

Department of Environment and Science

**Submission to the Department of
Aboriginal and Torres Strait Islander
Partnerships**

Cultural Heritage Acts Review

September 2019

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Introduction

The Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) has the role of administering the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the Cultural Heritage Acts). DATSIP invited stakeholders affected by this legislation to participate in a Review of Cultural Heritage Acts. The review aims to examine whether the legislation:

- is still operating as intended
- is achieving outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland
- is in line with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples
- should be updated to reflect the current native title landscape.

The review will also examine whether the legislation is consistent with contemporary drafting standards.

The Department of Environment and Science (DES) has responsibility for environment, science and the arts, and manages over 12.5 million hectares of protected areas and reserves – the traditional land and sea Country of Aboriginal and Torres Strait Islander peoples. The Queensland Museum continues to build a strong repatriation program of Aboriginal and Torres Strait Islander Ancestral Remains and Secret and Sacred Objects through ongoing dialogue with First Nations communities, assisting in the fulfilment of cultural and spiritual obligations.

Scope of Review

This submission has been prepared under the key themes and associated questions outlined in the DATSIP's Consultation Paper: *The Review of the Cultural Heritage Act* (June 2019), with consideration given to the following key questions:

Ownership and defining cultural heritage

Is there a need to revisit the definitions of cultural heritage – If yes, what definitions should be considered? What additional assessment and management processes should be considered?

Identifying Aboriginal and Torres Strait Islander parties

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

Land user obligations

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

Compliance mechanisms

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

Recording cultural heritage

Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?

Process

DATSIP released a public consultation paper on 23 May 2019 to facilitate the discussion of key themes for the purposes of the review. The paper provides a brief legislative history, an overview of the key components of the Cultural Heritage Acts, discussion points and questions, and a summary of legislation in other jurisdictions. The release of the consultation paper was supported by state-wide information sessions for First Nations peoples and stakeholders in June and July 2019.

The Department of Environment and Science submission

The DES submission aligns with the government's objective to reframe our relationships with First Nations peoples. DES is committed to progressing self-determination by recognising the rights and interests of First Nations people and partnering with First Nations peoples to support increased agency in the identification, ownership and management of cultural heritage across Queensland.

The DES submission includes feedback from business areas and key networks from across the department including the Queensland Museum, Science and Technology (responsible for the Biodiscovery Act reform), and the current Chairs of the three First Nations staff networks. The submission presents a summary of feedback to each of the topics and questions posed in DATSIP's public consultation paper. Analysis of feedback has informed the recommendations for consideration by DATSIP when reviewing the Cultural Heritage Acts.

Summary of recommendations

- Include intangible heritage in the definition of cultural heritage and incorporate a definition of harm caused by displacement of artefacts.
- Redefine ownership to protect the rights and responsibilities of First Nations peoples to own and manage cultural heritage.
- Replace the last claim standing provision with a model not reliant on Native Title and ensure any alternative model is co-designed and co-developed with First Nations people.
- Consider an independent state-wide body, similar to the Victorian and South Australian models, for the identification of Aboriginal and Torres Strait Islander parties, and for the dispute resolution process.
- Replace the process for Aboriginal and Torres Strait Islander parties to apply to be a Registered Cultural Heritage Body with a model not reliant on Native Title.
- Strengthen the obligations of land users through mandatory monitoring and recording processes to ensure compliance with the Duty of Care Guidelines.
- Develop cultural heritage communication and training materials including templates for self- assessment, agreements and management plans to support land users and First Nations peoples to manage their duty of care obligations (similar to the Native title Work Procedures).
- Investigate an independent body to provide resolution assistance for negotiations and voluntary agreements and general oversight.

