmanian Aboriginal people with the Tasmanian landscape.

It remained after the 2017 amendments only because it was found that to remove it would have required extensive amendment, largely to provisions that have no practical value now anyway. But the amended definitions did go a long way towards the type of definition that now exists in modern legislation elsewhere.

The definitions prepared for the 2013 Bill – updated as appropriate, along with additional elements for any new categories of Aboriginal cultural heritage that may be identified for inclusion through consultation – are proposed as the basis for the definitions in the new Act.

The key elements of the 2013 Bill were:

[extract from s.4(1)] ***Aboriginal heritage*** means –

(a) Aboriginal human remains; or
(b) Aboriginal objects; or
(c) Aboriginal sites; or
(d) nominated Aboriginal heritage; [a technical inclusion – see discussion of intangible heritage below]

5. Meaning of *Aboriginal human remains*

In this Act –

Aboriginal human remains means the whole or any part of the bodily remains of an Aboriginal person, other than –

(a) a body or bodily remains buried –
  (i) in a cemetery, within the meaning of the Burial and Cremation Act 2002; or
  (ii) in other land as allowed by, and in accordance with the permissions required by, section 41 of the Burial and Cremation Act 2002; or
(b) an object made from human hair; or
(c) an object made from bodily material, other than human hair, that is not readily recognisable as being bodily material; or
(d) any human tissue dealt with in accordance with the Human Tissue Act 1985 or any other law of a State or a Territory or the Commonwealth relating to the medical treatment of human tissue; or
(e) any human tissue lawfully removed from an Aboriginal person.

6. Meaning of *Aboriginal object*

(1) In this Act –

Aboriginal object means –

(a) any object in Tasmania that –
  (i) relates to the Aboriginal occupation of any part of Australia, whether or not the object existed before that part of Australia was occupied by persons of non-Aboriginal descent; and
  (ii) is of significance to the Aboriginal people of Tasmania; or
(b) any object, material or thing in Tasmania that –
  (i) is removed or excavated from an Aboriginal site; and
  (ii) is of significance to the Aboriginal people of Tasmania.

(2) Despite subsection (1), objects made, or likely to have been made, for the purposes of sale (otherwise than by way of barter or exchange in accordance with Aboriginal tradition) are not Aboriginal objects for the purposes of this Act.

(3) To avoid doubt, Aboriginal human remains are not Aboriginal objects for the purposes of this Act.

7. Meaning of *Aboriginal site*

In this Act –

Aboriginal site means –

(a) an area of Tasmania that is of significance to the Aboriginal people of Tasmania; or
(b) unless the contrary intention appears, a part of an Aboriginal site

The 2017 amendments also included a definition of 'Aboriginal tradition' as part of the approach to defining 'significance', which is proposed to be retained:

Aboriginal tradition means –

(a) the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and
(b) any such tradition, knowledge, observance, custom or belief relating to particular persons, areas, objects or relationships;

significance, of a relic, means significance in accordance with –

(a) the archaeological or scientific history of Aboriginal people; or
(b) the anthropological history of Aboriginal people; or
(c) the contemporary history of Aboriginal people; or
(d) Aboriginal tradition.

In other jurisdictions significance is generally left undefined, but this definition of tradition is long-established in various contexts. There is useful commentary in *Dhawura Ngilan* on why it is considered essential to rely on significance:

> *These definitions should recognise that an essential role of ICH (Indigenous Cultural Heritage) is to recognise and support the living connection between Indigenous Peoples today, our ancestors and our lands. It is crucial that definitions of ICH within legislation should recognise the role of 'tradition' as it is understood today in the definition of what is ICH. [p.25]*

> *However, the essential aspect of the definitions provided (from NSW, Victoria and the Northern Territory)], all of which were developed in consultation with Traditional Owners, is that the central lynchpin is how Traditional Owners today perceive their cultural heritage which is the crucial issue. [p.27]*

Only in Victoria is there a formal category of intangible heritage, introduced in 2016 and designed essentially to protect the intellectual property of Aboriginal people from commercial exploitation without fair return.

