

31 March 2022

Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST QLD 4002
By email: CHA_Review@dstdsatsip.qld.gov.au

Submission of Parallax Legal Pty Ltd: Review of Queensland's Cultural Heritage Acts

In 2019, the Queensland Government commenced a review of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (jointly, "**the CHAs**") to ensure that these Acts continue to protect and conserve Queensland's Aboriginal and Torres Strait Islander cultural heritage, while facilitating business and development activity.

In December of 2021, the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (**DSDSATSIP**) published an Options Paper towards finalising its review of the CHAs ("**the Options Paper**"). Public consultation and feedback has been sought by DSDSATSIP on the Options Paper as a key step in finalising the review of Queensland's CHAs.

Parallax Legal was established by Stephanie Parkin and Cassandra (Cassie) Lang, each Co-Founders and Principal Solicitors. Parallax Legal are a law firm that understands the importance of collective success. Like a legal compass, we navigate and mitigate risks within areas of native title, cultural heritage, governance, intellectual property, Indigenous cultural rights and engagement. Our work is about bringing perspectives together.

We thank the DSDSATSIP for the opportunity to provide this submission for its consideration in its review of Queensland's cultural heritage laws. For ease of reference, this submission follows the key areas, proposals and questions as set out in the Options Paper.

Yours sincerely



Cassie Lang
Co-Founder and Principal



Stephanie Parkin
Co-Founder and Principal



Key Area 1: Providing opportunities to improve cultural heritage protection

In its Options Paper, the DSDSATSIP outlines a suite of proposals (both legislative and non-legislative) as options for increasing the role of Aboriginal and Torres Strait Islander Peoples in managing and protecting their cultural heritage, strengthening existing compliance mechanisms, and introducing new compliance mechanisms. In our submission, each proposal and question within this key area is addressed in turn.

Proposal 1: *Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.*

Question 1: *Do you support this proposal and option? Why or why not?*

Our perspective: Parallax Legal supports the proposal to replace the current *Duty of Care Guidelines* (“**Guidelines**”) with a new *Cultural Heritage Assessment Framework*, as the current Guidelines are heavily weighted in favour of the land user. In our view, early and adequate engagement, consultation and agreement-making with Traditional Owners will be critical to the success of any framework which seeks to protect Aboriginal and Torres Strait Islander cultural heritage.

Question 2: *Are there any improvements that could be made?*

Our perspective: We submit that the proposed framework should provide a process which requires the notification of and engagement with Traditional Owners. In our view, the future acts framework provided by the *Native Title Act 1993* (Cth) would be an appropriate precedent in establishing procedures to follow for any proposed actions or developments which may impact cultural heritage. However, the proposed framework will require adequate support to be provided to the Aboriginal or Torres Strait Islander Party where required to enable their meaningful participation in the process.

Question 3: *Should consultation occur for all activities in high-risk areas so there is no excluded activity?*

Our perspective: Parallax Legal supports the proposal that consultation be required for all activities in high-risk areas, with a notification process similar to that provided by the future acts regime.

Question 4: *What are your thoughts on proactively mapping cultural heritage areas?*

Our perspective: Parallax Legal supports the proposed mapping of cultural heritage areas. However, we submit that this process needs to be adequately resourced to ensure that the

relevant data is properly captured, by enabling the Aboriginal or Torres Strait Islander Party to identify and engage the appropriate knowledge holders.

Question 5: *What types of activities and areas should be included in the definitions for:*

- *prescribed activity?*
- *high-risk area?*
- *excluded activity?*
- *significant Aboriginal or Torres Strait Islander area or object?*

Our perspective: Parallax Legal is concerned to understand who is proposed to determine whether an activity will have a lasting impact to the ground, and how this assessment will be made. We submit that this query will require clarification, because Traditional Owners and land users will view this threshold question differently, and disparate views have the potential to create disputes in the protection and management of cultural heritage.

