

## Laurel James

---

**From:** Annie Ross [REDACTED]  
**Sent:** Wednesday, 30 March 2022 1:14 PM  
**To:** CHA\_Review  
**Cc:** president@australianarchaeology.com; AAA VicePresident  
**Subject:** Submission on the Queensland Cultural Heritage Acts Options Paper from the Australian Archaeological Association Inc.  
**Attachments:** AAA Submission in response to QLD Indigenous Heritage Acts Option Paper - 300322 - FINAL JD signed.docx; AAA Submission in response to QLD Indigenous Heritage Acts Option Paper - DISCUSSION PAPER - 300322 - FINAL JD authorised.docx

**EXTERNAL SENDER:** This email originated from outside the organisation. Please be vigilant with any external email you receive and use caution before responding. Do not click links or open attachments unless you recognise the sender and know the content can be trusted.

Dear CHA Review Team,

Please find attached the submission on the Queensland Heritage Acts Options Paper from the Australian Archaeological Association Inc. The AAA submission is in two parts: a signed cover letter, which summarises the main issues identified by the AAA, and a longer Discussion Paper, which provides detailed critique of the various options and proposals provided by DSDSATSIP. The AAA looks forward to being able to discuss the various matters raised in this submission.

Yours sincerely

Annie Ross  
Lead, AAA QCHAs writing team  
on behalf of the AAA President, Dr Joe Dortch

Dr Annie Ross  
Associate Professor (Honorary)  
Editor-in-Chief *Australian Archaeology*  
School of Social Science  
University of Queensland  
St Lucia 4072  
Michie Building Room535  
Phone: 3365 1450  
<http://www.socialscience.uq.edu.au/>  
[REDACTED]

CRICOS Provider Number 00025B

---

**AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED**



ABN 13 110 628 970

---

Australian Archaeology Association Inc.  
Dr Joe Dortch, President  
Adjunct Senior Research Fellow  
School of Social Sciences  
The University of Western Australia  
35 Stirling Hwy  
Perth, WA, 6009, AUSTRALIA  
[president@australianarchaeology.com.au](mailto:president@australianarchaeology.com.au)  
[www.australianarchaeologicalassociation.com.au](http://www.australianarchaeologicalassociation.com.au)

Cultural Heritage Acts Review

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

PO Box 15397

CITY EAST Qld 4002

[CHA\\_Review@dssdsatsip.qld.gov.au](mailto:CHA_Review@dssdsatsip.qld.gov.au)

30 March 2022

Dear Queensland Cultural Heritage Acts Review Team,

**Submission from the AAA to the Options Paper for the  
Queensland Cultural Heritage Acts Review:  
Finalising the Review: December-March 2022**

Thank you for providing the Australian Archaeological Association Inc. (AAA) the opportunity to make a Submission to the *Queensland Cultural Heritage Acts Options Paper*, released in December 2021. We note that the 2021 Options Paper is an extension, and finalisation, of the QLD *Aboriginal Cultural Heritage Act 2003* and the QLD *Torres Strait Islander Cultural Heritage Act 2003* [together known as the Queensland Cultural Heritage Acts (QCHAs)] Review. Much of the content of this 2022 Submission is a repeat of – and/or an extension of – the details provided in 2019 and 2020 Submissions prepared by the AAA, although the current Submission expressly addresses the specifics of the 2021 Options Document.

In preparing this Submission, several members of the AAA (including Indigenous colleagues) with decades of experience in Indigenous cultural heritage management were invited to prepare comments on the Option Paper. Comments were workshopped and amalgamated into this single response, which we believe reflects the majority decision of AAA members with interests in Indigenous heritage in Queensland.

## Preamble

The AAA submission comprises two documents:

- ❖ This cover letter, which provides an overview of AAA's responses to the Options Paper.
- ❖ The attached Discussion Paper, which expands on the information given in the cover letter.