- Expand the formal cultural heritage assessment thresholds to incorporate intangible values and ensure thresholds fully consider and define high impact activities.
- Consider a formal assessment and management process to provide greater clarity and guidance on when an agreement or management plan is required.
- Consider stricter non-compliance and penalty enforcement options to enhance protection including expanding powers of authorised persons and the alignment with other contemporary time limitation sections for matters under investigation.
- Provide funding and support to First Nations peoples seeking redress for negligence or intentional damage or destruction of cultural heritage.
- Work with First Nations peoples to design culturally appropriate recording processes and authorities and provide adequate training, resources and support to access and use information contained in the cultural heritage register and database.
- Consider a provision that the registration of cultural heritage on the database is prima facie evidence that an area is 'cultural heritage' as defined by the Act.
- Improve monitoring and reporting requirements to evaluate whether the Acts are achieving their stated objectives.
- Prioritise the development of a whole of government payment schedule for Aboriginal and Torres Strait Islander people providing services and expertise to Queensland Government departments.
- Develop a process, in partnership with First Nations peoples and the Queensland Museum, for the care of archaeological collections and artefacts.
- Consider the requirement to involve First Nations peoples in all risk management processes where a potential threat to cultural heritage values has been identified.

Ownership and defining cultural heritage

**Is there a need to revisit the definitions of cultural heritage – If yes, what definitions should be considered?
What additional assessment and management processes should be considered?**

Yes, the current cultural heritage definition should be expanded to include cultural landscapes and intangible cultural heritage. The current definition focuses on physical places and objects and fails to take into account the metaphysical elements of culture and being. Intangible cultural heritage should reflect First Nations ontology, which encompasses the interconnection/s between, people, Country, law, lore, ancestral beings and related belief systems including:

- historical values
- spirituality
- social values including kinship
- customary lore
- ceremonial and sacred practice
- story
- song and songlines
- language.

The inclusion of intangible heritage necessitates increased clarity around the means by which assertions of intangible heritage value will be substantiated and communicated, to support Aboriginal parties and groups as cultural heritage owners and experts in identification and protection of cultural heritage according to community standards and traditions. Clarity around the mechanisms for assertion of cultural heritage, tangible and intangible, would help reduce potential for conflict about cultural authorities including the right people to identify, own and manage cultural heritage.

An expansion of the definition would contemporise the meaning of cultural heritage, and allow for heightened recognition and protection of cultural heritage under the Cultural Heritage Acts. The recent World Heritage listing of Budj Bim demonstrates the cultural significance of both intangible and landscape in one place.

Regarding Ancestral Remains and Secret Sacred Objects, the Queensland Museum sees no need to revisit the definition.

There is significant benefit in aligning definitions and processes relating to cultural heritage across Queensland Government agencies. A consistent approach would best ensure the rights and interests of Aboriginal and Torres Strait Islander peoples to enjoy, maintain, control, protect and develop their identity and cultural heritage. The current definition may be interpreted as focusing on existing or historical cultural heritage, and fails to clearly incorporate the rights and interests of First Nations peoples to continue to, for example, develop both tangible and intangible cultural practices and places.

Alignment would also improve consistency and ease of compliance.

Full consideration should be given to the provisions of the new *Queensland Human Rights Act 2009* regarding Aboriginal and Torres Strait Islander cultural heritage.

There are a number of existing definitions that include the incorporation of intangible values that could be used to inform a definition to meet legislative drafting conventions. Examples include:

- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- United Nations Declaration on the Rights of Indigenous Peoples
- 'cultural resource' under the *Nature Conservation Act 1992*

- under ss-1, 4, 79B of the *Aboriginal Heritage Act 2006* (VIC)
- Ask First; a guide to respecting Indigenous heritage places and values
- Burra Charter.

Currently there is an overlap in certain aspects of cultural heritage protected under the Cultural Heritage Acts and the *Queensland Heritage Act 1992* (Heritage Act) – namely historical places, or those places important to First Nations peoples and to the history of Queensland post-contact. Any change to definitions of cultural heritage should consider any consequential change to the extent of this overlap.

In addition, the review should consider incorporating the definition of harm caused by displacement of artefacts, not just physical damage: i.e. harm to Aboriginal cultural heritage means damage or injury to, or desecration or destruction or displacement of, cultural heritage.