We submit that the definition of 'excluded activity' should:

- Limit an area in defined spatial parameters (such as square meters), noting that an alternate approach with the subdivision of lots can vary significantly between developers; and
- Be limited to clearance around existing infrastructure.

We further submit that any definition of significant areas and objects must include intangible elements of cultural heritage.

Question 6: *Should consultation protocols be developed for each Aboriginal party and Torres Strait Islander party?*

Our perspective: Parallax Legal submits that consultation protocols should be standard for each Aboriginal and Torres Strait Islander Party to assist any proponents or other persons/entities seeking to do business with them. In our view, the existence of clear consultation protocols will also reduce uncertainties and inefficiencies between the parties.

Question 7: *How should Aboriginal and Torres Strait Islander parties be supported to manage increased consultation about cultural heritage protection?*

Our perspective: Parallax Legal submits that financial resources and support should be available to Aboriginal and Torres Strait Islander Parties, to enable their employment of staff to facilitate communication and engagement.

Question 8: *Should the development of a new assessment framework be led by a First Nations advisory group (with other experts as required)?*

Our perspective: Parallax Legal supports this proposal, and considers that this approach would be consistent with, for example:

- Articles 3-5, 11-12, 18-19, 23, 31-32 and 34 of the United Nations Declaration on the Rights of Indigenous Peoples¹; and
- Recommendations within the Parliamentary report into the destruction of Indigenous heritage sites at Juukan Gorge towards the co-design of any framework with Aboriginal and Torres Strait Islander Peoples.²

Proposal 2: *Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.*

Question 1: *Do you support this proposal and option? Why or why not?*

Our perspective: Parallax Legal supports this proposal. In our view, the integration of cultural heritage protection into land use planning is critical to enable land users to:

- Understand the overlay of their project with cultural heritage; and
- Allow for appropriate time and budget in their project plans for cultural heritage consultation and management at a best practice standard.

Question 2: *Are there any improvements that could be made?*

Our perspective: Parallax Legal submits that further consultation should be undertaken in relation to any proposed state and local government planning processes which deal with (or are otherwise relevant to) the identification and management of any risks of harm to cultural heritage.

Proposal 3: *Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.*

Question 1: *Do you support this proposal and option? Why or why not?*

¹ United Nations (2007). *United Nations Declaration on the Rights of Indigenous Peoples*. Adopted by the General Assembly on 13 September 2007 [Resolution 61/295].

² Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia (2021). *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*. See, for example, Recommendation 3 at pages 199-200.

Our perspective: Parallax Legal supports the proposal to amend the CHAs to expressly recognise intangible elements of cultural heritage. In considering any such amendment of the CHAs, we submit that it is critical to understand the importance of intangible cultural heritage and how it impacts tangible cultural heritage. Through our own experiences, including working with Traditional Owners across the State of Queensland and Torres Strait Islands, we understand that tangible cultural heritage does not exist in isolation. Intangible cultural heritage – including knowledge, belief systems and practices relating to tangible objects – impacts the tangible objects themselves. Tangible items of cultural heritage are underpinned by, and given their value and significance through, the generational transmission of knowledge of how and why that tangible object came into existence.

Question 2: *Are there any improvements that could be made to the option or definitions?*

Our perspective: In the *Aboriginal Heritage Act 2006* (Vic) (“**the Victorian Act**”), the purpose of including intangible heritage is to:

- Recognise Traditional Owners’ rights as cultural custodians, and the shortcomings of existing laws in adequately protecting these rights;
- Give Traditional Owners more control over the protection, management and potential use of their intangible heritage; and
- Encourage a focus broader than physical places and objects within the Victorian Aboriginal cultural heritage management system.³

Given that amendment of the Victorian Act in recognition and protection of intangible cultural heritage has already taken place, Parallax Legal submits that it would be useful to understand how effective this amendment has been in meeting its objectives to date. We suggest that an analysis of the Victorian Act amendment would shed some light on what is working, and what could work better, in terms of the application of the Victorian Act amendment and whether this is meeting its intended objectives. In that regard, any such analysis of the Victorian Act amendment should be led by and include Traditional Owners from Victoria who have had experience in relying upon the Victorian Act amendment to protect their intangible heritage.