The cover letter is in three parts:

- A brief introduction, outlining **the principles** under which this Submission has been prepared. We specifically emphasise:
  - the role for a **reframed relationship** between the Department [Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships]/Government and Aboriginal and Torres Strait Islander Traditional Owners/Custodians of Cultural Heritage in this state, including: genuine self-determination;
  - **locally**-led decision making;
  - **shared** commitment, **shared** responsibility, and **shared** accountability;
  - empowerment; and
  - free, prior and informed consent;all of which are based on the principles of the findings of the Juukan Gorge Review, the *Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia* document, the *Queensland's Path to Treaty*, and the *Queensland Human Rights Act 2019*. We set our suggestions for improved options to meet the guiding principles in the well-tested legislative precedent set by Victoria's *Aboriginal Heritage Act 2006* (supported by new Regulation in 2018).
- A **review** of the Options Paper, and **commentary** on the Proposals provided. This overview and commentary form the second part of this cover letter.
- A **summary of recommendations** made by the AAA arising from the discussion of the Options and Proposals proposed.

A detailed discussion of each Option and Proposal appears in the attached **Discussion Paper**. It is these comments that have provided the framework upon which this cover letter has been constructed, and the rationale for the concerns raised.

## Part 1: Introduction

The Australian Archaeological Association Inc. (AAA) made a comprehensive submission to the Review of the Indigenous Cultural Heritage Acts in July 2019, and again in 2020, following a lengthy period of consultation and collaboration with heritage professionals from across Queensland, as well as Aboriginal Traditional Owners Groups and Aboriginal Parties, and other stakeholders. AAA found this process of discussion with colleagues productive, as it allowed AAA to make a submission informed by wide-ranging stakeholder input. This current submission builds on the information gathered for our earlier submissions, and focuses specifically on the Options/Proposals presented.

### Principles informing this Submission

The principles for best-practice cultural heritage management outlined in the findings of the Juukan Gorge Review (*The Way Forward*); *Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander*

*heritage in Australia*; the *Queensland's Path to Treaty*; and the *Queensland Human Rights Act 2019* have informed this Submission. These four documents provide a 'principles framework' for discussion of the Options and Proposals presented in the Options Paper. All identify a similar suite of principles for the identification and management of cultural heritage in Queensland, which can be summarised as follows:

1. meaningful definition of heritage that includes intangible heritage;
2. culturally appropriate identification of those with right to speak for place – not only those with Native Title connections to Country;
3. ensuring Traditional Owners/Custodians control the Duty of Care, heritage assessment, and heritage decision-making process;
4. providing an active role for Government in overseeing and enforcing compliance requirements; and
5. ensuring the Traditional Owners/Custodians have a right to veto the destruction of significant heritage.

The AAA finds that none of these principles is adequately met in the Proposals included in the Options Paper. The attached Discussion Paper outlines the principles in each document in some detail, and provides a discussion of where the AAA finds the Options Paper fails these principles.

## Part 2: Overview of Commentary on the Options and Proposals

(for details see attached **Discussion Paper**).

The Options Paper begins by outlining key issues raised in previous submissions received by the QCHAs Review Committee in 2019 and in 2020. This review led to the identification of three key areas for detailed Review in the current Options Paper:

- A. **Providing opportunities to improve cultural heritage protection** through increased consultation with Aboriginal and Torres Strait Islander peoples, recognising intangible cultural heritage, and strengthening compliance mechanisms (Section 3 of the Options Paper).
- B. **Reframing 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 (Section 4 of the Options Paper).
- C. **Promoting leadership by First Nations peoples** in cultural heritage management and decision-making (Section 5 of the Options Paper).

Our Submission addresses each of these key areas, divided further into the following headings – reflecting the Options and Proposals presented in the Option Paper. The attached **Discussion Paper** outlines the AAA's detailed response to each of these issues, summarised below.

### A: Providing opportunities to improve cultural heritage protection (Section 3)

1. Review of the Duty of Care provisions (**Proposals 1 and 2**):
  - a. A detailed critique is provided of **Proposal 1: to replace the Guidelines with CH Assessment Framework**. The AAA argues that the proposed framework is flawed. It is superficial, unworkable, and highly unlikely to produce a heritage management framework that addresses the principles of *self-determination; locally-led decision making; shared commitment, shared responsibility, and shared accountability; empowerment; and free, prior, and informed consent*.

