



Queensland
Human Rights
Commission

Review of Queensland Cultural Heritage Acts

Submission to Department of Seniors, Disability Services and
Aboriginal and Torres Strait Islander Partnerships

31 March 2022

Summary

Recommendations

1. In summary, the Commission recommends the government:
 - a. Prioritise feedback from Aboriginal people and Torres Strait Islander peoples through this review, including because this is arguably required by the Human Rights Act;
 - b. Ensure any new heritage laws are informed by human rights principles, particularly the reports and events noted in section 1.5 of the options paper. In particular, as recommended by the Australian Parliament's Joint Committee on Northern Australia, new legislation must be consistent with UNDRIP and the *Dhawuru Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*.
 - c. Ensure disruption or interference with cultural heritage in Queensland only occurs with the free, prior and informed consent of all Aboriginal peoples and Torres Strait Islander peoples, through a process that identifies a genuinely accepted organisation.
 - d. Introduce new, free and accessible dispute resolution options where disagreements emerge about potential interference with cultural heritage.
 - e. Provide adequate resources to Aboriginal and Torres Strait Islander organisations and peoples to protect cultural heritage.

Introduction

2. Thank you for the opportunity to comment on the final stages of the Queensland Government's review of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the Acts), as proposed in the December 2021 Options Paper.
3. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
4. The Commission has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights. It includes rights drawn from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

5. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act.
6. Rather than commenting on all the specific options, this submission focuses on key principles that should underpin any reform, many of which are already discussed in the discussion paper.

Compatibility with human rights

7. Several human rights are relevant to reform of Cultural Heritage Acts and the guiding principles of the review (e.g. self-determination, local led decision making, shared commitment, shared responsibility and shared accountability, empowerment and free, prior and informed consent). These rights include the right to equality (s 15), freedom of thought, conscience, religion and belief (s 20), freedom of expression (s 21) and right to property (s 24). These rights are enjoyed by all individuals in Queensland including Aboriginal and Torres Strait Islander peoples and proponents. Additionally, s 28 of the HR Act also protects the specific cultural rights of Aboriginal and Torres Strait Islander peoples.
8. As the Options Paper notes, the HR Act requires that each arm of government to act compatibly with human rights. This includes that public entities must act and make decisions compatibly with human rights and when making decisions give proper consideration to human rights.¹ Such entities may only limit such rights, when justified as legitimate, necessary and proportionate.² In order to comply with these provisions, the actions and decisions of any Queensland government entity made under new Cultural Heritage Acts will have to reasonably and proportionately balance the rights of Aboriginal and Torres Strait Islander peoples with those of proponents, and others.

Significance of UNDRIP to this review

9. The Options Paper also notes that s 28 of the HR Act protects the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples. This section is modelled on article 27 of the International Covenant on Civil and Political Rights, and articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
10. Nonetheless, the Australian Parliamentary Joint Committee on Human Rights has suggested that UNDRIP does not create new rights, but

¹ HR Act section 58.

² HR Act sections 8 and 13.

provides ‘clarification as to how human rights standards under international law, including under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights apply to the particular situation of Indigenous peoples’.³ This is echoed in the *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation*, developed by the Heritage Chairs of Australia and New Zealand (**Best Practice Standards**),⁴ which notes that UNDRIP:

Does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world’s Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide.⁵

11. Similarly, the Chair of the Australian Parliament’s Joint Standing Committee on Northern Australia, in the ***A Way Forward*** report on the destruction of Indigenous heritage sites at Juukan Gorge, urged that lawmakers ‘consider the relevance of UNDRIP to the social, cultural and economic realities of Aboriginal and Torres Strait Islander peoples’.⁶ That Report identified ‘serious deficiencies’ across cultural heritage legislative framework in all jurisdictions. It found ‘none of these frameworks adequately encompass the complexity of Indigenous heritage which is living and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscape and waters’.⁷
12. Applying UNDRIP as a guidance document for the application of other rights protected in the HRA is particularly relevant to reform of Cultural Heritage Acts in a human rights jurisdiction like Queensland. The Human Rights Act creates a clear legislative obligation on Queensland public entities to consider rights of Aboriginal and Torres Strait Islander peoples interpreted through the articles of UNDRIP. The Best Practice Standards highlight that Article 11, 12, 13, 18, 19 and 31 are particularly relevant to cultural heritage and state that ‘Australia’s Indigenous Peoples are entitled