The Government's view is that the practical protection and management of the matters covered by the Victorian approach (which includes cultural material such as story, art and song, and which is understood not to have been actually used to date), are best left to the realm of intellectual property law that is governed by Commonwealth law. This is ultimately what *Dhawura Ngilan* concludes also (see Review Report, pp.21-22 and 34).

It is therefore proposed that the new Act would formally recognise intangible heritage as being an integral part of Tasmania's Aboriginal cultural heritage. The new Act would not specify management provisions for intangible heritage such as songs, language and stories to avoid duplication and interaction with Commonwealth intellectual property law. Recognition and management of cultural landscapes could be approached in many ways and the Government will be listening closely to all views on this matter. It is, however, considered appropriate that existing lawful access and use of land would not be impacted by future recognition of any cultural landscape.

There may be further specific categories of Aboriginal cultural heritage that ought to be defined. This would ensure proper recognition and allow for specific management provisions to be applied where appropriate. An example from some other jurisdictions is the defining of 'secret and sacred' objects, and inclusion of specific provisions regarding how such objects must be managed (this category is discussed in the next section). The new legislation may also need to include prescriptions for how each defined category is to be managed.

The Government is open to hearing from Tasmanian Aboriginal people to understand what, if any, specific categories of Aboriginal cultural heritage should be considered for inclusion.

3: Ownership:

What is proposed:

It is proposed that the new legislation would:

- acknowledge that Tasmanian Aboriginal people are the custodians of their heritage;
- remove current provisions assigning ownership of Aboriginal cultural heritage on Crown land to the Crown, and not specifically provide for any other Crown ownership of Aboriginal cultural heritage;
- prohibit the sale of Aboriginal cultural heritage;
- provide for the registration of private collections of Aboriginal cultural heritage;
- clarify rights of private land holders in relation to undertaking certain activities; and
- provide for the representative Aboriginal body (see section 4) to make decisions about repatriation of Aboriginal cultural heritage.

Context:

As discussed in the Review Report (pp.33-34), the issue of ownership is complex. Arguably it is a modern legal concept that is not always appropriate in the context of Aboriginal cultural heritage, which includes a range of possibilities far beyond the sort of portable object or defined land parcel that most easily fits into an 'ownership' approach. It is unsurprising that it has been a matter of dispute in all the reviews of Aboriginal heritage law in the past quarter-century.

This is an issue on which the Government would especially seek to understand the views of Tasmanian Aboriginal people.

The Government understands the view that all Aboriginal cultural heritage simply 'belongs to' Aboriginal people, and that this should be the basis of the law. We agree that it is fundamentally not right that any Aboriginal cultural heritage should 'belong to' anyone other than Aboriginal people. Putting this into practice is not easy, and requires some flexibility.

As a guiding principle, our approach is that 'ownership' is rarely absolute, but involves various rights to make decisions about, and dispose of, the property in question. What really matters, therefore, is who makes the decisions about what happens to the 'property' in question. In the case of Aboriginal cultural heritage, the principle should be that decisions lie with Tasmanian Aboriginal people.

In this context, the wide preference for 'custodianship' of heritage is noted. The key approach of the legislation, as envisaged, is that the rightful custodians of Aboriginal cultural heritage should be Aboriginal people. As discussed above, the Government favours a clear statement of principle along the lines that 'Aboriginal people are the primary custodians and knowledge holders of Aboriginal cultural heritage'.

At the simplest level, it is proposed that anyone possessing Aboriginal cultural heritage objects should be required to report the fact, so the heritage can be registered. Under the current Act, sale would be prohibited. In that sense, the 'ownership' rights of the possessors of such heritage are already very limited.

The long-term aim should be the possession of all such heritage by Tasmanian Aboriginal people.

It is notable that in other jurisdictions the practical expression of Aboriginal 'ownership' as normally understood – i.e. that the owners should have an immediate right of possession and of management of the material at their absolute discretion – is confined to the categories of 'secret and sacred' heritage, or 'ancestral remains'.

In relation to ancestral remains, the approach taken in Victoria may be considered and adapted for Tasmanian law relating to human remains, coronial responsibility and so on. The current procedures in Tasmania are in practice unlikely to be changed greatly. The key is that Aboriginal people should always be the ultimate decision makers on the disposition of ancestral remains. 'Ownership' is, in this context, an appropriate term.