- b. An analysis is provided of Proposal 2: to integrate cultural heritage protection and **mapping** into land-use planning to enable identification of cultural heritage and consideration of its protection at an early state of the planning process. **The AAA argues that this proposal, with some important modifications, is workable and follows the precedent set in other jurisdictions, especially in Victoria and New South Wales, but that its implementation will require adequate resourcing of the regulatory authority.**
2. Discussion of the recognition of Intangible Heritage (**Proposal 3**):
  - a. A brief discussion of the concept of Intangible Heritage is provided situated in the principles of recognition of Aboriginal Knowledge.
  - b. A review of such definitions as they appear in other jurisdictions is provided, with specific emphasis on the draft New South Wales Aboriginal Heritage Bill, the Victoria *Aboriginal Heritage Act 2006*, and the Burra Charter. **The AAA argues that this proposal is workable and follows the precedent set in other jurisdictions, especially that of Victoria, but that its implementation will require adequate resourcing for both the regulatory authority and Registered Indigenous Parties.**
3. Issues relating to management mechanisms of the QCHAs (**Proposal 4**):
  - a. We review each of the options outlined in the Options Paper (formation of an Advisory Group; and extending Alternative Dispute Resolution functions of the Land Court). **The AAA argues that a single First Nations Body is unworkable as it does not recognise the considerable variation that exists amongst First Nations peoples/communities across the vast state of Queensland, and that leaving all dispute resolution in the hands of the judicial system seriously disadvantages (often) impoverished First Nations communities. We suggest an alternative system under our comments on Section 5 of the Options Paper.**
4. Mandatory Reporting of compliance (**Proposal 5**):
  - a. We review each of the options outlined in the Options Paper (implementing a reporting audit; creating reporting templates; and having a secure central storage system for reports). **The AAA argues that the proposed reporting mechanisms are workable provided that the regulatory authority and Registered Indigenous Parties are adequately resourced to ensure implementation.**
5. Improve monitoring and enforcement of compliance (**Proposal 6**):
  - a. We review the proposal to introduce restorative justice provisions and expand authorised office roles. **The AAA argues that the proposed new/expanded mechanisms are workable provided that the regulatory authority takes responsibility for these activities. This activity should NOT be the responsibility of authorised officers who have limited support, functionality, and authority, but instead should fall to authorised compliance officers of the Department, supported by training, resources, and an authority to act.**

## **B: Reframing definitions of Aboriginal/Torres Strait Islander parties (Section 4)**

1. Reframing definitions of Aboriginal/Torres Strait Islander parties (Proposal 1)
  - a. A detailed discussion is provided of Option 1 – to make changes only to those areas which do not currently have a registered native title holder or claimant. **The AAA argues that the proposed new system is cumbersome and does not recognise the importance of cultural heritage for all Traditional Owners/Custodians regardless of whether or not a native title claim has been registered or supported. We provide an alternative mechanism that recognises both native title holders/claimants and Traditional Owners/Custodians, and offer an example of the workability of this model as provided in the Victoria *Aboriginal Heritage Act 2006*. The AAA strongly supports the removal of Section 35(7) – last man standing provisions.**
  - b. A detailed discussion is provided of Option 2 – to allow for the viability of last man standing native title claimants as Aboriginal/Torres Strait Islander parties. **The AAA strongly rejects this proposal as it disenfranchises legitimate Traditional Owners/Custodians who do not wish to seek native title, or who are not eligible to seek native title, for a variety of reasons. This proposal retains the Section 35(7) last man standing clause, which discriminates against legitimate cultural heritage decision-makers.**

## **C: Promoting leadership by First Nations peoples in cultural heritage management and decision-making (Section 5)**

1. Establish a First Nations-led entity to manage and protect heritage (Proposal 1)
  - a. We review the principle behind the option to create a First Nations-led entity. **Although the AAA supports the concept of a First Nations-led entity, we argue that a single First Nations Body does not recognise the considerable cultural variation that exists amongst First Nations peoples/communities across the vast state of Queensland. We suggest an alternative system that is based on regional Advisory Committees, thereby recognising local rights to speak for Country and manage local heritage.**
2. Establish a First Nations-led entity to oversight decision-making in regard to historical connectivity to place and Country.
  - a. We review the principle behind the option to create a First Nations-led entity in this regard. **Although the AAA supports the concept of First Nations-led entities to oversee cultural heritage decision-making in Queensland, the specific functions of these bodies need to be determined in consultation with Indigenous representatives across Queensland.**