³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *ParentsNext: examinations of Social Security (Parenting payment participation requirements-class of person) Instrument 2021* (Inquiry Report, 4 August 2021), 81

⁴ Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 32

⁵ Ibid.

⁶ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), xii.

⁷ Ibid, 2 [1.6].

to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in UNDRIP'.⁸

13. The Commission welcomes that the guiding principles of this review include free, prior and informed consent, a key obligation of UNDRIP and particularly relevant to cultural heritage. Article 32 of UNDRIP requires that the state seek the free, prior and informed consent of Indigenous peoples prior to the approval of any project that affects lands or resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. The *A Way Forward* report defined the terms 'free, prior and informed consent' in the following ways:

- **Free:** The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
- **Prior:** The consent is sought sufficiently in advance of any authorisation or commencement of activities.
- **Informed:** The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- **Consent:** A collective decision made by the right holders and reached through a customary decision-making process of the communities.⁹

14. The United Nations Human Rights Council has recently provided guidance on the right to be consulted, through its Expert Mechanism on the Rights of Indigenous Peoples:

The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.¹⁰

15. On this basis, the Commission submits compatibility with the rights detailed further below should be applied using the articles of UNDRIP. In particular, the protection and interference with cultural heritage should be whenever possible based on self-determination and only with the free,

⁸ Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 32.

⁹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 179 at [6.85]

¹⁰ United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [3].

prior and informed consent of Aboriginal and Torres Strait Islander peoples.

16. We also note that the Best Practice Standards were developed because:

While the UNDRIP provides the foundational principles that all ICH legislation should uphold, the Declaration is not a comprehensive code or model legislation that addresses all matters that need to be included in ICH legislation.¹¹

Right to equality

17. Section 15 of the HR Act provides that a person should not be unreasonably or disproportionately affected because of an attribute a person has, including their race. This right is further fulfilled by the specific protections against less favourable treatment because of their race under the AD Act.

Freedom of expression

18. This is the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland. It includes the right to hold and express an opinion and to seek out and receive the expression of others' opinions. Ideas and opinions can be expressed orally, in writing, in print, by way of art or in another way chosen by the person.
19. The right to freedom of expression also incorporates a right to freedom of information. In particular, it includes a right to access government-held information.
20. This right will be particularly relevant to the aspects of cultural heritage legislation dealing with the ability for Aboriginal and Torres Strait Islander peoples to express culture on country, as well as undertake informed decision-making, based on self-determination and free, prior and informed consent. It is also relevant to the weight given to submissions from Aboriginal and Torres Strait Islander peoples during this review. In the *A Way Forward* report, the Joint Committee on Northern Australia recommended that cultural heritage legislation be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples.¹²
21. Relevantly to this right, Article 11 of UNDRIP recognises that Indigenous peoples have the right to practice and revitalize their cultural traditions and

¹¹ Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 32.

¹² Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 199 [7.78] (Recommendation 3)

customs. This includes the right to maintain, protect and develop their past, present and future manifestations of culture such as ceremonies and visual and performing arts and literature.

22. Article 13 further provides the right to revitalise, use, develop and transmit to future generations history, language, traditions and retain their own names for communities, places and persons.