The difficulties around secret and sacred objects in Tasmania arise from the island's devastating history of dispossession and the loss of the Tasmanian First Peoples' own law. It is therefore difficult to know how much of the necessary knowledge has survived to support the identification and values of secret and sacred heritage, but there is no doubt that Tasmanian Aboriginal people consider some heritage in this light. Subject to their advice and inclusion of this category in the new legislation, the Government would support applying ownership to such heritage.

In relation to other heritage, however, Tasmania faces the same issues that prevent other jurisdictions from applying a simple ownership model. This is because it is not straightforward to separate ownership of heritage from private ownership of the land on or under which it is generally found. What would be made clear in new legislation, though, would be that the owner of the land is not the owner of Aboriginal cultural heritage associated with that land, and any Aboriginal cultural heritage associated with the land must be managed in accordance with the general provisions in the Act for protecting and managing Aboriginal cultural heritage.

The Government therefore considers that the model pursued in past reform processes remains appropriate still: that is, to address the rights of the landowner by providing assurance of continuing lawful use of their land, subject to their not harming the heritage.

This approach was introduced in Queensland with a simple formulation that was picked up also by Victoria, so has applied unchanged in those two jurisdictions since 2002 and 2006 respectively. It was also in the 2013 Bill.

Tasmania's current legislation assigns ownership of Aboriginal cultural heritage on Crown land to the Crown. The intention is to omit such a provision from the new legislation, and instead recognise Aboriginal people as the custodians of their heritage, and ensure Tasmanian Aboriginal people play the lead role in making decisions about how their heritage is managed (see following sections 4 and 5).

The *Pathway to Truth-Telling and Treaty* report confirmed the widespread concern about providing properly for repatriation within the State (international issues being the responsibility of the Commonwealth). The Government agrees that, without unnecessarily increasing the complexity of the legislation, it should facilitate repatriation.

The issue is often in practice related to the role of museums. As a general rule, it is proposed that decisions would be made by the proposed Aboriginal representative body (see following section 4), except when the heritage in question has come from land that is now Aboriginal land, as defined in the Aboriginal Lands Act. In that case the owner of that land would be the relevant decision-making body.

4: The representation of Aboriginal people and interests:

What is proposed:

It is proposed that the new legislation would:

- establish and recognise a statutory Aboriginal representative body that would have decision making powers;
- set out processes for nomination and appointment of members of the representative body; and
- set out requirements for membership – skills, gender balance, regional representation.

Context:

The Tabling Report noted that, while there were some important differences of view, most input and precedent favoured the continued existence of a single Aboriginal body to represent the interests of Tasmanian Aboriginal people, with clear and broad responsibilities and decision-making powers in the management of Aboriginal cultural heritage.

The Review confirmed that there are a number of alternative views held among Tasmanian Aboriginal people:

- that the single body should be the ALCT, which is independent and already set up to hold property on behalf of all Aboriginal people; as such it would be the natural body to exercise ownership rights over heritage on their behalf;
- that representation should be decentralised, with advice given and decisions made by local or regional Aboriginal community organisations, representing the people most invested in the heritage of their own Country; and
- that the single body should be like the current Aboriginal Heritage Council (AHC), but with strengthened prescriptions for eligibility and skills of members, and equitable geographic and gender representation.

These differing views largely mirror key differences, in relation to identity and land issues, that have been described at length in the *Pathway to Truth-Telling and Treaty* report.

On balance, the Government continues to believe that in Tasmanian conditions a single body, such as the current AHC, is the best means of ensuring fair representation of Tasmanian Aboriginal people for the purpose of managing their own heritage.

This would not preclude the appointment of sub-committees or expert advisory groups, and the single representative body (which is referred to hereafter as 'the strengthened AHC') should have considerable discretion to organise itself and its workload.

Various other issues have been raised, both through the Review process and more recently in the *Pathway to Truth-Telling and Treaty* report consultations. The key issue of decision making is addressed in the next section (Section 5 – Who makes decisions on Aboriginal cultural heritage). Apart from that, there are three main areas of concern.