## **Conclusion**

The AAA is pleased to see that there has been some advancement in the Queensland Heritage Acts Review process to include the development of Options and Proposals that address serious concerns about the functionality of the QCHAs, identified in earlier reviews. The AAA is disappointed, however, that many of the proposals make only superficial changes to the Acts. In particular, it is disappointing to see that the principles frameworks for best-practice heritage management, as set out in the Juukan Gorge Review, Dhawura Ngilan, Queensland's Path to Treaty, and Queensland's *Human Rights Act 2019*, do not appear to have provided the foundation for the proposals as presented. In particular, the AAA finds that the following principles have not been met:

- there is no culturally appropriate way to identify those with a right to speak for Country and heritage; the coupling of Aboriginal/Torres Strait Islander party status with native title status continues to disenfranchise Traditional Owners/Custodians who are not native title parties but who have legitimate rights to cultural heritage decision-making;
- Proposals 1 and 2 in relation to Duty of Care still do not provide an adequate role of Traditional Owners/Custodians to control the heritage assessment process;
- there remains a *laissez-faire* role for government to be involved in cultural heritage management planning;
- there is no opportunity for Traditional Owners/Custodians have a right to veto the destruction of significant heritage.

### Specific problems remain as follows:

- Duty of Care: both proposals require a single, once-only, surface mapping of heritage across the entire state of Queensland on the flawed assumption that this map will allow development activity to occur anywhere that significant heritage has not been identified.
  - The AAA has proposed a **modification** to Proposal 2 whereby decisions relating to when cultural heritage assessment is required will be linked to the planning process, with resourced officers of the regulatory authority, and/or resourced Indigenous parties, making assessments of all developments that do not already require a CHMP to be undertaken because of their need to undertake an EIS.
- Dispute Resolution, Compliance, and Mandatory Reporting: although the AAA supports proposals for improving opportunities for dispute resolution, compliance enforcement, and mandatory reporting of planning agreements, this cannot be done through the auspices of a single First Nations Advisory Body, or through the courts.
  - The AAA proposes that a series of regional First Nations Bodies be established with responsibilities to **oversee** enforcement of cultural heritage laws and regulations, but with actual implementation being the responsibility of resourced officers of the regulatory authority.
- Reframing definitions of Indigenous parties: the AAA finds the two proposals to revise the ways in which Aboriginal and Torres Strait Islander parties are identified are cumbersome and confusing, and continue to disenfranchise Traditional Owners/Custodians with legitimate rights to speak for heritage and Country, in contravention of Queensland's *Human Rights Act 2019*.
  - The AAA recommends adopting the system used in Victoria to recognise those with legitimate rights to speak for heritage.

### AAA supports the following proposals:

- Recognition of intangible heritage: amending the definitions of cultural heritage to include intangible heritage would require minimal changes to the existing QCHAs, and mechanisms to manage intangible heritage exist in other jurisdictions (e.g. New South Wales and Victoria), which can act as a template for adoption in Queensland.
- Promoting leadership by First Nations peoples: but not as one single body for the entire state of Queensland.
  - The AAA recommends the establishment of **regional** advisory bodies, with geographic boundaries based on cultural determinants of connection and belonging to Country.

The AAA looks forward to being able to present further details of both its concerns and support at future workshops or interview.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Joe Dortch', with a long, sweeping horizontal stroke extending to the right.

Joe Dortch, PhD, MAACAI  
President  
Australian Archaeological Association Inc.

---

**AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED**

---

ABN 13 110 628 970



Australian Archaeology Association Inc.  
Dr Joe Dortch, President  
Adjunct Senior Research Fellow  
School of Social Sciences  
The University of Western Australia  
35 Stirling Hwy  
Perth, WA, 6009, AUSTRALIA  
[president@australianarchaeology.com.au](mailto:president@australianarchaeology.com.au)  
[www.australianarchaeologicalassociation.com.au](http://www.australianarchaeologicalassociation.com.au)

Cultural Heritage Acts Review

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

PO Box 15397

CITY EAST Qld 4002

[CHA\\_Review@dssatsip.qld.gov.au](mailto:CHA_Review@dssatsip.qld.gov.au)

31 March 2022

**Submission from the AAA to the Options Paper for the  
Queensland Cultural Heritage Acts Review:  
Finalising the Review: December-March 2022  
DISCUSSION PAPER**

## **Introduction**

The Australian Archaeological Association Inc. (AAA) is the largest archaeological organisation in Australia, representing a diverse membership of professionals, researchers, students, Traditional Owners/Custodians, and others with an interest in archaeology and cultural heritage. The aims of AAA include:

- to promote the advancement of archaeology and cultural heritage;
- to provide for the discussion and dissemination of information and ideas about archaeology and heritage; and
- to encourage and support the study and conservation of archaeological sites and collections, and of heritage places.