Right to freedom of thought, conscience, religion and belief

23. This right protects both religious and non-religious belief, so it includes freedom of religion and freedom from religion. It requires the state not to interfere with an individual's spiritual or moral existence. This right has two parts: a freedom to think and believe whatever you choose, and a freedom to demonstrate your thoughts or beliefs publicly.
24. This right protects organised religious rituals and ceremonies, and displaying symbols or wearing particular kinds of clothing.
25. Article 12 of UNDRIP states that Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites, the right to use and control their ceremonial objects; and the right to the repatriation of their human remains.

Right to property

26. Section 24 of the HR Act provides that a person should not be unlawfully or arbitrarily deprived of property. The definition of the term 'arbitrary' under human rights law remains unclear in Australia, but is likely to include some consideration as to whether the actions of a public entity are unreasonable or disproportionate.¹³ Property is also not defined in the HR Act, although is likely to include all real and personal property interest recognised under general law (e.g. interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).
27. The Victorian Government has acknowledged that legislation which impacts upon interests in water will engage the right to property.¹⁴

¹³ See for example *PBU & NJE v Mental Health Tribunal* [2018] VSC 564; *PJB v Melbourne Health (Patrick's case)* (2011) 39 VR 373; *Thompson v Minogue* [2021] VCA 358.

¹⁴ Statement of Compatibility, Water Amendment (Water Trading) Bill 2014 (VIC).

28. Internationally, the Inter-American Court of Human Rights has interpreted the right to property in their human rights instruments to include indigenous communal rights in land. For example, the Court has made several decisions involving significant developments on indigenous people's land.¹⁵
29. It should be noted that the Australian High Court has expressed caution in relying too heavily on international law in interpreting human rights legislation.¹⁶ Nonetheless, some of these cases were considered by the Federal Court in *Northern Territory of Australia v Griffiths* [2017] FCAFC 106.

Cultural Rights

30. Aboriginal and Torres Strait Islander peoples have unique spiritual connections to land and waters, forming a key part of their cultural identities.
31. Arguably, s 28 protects the cultural rights of any person with a cultural interest in lands or waters, beyond those with an interest under native legislation. In 2020, in considering the Forest Wind Farm Development Bill 2020, the Queensland Parliament's State Development, Tourism, Innovation and Manufacturing Committee commented that assessing the Bill against section 28 of the Queensland Act required knowledge about what the spiritual relationship of Indigenous people is to the project area as defined in the Bill. While Indigenous Land Use Agreements made under the *Native Title Act 1993* (Cth) would assist those parties who have either obtained or are claiming a determination of native title, the Committee noted that this may not cover all Indigenous persons who have a spiritual connection with the land in the project area.
32. The Committee ultimately determined that section 28 on its face does not require the government to investigate who might hold Indigenous spiritual connections to the land for the Bill. As a result, whether the Bill fell within the scope of this right may only become apparent if any Indigenous people who are able to provide information about connection with the relevant land come forward claiming a breach of the right.¹⁷

¹⁵ *Yakye Axa Indigenous Community v Paraguay* (IACHR, 17 June 2005), *Sawhoyamaya Indigenous Community v Paraguay* (IACHR, 29 March 2006), *Saramaka People v Suriname* (IACHR, 28 November 2007).

¹⁶ *Momcilovic v The Queen* (2011) 245 CLR 1, 83 [146] and 90 [160].

¹⁷ State Development, Tourism, Innovation and Manufacturing Committee, Queensland Parliament, *Forest Wind Farm Development Bill 2020* (Report No 1, 56th Parliament, July 2020, 41).