1. Appointment of the strengthened AHC:

The current AHC comprises up to 10 members, all of whom are Aboriginal people. They have a three-year term and are appointed by the Governor. The terms are staggered to allow continuity, and members are appointed after an expression of interest process.

The current process is not legislated. The Government proposes to include more detail in the Act, such as clear criteria and procedures, so that the process is more transparent and accountable. However, the Government does not have a fixed view on how prospective members should be nominated, or how decisions are to be made regarding appointment of new members.

It is possible to maintain the process essentially as it is now, with an open call for expressions of interest, the Minister making recommendations on new members, and the Governor making the appointments. Other options include:

- requirement for nominations to come from Aboriginal organisations; decisions on new (rolling) membership by the full AHC itself;
- or decisions via an election process, assumed to be similar to that currently in place for the ALCT (or as reformed in the future).

The intention would be to build on the existing AHC model to strengthen it.

2. Role of the strengthened AHC:

There is general agreement that the strengthened AHC could and should have a broader role (see Review Report, pp.26-27). The AHC does in fact already undertake a range of activities, but there is an opportunity to set out in the Act the scope of its role, to put it at the centre of the Aboriginal cultural heritage protection system.

3. Capability and resourcing:

A related issue is the question of supporting the strengthened AHC to develop further the skills that members bring, individually and collectively. This is not a directly legislative issue, and the details are for consideration in the Budget context. However, the Government acknowledges that it would be wrong to establish a body with wide-ranging obligations, and not resource it adequately to fulfil its functions.

5: Who makes decisions on Aboriginal cultural heritage:

What is proposed:

It is proposed that the new legislation would:

- establish principles of early and proactive consideration of Aboriginal cultural heritage with a primary focus on avoiding impacts;
- establish a system whereby a strengthened Aboriginal Heritage Council (AHC) would make decisions about authorisations for unavoidable interference or destruction in relation to management of Aboriginal cultural heritage in as many circumstances as practically possible (including by issuing permits);
- provide that complex matters are managed through Aboriginal Cultural Heritage Management Plans where the pathway to approval is agreement between the proponent and the strengthened AHC; and
- provide a pathway of last resort for the Minister to propose a resolution where a proponent and the strengthened AHC are unable to reach agreement on an Aboriginal Cultural Heritage Management Plan for a proposed activity, after exhausting good faith efforts to reach agreement.

Note that this issue overlaps with section 7, which deals with management mechanisms, where further relevant detail may be found.

Context:

The Government has always acknowledged that this is the most difficult issue faced by the reform process.

As the Review outlined (pp.28-29), positions on this issue range from complete decision making by Tasmanian Aboriginal people to continued decision making only by the Minister or the Director of National Parks and Wildlife, with many variations between. The consultations for the *Pathway to Truth-Telling and Treaty* report confirmed widespread concern among Tasmanian Aboriginal people that a lack of final decision making power was contributing to the gradual erosion of Aboriginal cultural heritage in the State.

The issue has recently been widely discussed at the national level (Review Report, pp.15-16 and above, pp.5-7) and the debates are ongoing. The publication of the final report ('A Way Forward') of the Juukan Gorge Inquiry in October 2021, and debate around the new Western Australian *Aboriginal Cultural Heritage Act 2021* that passed in December 2021, attest to the broad interest in the issues.

It is noted that increasingly the reference point for discussion is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), endorsed by Australia in 2009, which is a core element of *Dhawura Ngilan*. It is not legally binding but has considerable moral force. The Declaration relies heavily on the concept of 'Free, Prior and Informed Consent' (FPIC). Many consider the absence of FPIC in any instance to indicate a failed process and argue that FPIC implies 'the right to say no' to proposals that could harm heritage.

The Tasmanian Government is committed to ensuring that Aboriginal people have a central role in deciding how Aboriginal cultural heritage is to be managed in Tasmania. The intention is to pursue a model by which, whenever practically possible, decision making should lie with the strengthened AHC: for example, on what constitutes Aboriginal cultural heritage; the registration of intangible cultural heritage; repatriation processes; the granting of permits for activities with a low risk of harming Aboriginal cultural heritage; and the approval of Aboriginal Cultural Heritage Management Plans for activities that pose a higher risk and/or raise complex issues around the avoidance or mitigation of harm (these mechanisms are discussed further in section 7).