In preparing this Submission, several members of the AAA (including Indigenous colleagues) with decades of experience in Indigenous cultural heritage management were invited to prepare comments on the Option Paper. Comments were workshopped and amalgamated into this single response, which we believe reflects the majority decision of AAA members with interests in Indigenous heritage in Queensland.

## Principles informing this Submission

The principles for best-practice cultural heritage management outlined in the findings of the Juukan Gorge Review (*The Way Forward*); *Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia*; the *Queensland's Path to Treaty*; and the *Queensland Human Rights Act 2019* have informed the preparation of this Submission. The key principles are as follows:

### **A Way Forward: An Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia**

The overall conclusion of the Parliament of Australia's inquiry into the destruction of the cultural heritage sites of Juukan Gorge was that Australia's cultural heritage legislation has contributed to damage and destruction of heritage **where it prioritises development over heritage protection**. Queensland's Indigenous Cultural Heritage Acts (QCHAs) fail in this regard, and the QCHAs were criticised in the inquiry for many reasons, including:

- development activity provides constant threats to the destruction of Indigenous cultural heritage;
- the CHMP process has become a 'commoditised, agreement-making process' with a lack of regulatory authority oversight;
- the Duty of Care provisions allow development proponents to make judgements about heritage significance and consequent management, taking any authority away from Traditional Owners/Custodians and from the regulatory authority;
- provisions relating to the identification of Aboriginal Parties disenfranchise many legitimate Traditional Owners/Custodians, especially in relation to 'Last Man Standing' provisions.

Minimum standards for legislation were outlined in the report of the Inquiry, including:

- **meaningful** definitions of heritage that include both tangible and intangible heritage;
- clear processes to identify who speaks for Country and therefore who has the right of decision-making about heritage;
- requirements for Traditional Owners/Custodians to be involved in heritage surveys **at the beginning of any decision-making processes**;
- the ability for Traditional Owners/Custodians to withhold consent in relation to heritage destruction;
- a clear role for Free, Prior, and Informed Consent as part of the CHMP agreement process;
- an ability to seek reconsideration of prior approvals if new information comes to light.

The AAA is not satisfied that the legislative changes proposed in the Option Paper adequately meet the principles as set out in *The Way Forward*, particularly in regard to:

- incorporating intangible heritage into the definitions of cultural heritage in the Act;
- recognising the rights of **all** relevant Traditional Owners/Custodians to speak for Country through the processes relating to identifying Registered Indigenous Parties;
- ensuring Traditional Owners/Custodians can be involved in **all** heritage surveys and assessments **at the beginning of any decision-making processes** (including Duty of Care);
- ensuring Traditional Owners/Custodians have a right to withhold consent in relation to heritage destruction.

### **Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia**

*Dhawura Ngilan* is built upon the foundations of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in relation to best practice for heritage management. For the proposed changes to the QCHAs to meet the Indigenous aspirations detailed in *Dhawura Ngilan*, legislation and policy would need to meet four main principles:

- Aboriginal and Torres Strait Islander peoples are the custodians of their cultural heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians;
- Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage;
- Aboriginal and Torres Strait Islander heritage is **managed consistently across jurisdictions according to community ownership** in a way that unites, connects and aligns practice (emphasis added); and
- Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

In terms of Queensland's Aboriginal and Torres Strait Islander heritage legislation, it is the third principle that is most relevant. This principle can be achieved by:

- **actively** identifying and protecting heritage places and achieving equity on statutory lists between the regulatory authority and Traditional Owners/Custodians;
- ensuring **all** members of the Aboriginal and Torres Strait Islander communities with traditional connections to place are involved in the decision-making about place management;
- prioritising the recording and digitisation of place-based traditional knowledge, including Songlines, Indigenous place names, and other forms of **intangible heritage**.

Potential legislative outcomes based on the principles of *Dhawura Ngilan* could include:

- dual or sole naming of Aboriginal and Torres Strait Islander places;
- embracing truth-telling about heritage;
- incorporating intangible heritage and culturally significant species into legislation; and
- providing opportunities for **all** Traditional Owners/Custodians to speak for Country and heritage.