Question 3: *Is there an alternative framework or option that might better recognise intangible cultural heritage, instead of amending the definitions in the Cultural Heritage Acts?*

Our perspective: If any definitions are considered towards this proposed amendment, Parallax Legal suggests that the definition is flexible enough to consider all types of intangible cultural heritage including oral stories, knowledge and/or known practices.

³ First Peoples – State Relations: [Protecting Aboriginal intangible heritage | First Peoples - State Relations \(firstpeoplesrelations.vic.gov.au\)](https://firstpeoplesrelations.vic.gov.au)

Given the significance of intangible heritage, and particularly the way in which it gives (and/or enlivens) significant value to tangible heritage, we submit that such rights could have their own unique framework or system of use, recording, management and sharing of such rights. This would assist to identify and record intangible rights for particular purposes only, and to identify how such rights should be spoken about or used.

Proposal 4: *Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.*

Question 1: *Do you support this proposal? Why or why not?*

Our perspective: Parallax Legal supports this proposal, and submits that the CHAs require a better mechanism for the resolution of disputes between parties. In our experience, the views and concerns of the Aboriginal or Torres Strait Islander Party are often considered inferior to that of the land user. We submit that there needs to be a process which enables equal representation of the parties at the decision-making level, and/or a fair dispute resolution process. In our view, one of the biggest disadvantages that Aboriginal and Torres Strait Islander Parties face is resourcing to participate in any dispute resolution process in an equitable manner, due to imbalances of resources and bargaining power between the parties. Cultural heritage is about sharing the history of our State and Nation, and should be respected and celebrated.

Question 2: *Do you support these options? Why or why not?*

Our perspective: In our view, each of the options proposed seem reasonable. However, Parallax Legal submits that any such mechanism (if implemented) needs to ensure that processes are in place for Aboriginal and Torres Strait Islander Parties to be appropriately supported and/or resourced to participate equitably in any dispute resolution process.

Question 3: *Are there any improvements that could be made?*

Our perspective: Parallax Legal submits that any independently mediated or facilitated decision making process should involve equal and fair representation of the parties to the dispute, so that each party can educate and otherwise assist the other to identify and understand the relevant issues.

Proposal 5: *Require mandatory reporting of compliance to capture data and support auditing of the system.*

Question 1: *Do you support this proposal and option? Why or why not?*

Our perspective: Parallax Legal supports this proposal, and submits that the cultural heritage framework requires more transparency from land users. In particular, we consider that greater transparency is required in relation to land users' self-assessment (such as is permitted by the Duty of Care Guidelines).

In respect of the secure storage of documents and information, we submit that the only persons and/or entities who should be able to access such documents should be the relevant parties, the DSDSATSIP Cultural Heritage Unit, and the Land Court.

We agree that the availability of templates will particularly assist small land users to meet their compliance obligations. For example, the Department of Resources has a range of templates and information available for the purposes of applying for and managing various mining and exploration permits.

Question 2: *Are there any improvements that could be made?*

Our perspective: Parallax Legal understands that the Department of Environment and Science (DES) has recently undertaken a body of work around identifying best practice in agreement-making with First Nations People. We submit that any best practice standards identified by DES in this regard may be of assistance to land users and the DSDSATSIP in the development of any such processes contemplated by this proposal.

Proposal 6: *Provide for greater capacity to monitor and enforce compliance.*

Question 1: *Do you support this proposal? Why or why not?*

Our perspective: Parallax Legal supports this proposal and submits that it would provide an improvement on the current process. In our experience, seeking any investigation of a suspected breach of cultural heritage protections is very onerous on Aboriginal and Torres Strait Parties, and particularly so where they are the party most disadvantaged by disparities in resources.