The incorporation of intangible heritage into the definition will provide stronger cultural heritage protection. A more comprehensive definition of cultural heritage will also aid in prosecutions involving harm to cultural heritage. For example, in a recent prosecution, the Court found that the harm went ‘far beyond any physical damage that may have been sustained by any particular artefact and the harm to the spiritual culture of the [Aboriginal Party] is significant’.

Ownership and protection

Taking a rights-based approach, First Nations parties or groups must:

- retain ownership of all aspects of their cultural heritage
- retain traditional and customary responsibilities for the management of cultural heritage with legislation providing protection and governance parameters
- be able to access cultural heritage sites.

The Cultural Heritage Duty of Care (s23) fails to define what duty is owed by the State.

Recommendations

1. Include intangible heritage in the definition of cultural heritage. The definition of cultural heritage should be co-designed with Aboriginal and Torres Strait Islander peoples, led by Aboriginal and Torres Strait Islander people with expertise, experience and cultural knowledge from across the state. Appropriate representation of First Nations rights and interests will need to take into account the diverse tangible and intangible values which are linked to both individual people and places, and collective peoples and places.
2. Consider incorporating a definition of harm caused by displacement of artefacts.
3. Redefine ownership to protect the rights and responsibilities of First Nations peoples to own and manage cultural heritage.

Identifying Aboriginal and Torres Strait Islander parties

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

Yes, the last claim standing is not an appropriate mechanism to identify First Nations peoples for a number of reasons including:

- not all First Nations peoples submit a Native Title Claim
- the last claim standing may not represent the correctly recognised rights holders
- the last claim standing may not represent the knowledge holders for Country.

Consultation to determine an appropriate alternative should be wide and varied. This approach is relevant for both repatriation and archaeological activities.

Recommendations

4. Replace last claim standing provision with a model not reliant on Native Title.
5. Any alternative model should be co-designed and co-developed with First Nations peoples through a fully consultative process and should consider both repatriation and archaeological activities.

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

Yes, there is a need to strengthen provisions for the identification of Aboriginal and Torres Strait Islander parties and cultural heritage bodies under the Cultural Heritage Acts.

The Victorian and South Australian cultural heritage legislation offer alternative and more appropriate models for the identification of Aboriginal and Torres Strait Islander parties, such as the appointment of an independent state-wide advisory body to appoint and oversee Cultural Heritage Bodies, with technical support and an operational secretariat. The body could also provide dispute resolution when required. A legislative provision for one register of parties (and their contact details) could also minimise the risk of incorrectly undertaking notification procedures.

There is an opportunity for DATSIP to improve and extend its communication of the purpose, functions and powers of the Cultural Heritage Acts with First Nations peoples. There is a need for better communication with communities so that more people are aware of processes and options for both inclusion and objection. The parties involved also need to agree on communication procedures.

Recommendation

6. Consider an independent state-wide body, similar to the Victorian and South Australian models, for the identification of Aboriginal and Torres Strait Islander parties, and for the dispute resolution process.

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

Yes, the process needs to ensure the Aboriginal and Torres Strait Islander party is the right voice for the right Country. The current model excludes any Aboriginal and Torres Strait Islander party not involved in the Native Title process, and does not provide an avenue to correctly identify and involve the rightful custodians to be part of decisions and actions which may impact on cultural heritage.

A process for registering a cultural heritage body may be more representative than a Native Title reliant model. It is important for prosecutions to be able to identify who is the correct Aboriginal and Torres Strait Islander party.

This would be easier to establish with a Registered Cultural Heritage Body than in the case where there is no Native Title claimant.

Recommendation

7. Replace process for Aboriginal and Torres Strait Islander parties to apply to be a Registered Cultural Heritage Body with a model not reliant on Native Title.

Land user obligations

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

Yes, there should be a greater level of oversight of self-assessment and voluntary processes to ensure compliance with the Duty of Care Guidelines.