The AAA is not satisfied that the legislative changes proposed in the Option Paper adequately meet the principles as set out in *Dhawura Ngilan*, particularly in regard to

- incorporating intangible heritage into the definitions of cultural heritage in the Act; and
- recognising the rights of **all** relevant Traditional Owners/Custodians to speak for Country.

### **Queensland's Path to Treaty**

The *Queensland's Path to Treaty* Report is largely a summary of the ongoing consultation process, but three key and consistent themes from community feedback were:

1. *Inclusion*: This is a conversation for all Queenslanders, Indigenous and non-Indigenous.
2. *Reconciliation*: Truth-telling and healing are an important part of this process.
3. *Capability*: We need to invest in the capability of people to be treaty-ready.

The relevance of this report for the QCHAs is that all consultation about the legislation and its revision must meet these principles of Inclusion, Reconciliation, and Capability.

The AAA is satisfied that the process of consultation on the Options Paper meets these provisions, providing sufficient time is given to allow for widespread community engagement and input.

### **Queensland's Human Rights Act 2019**

Rights espoused under the provisions of the Queensland's *Human Rights Act 2019* include:

- every person has the right to enjoy human rights without discrimination; and
- every person has the right to **equal and effective protection** without discrimination; and
- measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination; and
- **a person must not be arbitrarily deprived of a person's property.**

Queensland's First Nations peoples' cultural rights are specifically addressed in Section 28 the Act:  
(2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—

(a) to enjoy, maintain, **control, protect** and develop their identity **and cultural heritage**, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and ....

(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

(3) Aboriginal peoples and Torres Strait Islander peoples **have the right not to be subjected** to forced assimilation or **destruction of their culture**.

To meet the provisions of Queensland's *Human Rights Act 2019*, revisions to the QCHAs **MUST** include the following:

- adequate recognition of relevant Traditional Owners'/Custodians' rights to speak for Country, **not just those with a recognised Native Title holding/claim**; and
- adequate meaningful definitions of cultural heritage, that include intangible heritage; and
- a right for Traditional Owners/Custodians to have the **primary** responsibility for decision-making on Duty of Care, when a heritage assessment is to be undertaken, who is to be involved in heritage assessment, and all consequent heritage decision-making; and
- a role for government (through the working of the Department) to be an *active* presence in investigation/enforcement of cultural heritage compliance requirements.

The AAA is not satisfied that the legislative changes proposed in the Option Paper adequately meet the provisions of Queensland's *Human Rights Act 2019*, particularly in regard to

- incorporating **intangible** heritage into the definitions of cultural heritage in the Act;
- recognising the rights of **all** relevant Traditional Owners/Custodians to speak for Country;
- ensuring Traditional Owners/Custodians have **primary** responsibility for cultural heritage decision-making, including in the Duty of Care process; and
- an active role for government/the Department in overseeing and enforcing compliance requirements.

### **Overview and Summary of Principles Informing Submission**

In summary, the four documents the Options Paper nominated as the 'principles framework' for discussion of the Options and Proposals all identify similar principles for the identification and management of cultural heritage in Queensland:

- meaningful definition of heritage that include intangible heritage;
- culturally appropriate identification of those with right to speak for place – not only those with Native Title connections Country;
- ensuring Traditional Owners/Custodians control the Duty of Care, heritage assessment, and heritage decision-making process;
- providing an active role for Government in overseeing and enforcing compliance requirements; and
- ensuring the Traditional Owners/Custodians have a right to veto the destruction of significant heritage.

**AAA is disappointed the Options Paper does not adequately meet these five guiding principles.**

## Detailed Discussion of each Option and Proposal

### A: Providing opportunities to improve cultural heritage protection (Section 3)

#### 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.

- The AAA argues that the proposed framework is superficial, unworkable, and highly unlikely to produce a heritage management framework that addresses the principles of **self-determination; locally-led decision making; shared commitment, shared responsibility, and shared accountability; empowerment; and free, prior, and informed consent.**

The principle to include greater engagement, consultation, and agreement-making with Aboriginal Parties or Torres Strait Islander Parties is laudable, but is pointless if the mechanism proposed cannot meet the principle. The AAA finds that the proposal, as written, will **not** provide ‘greater engagement, consultation and agreement’, and will not meet the principles of the Juukan Gorge Review (*The Way Forward*); *Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia*; the *Queensland’s Path to Treaty*; and *Queensland’s Human Rights Act 2019*.