It is also envisaged that the AHC will play a central role in the creation of Aboriginal Cultural Heritage Protected Areas.

However, the fundamental aim of the new approach is to shift 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.

This approach would mean that Aboriginal cultural heritage would always be a consideration when changes of land use are contemplated. (There is more information about early consideration mechanisms in Section 6.)

In cases where it is clear that specific decisions need to be made to avoid or minimise and mitigate any harm, the intent of the proposed processes is to encourage the reaching of agreement. However, there may be occasions when the project proponents and the strengthened AHC cannot reach agreement on an Aboriginal Cultural Heritage Management Plan.

The Government remains convinced that in these difficult, but hopefully rare circumstances, there should be a legitimate role for the elected Minister to undertake an independent assessment and propose a resolution.

It is important to recognise that the Minister may have means of assisting beyond simply encouraging development of a workable management plan, including the potential to provide grant funding to assist protection or management of heritage, or to facilitate progress through other approval processes.

The proposal is for the new Act to ensure that the circumstances under which the Minister is required to become involved in relation to management of Aboriginal cultural heritage be limited and defined by specified criteria. Seeking agreement with the strengthened AHC should be the primary and first pathway. As in relevant legislation elsewhere and the 2013 Bill, a proponent would be obliged to make all reasonable efforts to reach agreement. A mandatory mediation approach to first seek a resolution to any impasse is proposed as a first step, rather than defaulting to seeking a resolution the Minister.

It is expected that certain matters would be prescribed if the Minister is required to be involved. These would likely include:

- the requirement that any approved plan avoids harm wherever possible, and mitigate it to the greatest extent possible if harm is unavoidable;
- requirements for advice to be considered (from the strengthened AHC always, and as appropriate from others such as Local Government planners);
- requirements for certain matters to be considered (such as social, economic and environmental aspects, which might include possible benefits or deficits in terms of public health, public infrastructure, transport and housing needs);
- a requirement for a detailed and published statement of reasons; and
- application of appeal provisions.

In short, the overarching intent in the new Act would be to incentivise proponents to identify, plan for, and protect Aboriginal cultural heritage.

The Government is open to hearing how and when the Minister should and should not be involved, and how accountability and transparency can be assured.

6: Alignment with the State's planning and development system:

What is proposed:

It is proposed that the new legislation would:

- require persons making decisions, or providing advice under the Act to take into account the objectives of the State's Resource Management and Planning System (RMPS);
- establish statutory assessment and approval processes and timeframes which align, where practical, with other RMPS legislation – particularly the *Land Use Planning and Approvals Act 1993*;
- encourage, and where appropriate require, early consideration of Aboriginal cultural heritage in planning and development processes, with the intention of identifying, avoiding and proactively managing potential impacts; and
- retain provisions for statutory guidelines which may adopt standards, rules, codes and guidelines – particularly in the forestry and mining sectors.

Context:

Most of the Tasmanian legislation that regulates activity affecting the natural and cultural environment is part of the RMPS. The relationship of the new Act with the RMPS would be significant for what it says about the place of Aboriginal cultural heritage in relation to how decisions are made about land use in the State.

The objectives of the RMPS have been in place for nearly 30 years and their integrated approach, and requirement to consider all aspects of an issue, are principles that are well understood. It is the Government's view that Aboriginal cultural heritage should also be included. It should not be siloed and potentially ignored, nor should decisions about Aboriginal cultural heritage be made in isolation from all other considerations. Importantly, the *Historic Cultural Heritage Act 1995* is already included in the RMPS.

It is acknowledged that the Aboriginal Heritage Council already, in practice, takes into account broader social, economic and environmental considerations when it provides its advice to the Minister, as do the Director of Parks and Wildlife and the Minister when performing their respective statutory functions under the current Act. It is proposed that this would be made a requirement for all decisions made under the new legislation.

A very clear message in the review was that local government and developers have a strong desire for more certainty of process (as well as better protection of Aboriginal cultural heritage) by better aligning Aboriginal cultural heritage law with other legislation under the RMPS. In this regard, it is proposed that new legislation would specify clear processes and timeframes for assessment and approval activities undertaken under the Act.