Question 2: *Do you support these options? Why or why not?*

Our perspective: Parallax Legal supports these proposed mechanisms. We consider that increasing mechanisms for the monitoring and enforcement of compliance will both encourage and assist land users to comply with their cultural heritage obligations and agreements.

Question 3: *Are there any improvements that could be made?*

Our perspective: Parallax Legal submits that the following mechanisms would also strengthen the monitoring and enforcement of compliance:

- The ability to issue ‘on the spot’ infringement notices, and a mandatory timeframe to prove compliance;
- Guidance on processes for the reparation or compensation for any harm to cultural heritage, and the spiritual hurt which is suffered as part of the quantum of damage caused (such as was observed in the Timber Creek native title compensation proceedings); and
- Random audits of land users on an annual basis, similar to those audits undertaken by the Queensland Law Society or the Australian Taxation Office. We suggest that there be an option for land users to nominate themselves for audit, and to receive some form of benefit for their initiative and transparency.

Key Area 2: Reframing the definitions of ‘Aboriginal party’ and ‘Torres Strait Islander party’

In its Options Paper, the DSDSATSIP proposes two (2) options to reframe the definitions of Aboriginal party and Torres Strait Islander party under the Cultural Heritage Acts.

Proposal: Reframe the definitions of ‘Aboriginal party’ and ‘Torres Strait Islander party’ so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom have an opportunity to be involved in cultural heritage management and protection.

Question 1: Do you support Option 1? Why or why not?; and

Question 2: Do you support Option 2? Why or why not?; and

Question 3: If you do not support either option, please explain why?

Our perspective: Parallax Legal does not support either Option 1 or Option 2.

In our view, a negative determination of native title does not mean that the relevant claimants are not the right people for Country. Rather, it may instead mean that those claimants were unable to meet the excessively high standard of evidence required by Australian law that those persons have continued as a society for the purposes of successfully establishing a native title claim. We consider that this approach:

- Fails to acknowledge the hurt and trauma suffered by First Nations People in and of these areas as a result of past injustices; and
- Does not reflect the Queensland Government’s intention to reframe its relationship with Aboriginal and Torres Strait Islander People, such as through its *Statement of Commitment* to a Path to Treaty.

Parallax Legal submits that any proposed amendment of the CHAs to the effect that a previously registered native title claimant is not a native title party should only apply to the extent that a claim has been discontinued or 'struck out' due to a failure to prosecute that claim. It is our understanding that previously registered native title claimants were required to provide sufficient *prima facie* evidence of their connection to the land and waters subject to their native title claim in order to satisfy the National Native Title Tribunal (NNTT) that their claim should be accepted for registration. We submit that such registered claimants should remain a native title party until any such time as a new native title claim is lodged and accepted for registration by the NNTT.

Question 4: *Do you think the Cultural Heritage Acts should be changed so that all previously registered claimants are not native title parties for an area and not just those subject to a negative determination?*

Our perspective: Parallax Legal does not agree to this proposal, for the reasons outlined in response to Questions 1 through 3 above. In the alternative, we propose another option to ensure the presence of Indigenous officers within the Department who can build relationships with Aboriginal and Torres Strait Islander People in any such areas to assist with the identification of persons of the purposes of s35(7) of the CHAs.

Key Area 3: Promoting leadership by First Nations peoples in cultural heritage management and decision-making

In its Options Paper, the DSDSATSIP provides a range of considerations towards the greater participation of First Nations People in the control, protection and administration of cultural heritage, and decision-making about cultural heritage matters. In our submission, each proposal and question within this key area is again addressed in turn.

Proposal 1: *Establish a First Nations-led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity could work with existing and future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas.*

Question 1: *Do you support the proposal to establish a First Nations-led entity? Why or why not?*

Our perspective: Parallax Legal submits that any proposal for a First Nations-led entity must also have a clear plan identified for its funding sources. Any First Nations led-entity that is committed to undertake this work must be provided with comprehensive and long-term funding in order to properly fulfil all of its identified objectives. Financial resourcing of the entity must be identified, agreed upon and be certain so that expectations around its role and functions can be managed.