Mechanisms to improve processes should consider the following:

- Mandatory submission of a self-assessment form, including evidence of the cultural heritage search results, evidence of working in partnership with the relevant Aboriginal or Torres Strait Islander party, cultural heritage surveys undertaken (in partnership with the relevant Aboriginal or Torres Strait Islander party) and/or a Cultural Heritage Management Agreement (CHMA)/Cultural Heritage Management Plan (CHMP)
- Strengthen both monitoring and consequence to ensure land users comply with self-assessment processes
- Provide more formal procedural guidance on land users' obligations to assess cultural heritage values self-assessments and negotiating/administering voluntary agreements (the Ask First flow chart clearly defines 'check points' which are clear to understand expectations and obligations)
- Require earlier engagement with First Nations peoples regarding cultural heritage assessment processes
- Resource agencies to follow through with appropriate reinforcement.

Recommendations

8. Strengthen restrictions and monitoring processes of land users to ensure compliance with self-assessment (for example, the heritage protections in Victoria).
9. Reverse compliance so that the person conducting the activity is required to prove that they complied with the Duty of Care Guidelines.
10. Simplify the guidelines and provide a step-by-step process (flowchart) for managing duty of care obligations (similar to the Native title Work Procedures).
11. Develop cultural heritage communication and training materials including templates for self-assessment, agreements and management plans.

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

Yes, there is a need for dispute resolution assistance, particularly for relatively low value activities which may not warrant a full CHMP process. An independent body with parameters around consultation, access to advice, and powers to enforce recommendations would assist parties negotiating voluntary agreements. An independent body could also provide greater transparency in decision-making and robust review and oversight. A consistent approach for proposed works on state lands would enhance processes.

Recommendation

12. Investigate an independent body to provide resolution assistance for negotiations and voluntary agreements and general oversight.

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

Yes, clearer thresholds would assist in identifying when a project requires a CHMP (or examples of instances when an agreement is an acceptable substitute for a CHMP). Mandatory cultural heritage assessments should be required for high impact activities (e.g mining, construction, extraction and screening, quarrying). Any assessment and management processes should also record the intangible relationships between people, cultural heritage and

a site. A formal cultural heritage assessment process would provide more clarity. An independent third party could undertake the assessment reviews.

For archaeological sites and artefacts, there is a need for more considered thresholds and definitions of high impact; adjustment could be based on breaches and destruction encountered under the current legislative framework.

Recommendation

13. Thresholds are largely sufficient, however for high impact activities there needs to be more considered thresholds and definitions.
14. Thresholds should be expanded to incorporate intangible values.
15. Consider a formal assessment and management process, for example through standardised templates and workflows, to provide greater clarity and guidance on when an agreement or management plan is required.

Compliance mechanisms

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

Yes, compliance mechanisms to protect cultural heritage sites across the state should be enhanced.

For archaeological sites and artefacts:

- Improve compliance monitoring (e.g. auditing)
- Adequately fund all processes including salvage investigations, post-salvage artefact analysis and restitution of objects to Country.

Recommendation

16. Consider stricter non-compliance and penalty enforcement options to bolster protection including:

- Penalty Infringement Notices (PINs)
- Enforceable undertakings
- Executive Officer liability
- Enforcement notice
- Cost recovery
- Education and public benefit orders (with penalties to be paid directly to the impacted community)
- Emergency powers.

17. In addition to penalty enforcement, mechanisms should be developed and funding provided to support First Nations people to seek redress for negligent or intentional damage or destruction of cultural heritage.

Recording cultural heritage

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?

Yes, additional assistance and resources for Aboriginal and Torres Strait Islander parties and proponents would encourage and improve the recording and management of cultural heritage information. The process for recording cultural heritage should be agreed between Aboriginal or Torres Strait Islander parties and the proponent to clearly articulate how, where and who records and has access to cultural heritage knowledge.

It is important that all land managers, administrators and mining environmental authority holders can continue to access information on the cultural heritage register to ensure compliance with the Duty of Care Guidelines and environmental authority requirements.