There is consensus that it is vital that consideration of Aboriginal cultural heritage occurs early in planning or approval processes under the RMPS. This is envisaged to be achieved through a combination of non-statutory and statutory mechanisms.

At the moment, there is no connection or linkage between the Aboriginal Heritage Act and the RMPS, with the exception of integrated assessments for major projects. Processes under the Aboriginal Heritage Act predominantly operate independently and, because they are not referenced in normal planning processes, are often either ignored or activated late.

The inclusion of new mechanisms to ensure the consideration of Aboriginal cultural heritage in planning processes has already been committed to by the Government (see Tabling Report, p.4), and the *Pathway to Truth-Telling and Treaty* report states:

There is also merit in proceeding immediately with the measures mentioned in the Tabling Report as interim steps independently of the introduction of the new legislation. (p.88)

Non-statutory processes and mechanisms:

The measures include improvements to the existing 'Dial Before You Dig' service that alerts people to the known presence of Aboriginal cultural heritage, and two new initiatives:

- PlanBuild Tasmania - a new portal for guiding proponents through requirements for the preparation of a variety of applications for development, which incorporates criteria that, if triggered, would alert a proponent to the need to consider Aboriginal cultural heritage; and
- enhanced LIST property search functionality that would alert people doing due diligence on properties prior to purchase (e.g. conveyance lawyers) to known presence of Aboriginal cultural heritage on or in the immediate vicinity of the property being investigated.

Statutory provisions in the new Aboriginal cultural heritage legislation:

The intention is to have formal, but 'light-touch' integration into the RMPS, and with LUPAA in particular. The 2013 Bill provided for a model of 'full integration' with LUPAA similar to that currently provided for European heritage under the *Historic Cultural Heritage Act 1995*. However, full integration of the process is not considered feasible at this point due to a number of complexities that differ to the consideration and management of European heritage.

It is therefore proposed that the new Act require that anyone seeking approval to undertake certain activities (such as an activity requiring a planning permit and that includes a threshold level of ground disturbance) must first undertake a search of the statutory Aboriginal Cultural Heritage Register.

Such a requirement could be strengthened with the addition of a requirement under LUPAA that relevant planning permit applications must be accompanied by evidence (e.g. an Aboriginal Cultural Heritage Property Search certificate) that the required search had been undertaken. It is also proposed that any activity that is of a certain scale or degree of risk to heritage would require a mandatory Aboriginal Cultural Heritage Management Plan to be completed and approved prior to the activity commencing (see section 7 below).

Unlike RMPS legislation, in which the important principle of independent appeal mechanisms is integral, the Aboriginal Heritage Act also has no review provisions. It is intended that appeal/review provisions would be included; they are described further in section 7 below.

Certainty of statutory process:

A crucial failing of the current arrangements is the lack of process specified in the Act. In practical terms, Aboriginal Heritage Tasmania has made great efforts to create procedures and deliver outcomes to meet target deadlines, and so on. Currently they have no basis in law and are thus completely unlike the processes that people have to comply with in other legislation.

The Government therefore proposes to ensure the new legislation includes transparent processes and timelines that align as far as practicable with those in other RMPS Acts, around matters such as:

- applications – for authorisations (permits, management plans, etc), registration of intangible heritage;
- timelines – for the completion of assessments and authorisations, and registrations;
- assurance that permits are not subject to retrospective modification if new processes come into operation; and
- appeal/review rights (see section 7 below).

In addition, it is proposed to retain provisions in the current Act that provide for the adoption of standards, rules, codes and guidelines where appropriate. Three such documents have been adopted under the current Act:

- the Aboriginal Heritage Standards and Procedures;
- the Procedures for Managing Aboriginal Cultural Heritage When Preparing Forest Practices Plans; and
- the Mineral Exploration Code of Practice.

It is proposed that the new Act would recognise early consideration of Aboriginal cultural heritage for some activity types (such as certain forestry and mining activities), in accordance with processes detailed in adopted codes etc, as constituting appropriate due diligence for managing potential impacts on Aboriginal cultural heritage.

The principle of a 'level playing field' is proposed to apply however, and it is expected that some activity types (such as a road or a quarry) would be considered the same way whether they are part of a forestry, mining, or other land use activity.