33. This demonstrates the potential breadth of s 28, but also the practical challenges presented by reform to cultural heritage legislation.
34. As well as the articles of UNDRIP already discussed, article 11 of UNDRIP recognises that Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop their past, present and future manifestations of culture such as archaeological and historical sites, artefacts, designs and ceremonies.
35. Article 31 also provides that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions

Voice of Aboriginal and Torres Strait Islander Peoples

36. The discussion paper notes the various submissions regarding cultural heritage reform in Queensland. Arguably, to ensure compatibility with the human rights of Aboriginal peoples and Torres Strait Islander peoples, the Government must prioritise feedback provided by Aboriginal and Torres Strait Islander peoples. As the Victorian Aboriginal Heritage Council has observed, registered Aboriginal parties must be the primary source of advice to government on both tangible and intangible Aboriginal Cultural Heritage.¹⁸
37. As the options paper sets out, particularly in relation to Proposal 1 under Part 3.3 and the proposals under Part 5, law reform is necessary to provide effective mechanisms for Aboriginal people and Torres Strait Islander people to not only be consulted, but determine when and how cultural heritage will be protected. As the Best Practice Standards state:

The key to UNDRIP is the principle of self-determination. In the context of ICH, this 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.¹⁹

¹⁸ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage*, (Report, October 2021), 12.

¹⁹ Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 35.

38. Article 19 of UNDRIP obliges states to consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Article 18 provides that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves, in accordance with their own procedures.
39. Article 32 further provides a right for indigenous peoples to determine and develop priorities and strategies for the development or use of their lands. Article 33 states that Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions
40. Guidance from the United Nations Human Rights Council suggests that consultation with Indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective' and that consultation does not entail 'a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up'.²⁰

Use in the Declaration [on the Rights of Indigenous Peoples] of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard ... It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.

41. The *A Way Forward* report received evidence from Queensland stakeholders that the current framework provides insufficient obligations for consultation:

If a proponent, whether it's a mining company or a developer, determines they're within parts 1 to 4 of the duty of care provisions, they do not even need to notify the Aboriginal party of the proposed works. So Aboriginal people, by and large, are not notified prior to works undertaken in their areas. It's often after the fact that people find out that heritage has been impacted. Our view is that you could drive a truck through the duty-of-care guidelines in Queensland.²¹

²⁰ United Nations Human Rights Council, *Free, prior and informed consent: a human rights-based approach - Study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/39/62 (2018) [15].

²¹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 121-122 [5.72].

42. Evidence to the Joint Committee was also critical of ‘last claim standing’ provision in the Queensland legislation. Section 34 currently provides a mechanism to identify a relevant Aboriginal and Torres Strait Islander party that a proponent must deal with to negotiate or develop a cultural heritage management plan. If there is no native title party for an area, the last claimant is considered to be the registered party. As the *A Way Forward* report notes ‘this is highly problematic because under the Native Title Act there are often competing claims over a particular area’.²² It may also be insufficient to meet the requirements of s 28 of the HR Act in light of the potential for other peoples to have a cultural interest in an area beyond the last claimant.
43. The Karingbal people provided evidence to the Committee regarding a native title claim they and another group made at the same time, which both failed. Despite the other group being found never to have held native title over the determination area, both groups were considered the registered party for the native title claim area. This places the Karingbal in the situation where a group with no traditional affiliation with, or traditional knowledge of, their culture are able to make decisions about their heritage.²³
44. The *A Way Forward* report concluded that the ‘last claim standing’ provision ‘remains as one of the most controversial and problematic elements of the state’s legislation’.²⁴ It noted:

7.38 Currently no heritage framework successfully grapples with how to identify the correct Aboriginal and Torres Strait Islander group/s to speak with about heritage sites. The recognition of traditional owners is complicated by a long history of state-sanctioned disconnection of Aboriginal and Torres Strait Islander peoples and their lands and compounded by complicated legislative frameworks at multiple levels of government.

7.39 In jurisdictions where they operate, entities such as Land Councils and Prescribed Bodies Corporate (PBCs) have specific roles and functions that allow them to speak about cultural heritage with authority. However, some heritage laws pre-date native title laws and as such, newer bodies recognised under Commonwealth law may not be recognised under state laws.