In considering this proposal, we have concerns as to the extent and nature of authority that a First Nations-led cultural heritage entity is intended to have. In our view, if any such entity does not have the ability to make binding decisions, it will lose credibility within the community. Parallax Legal further submits that particular care will need to be taken when defining the process for appointments of representatives to that entity.

Question 2: *An alternative to establishing an entirely new entity for this purpose could be to incorporate the proposed First Nations-led entity's responsibilities into another already existing entity or body. Do you support this alternative approach? If yes, what existing entity or body could this become a part of?*

Our perspective: Parallax Legal submits that the First Nations Treaty Institute, as contemplated by Queensland's Path to Treaty, could be an appropriate 'host' entity for this purpose. In the alternative, a peak body of all cultural heritage bodies within Queensland could be established, such as NACCHO⁴ in respect of Aboriginal community controlled health organisations.

Question 3: *Do you think there should be two separate entities – one for Aboriginal cultural heritage and another for Torres Strait Islander cultural heritage?*

Our perspective: Yes – Parallax Legal agrees that there should be two (2) separate entities for the appropriate representation and leadership of Aboriginal and Torres Strait Islander People.

Question 4: *What are your views on the proposed functions? What other functions could this entity have?*

Our perspective: In our view, the proposed functions of a First Nations-led cultural heritage entity (or entities) are 'all bark and no bite' – any such entity must have teeth and authority, and be able to make decisions and take action. We submit that the proposed entity must be able to, for example:

- Issue infringement fines for harm caused to cultural heritage;
- With revenue received through fines, make funds available to Aboriginal and Torres Strait Islander groups whose cultural heritage was harmed; and
- Appoint suitably skilled Indigenous People to its Board of Directors for the provision of advice.

Question 5: *Should this entity have decision-making responsibility for approving 'party status' for an area and approving Cultural Heritage Management Plans?*

⁴ The National Aboriginal Community Controlled Health Organisation.

Our perspective: Yes – we consider that this entity (or entities) should hold this responsibility, in a similar manner as the NNTT holds responsibility for maintaining the Register of Indigenous Land Use Agreements. Parallax Legal submits that there should be threshold and mandatory clauses and/or processes which must be within Cultural Heritage Management Plans prior to their approval, such as minimum timeframes, dispute resolution, intellectual property.

Question 6: *Is it culturally appropriate for this body to have a role in cultural heritage management and protection?*

Our perspective: No – Parallax Legal considers that such an entity (or entities) should have an advisory and enforcement role. For example, we suggest that the First Nations-led entity (or entities) could make recommendations to the parties if, upon review of a cultural heritage agreement, it has identified any deficiencies in the proposed agreement and ways in which those could be addressed.

Question 7: *Should the entity have a dispute resolution function?*

Our perspective: Yes – Parallax Legal agrees that the proposed entity (or entities) should have a dispute resolution function, and submits that its decisions must be binding and enforceable.

Question 8: *Should the entity be independent of the government?*

Our perspective: Yes – Parallax Legal agrees that any such entity should be independent of the government.

Proposal 2: *The First Nations independent decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.*

Question 1: *Do you support this proposal on historical connection?*

Our perspective: Parallax Legal supports this proposal, with some reservations (outlined in response to Question 2 below).

Question 2: *Why or why not?*

Our perspective: Parallax Legal supports this proposal on the understanding and condition that any decision-making body must, at all times, work alongside Aboriginal and Torres Strait Islander People to which the cultural heritage management concern relates, in order to identify:

- Any relevant historical connection(s); and

- The most culturally appropriate and respectful way to approach the situation.

It is important to note and consider that a 'one size fits all' approach will not work across the State of Queensland. Any such decision-making body will need to be properly funded and flexible enough to work with a range of different Aboriginal and Torres Strait Islander groups, who will have distinct ways of recognising and dealing with historical connection and methods of culturally appropriate use.