Other opportunities for integration with planning and other approval systems:

There are also several relevant initiatives in the sphere of planning reform. First, the preparation of the Tasmanian Planning Policies (TPPs) will set the high-level policy framework for the Tasmanian planning system, particularly shaping strategic land use planning.

This provides the opportunity to set measures for requiring early consideration of potential Aboriginal cultural heritage impacts in the highest (State and regional) level of strategic planning through the three Regional Land Use Strategies. This will trigger the consideration of Aboriginal cultural heritage at the rezoning stage, which provides the ideal time to ensure that uses and values are aligned, and Aboriginal cultural heritage needs to be considered in that critical phase.

The making of the TPPs will trigger a comprehensive review of the current Regional Land Use Strategies. The current Regional Land Use Strategies already recognise Aboriginal cultural heritage values, but the establishing of the TPPs will deliver a state-wide consistent approach to recognising these values.

Finally, the Government is also reviewing two important non-statutory processes for public land – the Reserve Activity Assessment, and the Expressions of Interest for Tourism Opportunities on National Parks, Reserves and Crown Lands. Among the aims of those reviews is to ensure that consideration of Aboriginal cultural heritage – including cultural landscapes, and appropriate consultation with Tasmanian Aboriginal people – are prominent requirements in the very early stages of developing and assessing proposals.

7: Modern management mechanisms:

What is proposed:

It is proposed that the new legislation would:

- provide for Aboriginal Cultural Heritage Management Plans (both voluntary and mandatory) for high-risk/high-impact projects, as in other modern legislation, with the normal process being for finalisation by agreement between the proponent and the strengthened AHC, and (see section 5 above) going to the Minister only if agreement cannot be reached;
- provide for development projects of lesser scale or complexity to be subject to a streamlined assessment and approval process for permits, approved by the strengthened AHC, triggered by the known presence of Aboriginal cultural heritage;
- provide for a system of voluntary Aboriginal cultural heritage agreements to provide for flexible management and protection arrangements (e.g. especially useful for farmers and other owners of land containing Aboriginal cultural heritage values);
- establish a statutory Aboriginal Cultural Heritage Register to record and support management of Aboriginal cultural heritage records and statutory processes;
- introduce modernised provisions enabling the creation of Aboriginal Cultural Heritage Protected Areas for areas requiring the strongest protection, with appropriate management provisions;
- provide for a range of appeal processes, to ensure the Act is administered reasonably and fairly; and
- subject to advice from Tasmanian Aboriginal people, recognise additional categories of Aboriginal cultural heritage and include special management provisions.

Context:

As already indicated, the expectation is that much of the content of the new Act would consist of provisions that are increasingly standard across jurisdictions, and that will clarify and modernise the practical application of the legislation.

Management tools:

The range of these tools is particularly well established, and the 2013 Bill already included those raised during the review process and discussed in section 3.8 of the Review Report.

As discussed in section 5 on decision making, the system of authorisations would be divided between permits and Aboriginal Cultural Heritage Management Plans. Permits would be required to undertake a range of low-impact activities (including non-development ones such as taking heritage out of the State), where extensive preliminary investigation and ongoing management is not required.

The intention is that these be issued by the strengthened AHC, with streamlined processes and delegations to ensure timely decisions. Low impact activities would be identified as activities that are of a scale and nature that mean they present a low risk to Aboriginal cultural heritage values.

Aboriginal Cultural Heritage Management Plans would be required where the potential risk to Aboriginal cultural heritage is known or likely to be significant, and would require assessment of impacts and the development of appropriate management provisions. They would be mandatory if certain scale and activity type triggers were activated. Aboriginal Cultural Heritage Management Plans could also be voluntary, as in other States, in circumstances where no formal trigger applies, but where it is reasonable to expect complex Aboriginal cultural heritage issues, and wise to address them pro-actively.

Proponents and the strengthened AHC would be required to seek an agreed plan that should avoid harm if possible; and minimise or mitigate harm if avoidance is not possible. They would contain all the conditions and/or authorise all the measures necessary to provide the required protection.