7.40 Identifying appropriate and representative spokespeople is more problematic in areas where there is no clearly defined entity with statutory responsibility. However, many of the disputes about overlapping claims or entitlements to speak for country are a product of divisions caused by colonisation and Anglo-Australian laws. Native Title Law has unfortunately

²² *Ibid*, [5.76].

²³ *Ibid*, [5.77].

²⁴ *Ibid*, [5.80].

seen division and counter claims between applicants and respondents within Aboriginal and Torres Strait Islander people contending for Native Title recognition over claimable land.

45. The Report found that ‘the process of recognising traditional owner groups will be unique to each jurisdiction’ and recommended that cultural heritage legislation set out a clear process for identifying the appropriate people to speak for cultural heritage based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist.²⁵ Similarly, the report recommended that decision making processes must ensure that traditional owners and native title holders have primary decision making power in relation to their cultural heritage.²⁶ The report further recommended that cultural heritage legislation include a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent.²⁷
46. In this respect, the Commission notes the Best Practice standards require that where a Prescribed Body Corporate, Aboriginal Land Council or organisation that represents Traditional Owners exists, Indigenous cultural heritage legislation should vest in that organisation control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon cultural heritage. Where such an organisation does not yet exist, efforts should be made to find a Traditional Owner organisation that can be legitimately characterised as a representative organisation. Where no such organisation exists, the legislation should include mechanisms for the identification and appointment of such a genuinely accepted organisation.
47. Therefore, while welcoming that the proposals in the Discussion Paper for how recognising those with a cultural interest, the above requirements should be considered in choosing an option (that is also supported by Aboriginal and Torres Strait Islander peoples).

Adequate resourcing

48. Further, the Best Practice standards require that any Aboriginal or Torres Strait Islander organisation undertaking cultural heritage protection must be properly resourced.²⁸ Evidence to the Australian Parliament’s Joint Committee on Northern Australia suggests inadequate resourcing has been provided in Queensland to equip Aboriginal communities to control

²⁵ Ibid, 199 [7.80].

²⁶ Ibid.

²⁷ Ibid.

²⁸ Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 36.

and manage their cultural heritage.²⁹ The Centre for Social and Cultural Research at Griffith University was ‘scathing’ in its analysis of the resources provided to protect cultural heritage:

No real resourcing has been provided by the State Government to adequately equip Aboriginal communities to administer management of their heritage, and many Aboriginal organisations are already crippled with other responsibilities (such as for broader land management, housing, the provision of health, language survival, improving education outcomes and other essential services). It is absolutely the case that Indigenous peoples should be empowered to control their heritage, but failing to provide cultural custodians with the necessary funding, training and resources with which to do so is, in our view, irresponsible.³⁰

Intangible cultural heritage

49. Proposal 3 under Part 3 of the Options Paper acknowledges the importance of recognising intangible elements of cultural heritage. While many of these decisions and guidance relate to major and significant developments on land, their principles may be applicable to developments that cause less disruption to land and waters, and those that interfere with intangible cultural heritage. The Australian Parliaments Joint Committee on Northern Australia recommended that cultural heritage legislation must recognise both tangible and intangible heritage.³¹
50. The Options Paper puts forward ideas about how consultation might take place regarding cultural heritage, including under proposals 1 and 3. These options may fulfil the requirements of UNDRIP, but only if endorsed by Aboriginal peoples and Torres Strait Islander peoples.
51. The Best Practice Standards also require specific protection of ancestral remains, and of secret or sacred objects.³² Standard 9 specifically deals with intangible indigenous cultural heritage and notes it can be challenging to protect and manage in a legislative context. The standards note several international instruments relevant to this form of cultural heritage.³³

²⁹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 120 [5.67].

³⁰ *Ibid*,

³¹ *Ibid*, 199 [7.80].

³² Heritage Chairs of Australian New Zealand, *Dhawura Ngilan: A Vision of Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (Report, March 2021), 37 – 38.