Any improvements to the collection and management of the cultural heritage register and database should consider the following:

- First Nations peoples may not want heritage sites recorded for many reasons including to protect, cultural heritage sites, knowledge and values. For example, at some locations, First Nations peoples have provided culturally appropriate advice on how to best manage the value, however the cultural heritage value itself is not revealed.
- Site masking options through polygons may provide greater confidence to First Nations peoples about site privacy and the protection of site details and integrity. Masking also requires land users to discuss proposed activities with Aboriginal and Torres Strait Islander parties.
- Reliance on the database may lead to the exclusion of Aboriginal and Torres Strait Islander people from the process. A comprehensive register of cultural heritage values may increase this trend.
- Not knowing about the presence/existence of values can sometimes lead to the loss of the value.
- Conflict between informing relevant land managers versus restricting information in the public realm needs to be made clearer (even if it is on a case by case basis).

Online GIS mapping tools could be more user friendly for communities and proponents, such as enabling some map layers to be made available to use in other GIS applications.

Recommendations

18. Work with First Nations peoples to design culturally appropriate recording processes and authorities to access and use information contained in the cultural heritage register and database. This will provide structural (in terms of information architecture) and process protection of First Nations ownership of cultural heritage.
19. Resource First Nations peoples to undertake training to help build, access and use the cultural heritage register and database.
20. Consider including a provision that the registration of cultural heritage on the database is prima facie evidence that an area is 'cultural heritage' as defined by the Act.

Other

Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?

All of the above aspects need to provide clarity on the requirements of land users and further clarity on the thresholds for each activity.

Discussion about rates of payment can have a negative impact on partnering with First Nations peoples. A whole of government standard for payment to Traditional Owner for specialist cultural heritage advice and services, as well as upskilling and development opportunities would allow a real focus on the protection of cultural values.

The Cultural Heritage Acts should also be strengthened in relation to investigation and enforcement. For example the limitation of time should be aligned to other contemporary time limitation sections. At present the limitation is short for conducting summary matters when often offences are not identified until sometime after the event and/or the offences are remote and difficult to detect.

There are challenges around both archaeological collections and artefacts related to ongoing care. A process is required to outline options for care, such as return to Country, inclusion in a keeping place, or retaining in community or a museum. This would need to set out templates for scoping and be adequately funded, for establishment and maintenance, rather than relying on communities (or museums) to find funds for growing collections and changing needs. This is a digital issue as well as a physical issue, as there is physical cultural heritage and a historic and growing intellectual archive that documents cultural heritage. The intellectual property of cultural heritage records and archives of any kind, whether physical or digital, must remain with First Nations owners, not with government, academic or other institutions, private companies, or any individual engaged in recording the information, regardless of the intellectual, physical or economic contribution made in collecting the information.

In consideration of the increased risk to cultural heritage from climate change related events, including increased occurrence of wildfires and sea level rise, protection and mitigation of cultural heritage should be co-defined in all risk management processes. Involvement during the in risk planning could potentially protect cultural heritage values.

Recommendations

21. Undertake an audit and report every two years on whether the Acts are achieving their stated objectives.
22. Prioritise the development of a whole of government payment schedule for Aboriginal and Torres Strait Islander people providing services and expertise to Queensland Government departments.
23. Develop a process, in partnership with First Nations peoples and the Queensland Museum, for the care of archaeological collections and artefacts.
24. Strengthen the Cultural Heritage Acts with the consideration of:
 - Expanded powers of authorised persons
 - Limitation of time – align with other contemporary time limitation sections
 - Evidentiary provisions – specifically evidentiary certificates and statements in complaints e.g. who is the Aboriginal Party, whether a CHMP exists or other agreement exists
 - Recovery of investigation costs
 - Executive Officer liability provisions
 - A wilful component to key offences with a higher penalty
 - Payment of penalties to First Nations parties, with the option to engage Queensland Government support for restoration
 - Penalty – remove the monetary cap on summary proceedings.
25. Consider the requirement to involve First Nations peoples in all risk management processes where a potential threat to cultural heritage values has been identified.