Provision for voluntary Aboriginal cultural heritage agreements would be included, to facilitate the long-term protection and management of heritage that, for instance, exists on land that is unlikely to be disturbed, but where ongoing management and access are necessary. These would be particularly useful for farmers or for infrastructure operators.

A potentially critical element in the long term is the ability to create Aboriginal Cultural Heritage Protected Areas. Other jurisdictions have this capacity, and it allows for permanent protection and the establishment of considered management provisions of areas that demonstrably warrant the highest form of protection, backed up with very high deterrent penalties. An appropriately careful and transparent process, with appeal rights, would be established for creating and declaring such areas. It is envisaged that the strengthened Aboriginal Heritage Council would play a central role in this process.

As discussed in Section 2 – Better definitions, the Government is open to hearing from Tasmania's Aboriginal people in relation to the need to recognise special classes of Aboriginal cultural heritage. In the event that a special class of heritage is defined and recognised, it may also be necessary or beneficial to further specify in the Act how a particular class of heritage is to be managed.

A critical component to underpin the whole system would be the statutory register. Preliminary work is already underway on scoping the basic technical architecture for such a register, but it is essential that policy aspects should be provided for in the Act. Key features would include having scope to include all forms of heritage covered by the Act, 'need to know' access provisions, and the ability to preserve confidentiality of sensitive heritage.

Appeal processes:

All modern Aboriginal cultural heritage legislation includes some form of appeal process to an independent forum. Appeals would be part of the new legislation, as would mediation or alternative dispute resolution, which is also a feature of other recent legislation. The proposal is similar, but not identical, to that of the 2013 Bill, and comment is welcomed.

It would be explicit that no appeal could dispute or vary an assessment by the strengthened AHC of the heritage significance of any Aboriginal cultural heritage.

Before any formal appeal relating to an Aboriginal Cultural Heritage Management Plan, either party to the dispute may refer it to the Planning and Resource Stream of the Tasmanian Civil and Administrative Tribunal (TASCAT) for mediation (and this would be strongly encouraged).

On matters that relate to management of Aboriginal cultural heritage in land use planning (i.e. Aboriginal Cultural Heritage Management Plans or development-related Aboriginal cultural heritage permits), appeal would be to TASCAT. It is possible to limit the scope of the appeal determination, but the Government is open to suggestions on any appropriate and effective limitation.

On other matters that the strengthened AHC may decide, which do not involve land use, appeal would be to the Magistrates Court (Administrative Appeals Division). The Court rules on both facts and law. Again, it would be open for the new Act to limit the scope of the Court in its appellate role.

8: Compliance and enforcement:

What is proposed:

It is proposed that new legislation would:

- retain the current level of penalties for disturbing or damaging Aboriginal cultural heritage, as well as a range of proportionate penalties for administrative offences that do not directly harm heritage;
- include 'stop work' and 'vacate site' provisions with clearly defined criteria for when and how they may be used, and how long they may remain in force; and
- include provisions enabling the issue of infringement notices and remediation orders with clearly defined criteria for when and how they may be used, and what types of conditions they may contain.

Context:

In terms of compliance and enforcement, the current Act does now provide for maximum penalties that most regard as adequate – they are above or close to the level of penalties in other jurisdictions, and the maximum penalties are equal to those for harming historic heritage.

In addition, like modern legislation elsewhere, there would be provision for protective 'stop orders' to prevent avoidable harm to heritage, and subject to stringent penalties. There would be safeguards against their unreasonable use, including strict time limits and appeal rights for proponents.

Other matters to be addressed, outlined in section 3.9 of the Review Report, include provision for remediation orders, infringement notices, and for a more inclusive enforcement system with potential for Aboriginal rangers – e.g., through the Working on Country Aboriginal trainee ranger program in the Parks and Wildlife Service.

Approved Aboriginal Cultural Heritage Management Plans would become statutory instruments and provisions in these plans would become legal requirements under the new Act.

Note that the new Act would include many other more technical matters, such as: transitional provisions (e.g., covering the continuation of authorities issued and processes begun under the current Act); the powers of authorised officers, etc; how notice is to be given; and what (if any) matters are to be dealt with in Regulations. These details will all be available for examination and comment when the draft exposure Bill is issued.

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