³³ As noted in *Dhawura Ngilan* this includes the 2003 UNESCO Convention for the Safeguarding of the Intangible Heritage (to which Australia is not yet a party), the Convention of Biological Diversity, and (to some extent) the 1996 WIPO Performances and Phonograms Treaty.

52. The Victorian Aboriginal Heritage Council suggests that Aboriginal Heritage Officers be given search and seizure powers when they reasonably believe there is a need to protect secret or sacred objects or Aboriginal Ancestral Remains. The power would be limited to being for the purposes of preventing the commission, restitution or continuation of an offence under the Act. The Council notes this power is already available under the existing *Aboriginal Cultural Heritage Act 2003* (QLD).
53. Nonetheless, the lack of protection for intangible cultural heritage under Queensland law was an issue raised by the Australian Heritage Specialists in submissions to the *A Way Forward* report, noting that the Queensland Duty of Care guidelines allow a land user to dismiss ‘anything intangible.’³⁴

Dispute Resolution

54. Proposal 4 under Part 3 of the Options Paper suggests a mechanism be developed to resolve and deal with issues arising under the Cultural Heritage Acts. Article 40 of UNDRIP provides that Indigenous peoples have the right to access to a prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.
55. The Victorian Aboriginal Heritage Council has observed the difficulties Aboriginal people in that jurisdiction face in accessing dispute resolution procedures through the Victorian Civil and Administrative Tribunal. It recommends greater use of alternative-dispute resolution options.³⁵
56. In this respect, the proposals put forward in the Options Paper, including establishing a new advisory group and extending the Land Court’s functions may address these issues.
57. The Commission supports any reform that will provide adequate dispute resolution options, but again emphasises that this change must be driven by the views of Aboriginal and Torres Strait Islander peoples.

³⁴ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 121 [5.71].

³⁵ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage*, (Report, October 2021), 42.

Protection and Destruction of culture

58. Proposal 6 under Part 3 of the Options Paper seeks to provide for greater capacity to monitor and enforce compliance. As observed by the Chair of Australian Parliament's Joint Committee on Northern Australia, 'Rio Tinto's destruction of the 46,000+ year old Juukan Gorge rock shelters on 24 May 2020 caused immeasurable cultural and spiritual loss, as well as profound grief for the Puutu Kunti Kurrama and Piinikura peoples.'³⁶ The Committee Chair notes that the events highlighted inadequate protection afforded under the Western Australian *Aboriginal Heritage Act 1972*.³⁷

It is time for the legislative frameworks in all Australian jurisdictions to be modernised to bring meaningful protections for Aboriginal and Torres Strait Islander cultural heritage to ensure that nothing like Juukan Gorge ever happens again.³⁸

59. Evidence to the Committee commented on the inadequacy of enforcement mechanisms in Queensland's cultural heritage legislation due to risks of consequential damage.³⁹ The Committee further heard that avenues for enforcement through legal action are limited.⁴⁰ Stakeholders also raised issues that threats to and destruction of cultural heritage is 'a constant occurrence in the State'.⁴¹ The Cape York Land Council suggested that 'non-Indigenous land use and development is routinely prioritised as more valuable than Indigenous cultural heritage, and Indigenous cultural heritage is expendable if it gets in the way of development'.⁴²

It is impossible to quantify the full extent of destruction of Indigenous cultural heritage in Queensland, including Cape York, resulting from land use and development. Mining, agriculture, urban development, infrastructure and other land uses have taken a huge toll on Indigenous cultural heritage. No comprehensive official record of the damage and destruction has been maintained. The destruction has been ongoing since colonisation and is too extensive, pervasive, unrecorded, qualitative and personal to accurately measure.

³⁶ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), xii.

³⁷ *Ibid.*

³⁸ *Ibid.*, xii.

³⁹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 119 [5.64].

⁴⁰ *Ibid.*, 119.

⁴¹ *Ibid.*

⁴² Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 120 [5.66].

60. Another example given in the Report suggests rock formations with carvings were destroyed on the Sunshine Coast.⁴³ Similarly, the Centre for Social and Cultural Research at Griffith University raised concerns as to whether the current Queensland’s legislation is meeting its goal of protecting culture:

In practice we see the Queensland heritage legislation as allowing developers an almost open hand with how to approach heritage management. Often a “cultural heritage management plan” is drafted prior to the identification of the heritage that will be subject to the plan, which is in diametric opposition to best practice and all the fundamental tenets of cultural heritage management. Most troubling, the current Queensland heritage legislation allows any person to be recognised as a “cultural heritage advisor”. Failure to include minimum mandatory qualifications has allowed a small cohort of unscrupulous practitioners, often charging clients exorbitant rates, to provide reckless, inadequate advice.⁴⁴

61. Several organisations have identified lack of enforcement tools as a major deficiency in Queensland’s current laws. For example, in submissions to the *A Way Forward* report, the Quandamooka Yoolooburrabee Aboriginal Corporation said:

The Duty of Care guidelines are vague, and when combined with no power to enter land and inspect a breach of the Act turn the Qld Act into a toothless tiger. Without a clear statutory compliance power, the Qld Act is a sham and does not protect cultural heritage at all. You cannot prosecute if you cannot collect evidence.⁴⁵

62. The *A Way Forward* report recommended that traditional owners have the ability under cultural heritage legislation to withhold consent to the destruction of cultural heritage.⁴⁶ Further, it recommended that such legislation include adequate compliance, enforcement and transparency mechanisms and include adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners.

63. The Victorian Aboriginal Heritage Council recommends the rights and responsibilities for prosecution of offences under cultural heritage legislation be broadened to include organisations like it, reflecting that organisations such as the RSPCA may prosecute offences connected with the cruelty of animals.

⁴³ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 120 [5.67].

⁴⁴ *Ibid.*, 121 [5.70].

⁴⁵ *Ibid.*, 120 [5.67].

⁴⁶ *Ibid.*, 199 [7.80].

To award increased powers to Traditional Owners in the oversight and management of prosecuting and actioning regulatory responses to offences, would be in keeping with principles of self-determination, and specifically with the Act's purpose of empowering Traditional Owners as protectors of their Cultural Heritage.⁴⁷

64. Related to this, the Victorian Council recommends that Aboriginal heritage officers be permitted to enter land without the occupier's consent to monitor compliance with heritage laws. The Council notes this will likely limit the rights of occupiers, but is necessary to ensure Traditional Owners can protect and manage their cultural heritage.⁴⁸ The *A Way Forward* similarly recommended that Aboriginal and Torres Strait Islander peoples have a right to timely access to protected cultural heritage sites.⁴⁹
65. We note that many of these recommendations are included in Proposal 6 under Part 3.
66. The Victorian Council also recommends that including civil damage provisions into cultural heritage legislation is an important deterrent, particularly for corporations for whom the possibility of criminal prosecution may be less of a disincentive.⁵⁰ Similarly, that a court be able to order the prohibition of use or development of land for a period of to 10 years on a culturally significant site where there has been deliberate or wilfully negligent unlawful destruction.⁵¹
67. The *Way Forward Report* also recommended that cultural heritage legislation include a process for mapping cultural heritage sites, including a record of past destruction. Such a database should include adequate safeguards to protect secret information and ensure traditional owner control of their information on any database.⁵² We note this appears to be contemplated as part of Proposal 1 under Part 3.

Conclusion

68. Thank you again for the opportunity to participate in this review.

⁴⁷ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage*, (Report, October 2021), 46.

⁴⁸ *Ibid*, 73.

⁴⁹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), 199 [7.80]

⁵⁰ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage*, (Report, October 2021), 86.

⁵¹ *Ibid*, 94.

⁵² Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021, 199 [7.80]