Proposal 1 argues for replacing the Duty of Care Guidelines with a Cultural Heritage Assessment Framework that aims to identify four types of development:

- A **prescribed activity**. All prescribed activities will require consultation with Aboriginal/Torres Strait Islander Parties to determine potential impact of development on cultural heritage.
- An **excluded activity**. An excluded activity, even in a **high-risk area**, may proceed without consultation.
- A **non-excluded activity** in a **high-risk area**. This activity will be treated in the same way as a prescribed activity.
- Any other activity (not a prescribed activity) not in a high-risk area. Development may proceed without consultation. In this case, any cultural heritage uncovered during development will require development to be halted and consultation to be undertaken.

There are a number of problems with this proposal:

1. The model assumes that development activity is at the heart of heritage protection.
  - 1.1 The focus – as with the current Duty of Care Guidelines – is focused on the nature of the activity, not the nature of heritage;
  - 1.2 The model assumes that identifying ‘high-risk areas’ is a simple process. It is not (see point 2 below);
  - 1.3 The model assumes there is no option to negotiate over heritage in a high-risk area subject to an excluded activity. This is exactly what happened with the Juukan Gorge sites and led to their destruction. **There must always be an opportunity to negotiate to protect significant heritage.**
2. The model assumes that high-risk areas can be mapped and documented in a single, once-off, state-wide mapping exercise. This is, in fact, an extremely dangerous model, and is unsupportable for a number of reasons:
  - 2.1 it is not possible to undertake a survey of the entire state of Queensland to identify the Aboriginal heritage potential of all landscapes, and to categorise all landscapes as high-risk areas or other-risk areas based on surface survey alone. MANY heritage places are buried archaeological sites that can only be located with excavation or as a result of

- ongoing natural erosion. **Juukan Gorge is a classic example of a cultural heritage place that would not have been documented based on a surface mapping exercise.** A single survey, undertaken at a single point in time, is nothing more than a temporary snapshot of the visible evidence for surface heritage, and would fail to identify a large number of highly significant archaeological and Aboriginal heritage places;
- 2.2 it is not possible to undertake a survey of the entire state of Queensland to identify the Aboriginal heritage potential of all landscapes, and to categorise all landscapes as high-risk areas or other-risk, based on surface survey. MANY heritage places are locales of tangible and intangible heritage that cannot be revealed to others based on a range of socio-cultural factors, including gender (many heritage places are gender restricted), age (many heritage places can only be revealed to Elders), level of knowledge (many heritage places cannot be revealed to anyone other than a knowledgeable Elder), etc.
  - 2.3 the model assumes that heritage, and its significance, is static. It is not. Heritage is mutable. It changes from season to season, from generation to generation, and from place to place. What is significant to one geographically defined group may not be significant to another – and vice versa. Similarly, what is significant to one group at one time may not be significant at another time – and vice versa.
3. The model assumes that, once mapped and documented, any development can proceed in a high-risk area providing known/mapped/recorded heritage places are avoided. This, too, is naïve, for the reasons outlined in Point 2 above. The principle behind this assumption is that a land-user simply needs to check the database to see if their development is in an area determined as ‘high-risk’ by a once off surface survey. The onus, once again, is given to developers/land users to determine whether heritage assessment is required.

In short, the problems with this proposal can be summed up by the following statement:

Although a broad framework for Australian archaeology was crafted as early as the 1960s, the vastly more complex deep-time, local, and regional archaeologies developed through partnership research with Traditional Owners are only now beginning to reveal the extraordinary cultural and environmental diversity of the vast Australian continent. *Much of Australia has had no systematic archaeological investigation.* Local and regional archaeological narratives are most relevant to Indigenous communities. *Such archaeologies require research focused on local cultural traditions and practices and local environmental factors and changes.* People shape environments and environments shape people. ***To understand this nexus and causal feedback loops requires high-resolution, locally situated Indigenous knowledges, contextualised by archaeological and palaeoenvironmental records.***

In other words, a one-size-fits-all system of categorising landscapes and their cultural heritage components ignores the socio-cultural complexity of sites and heritage places and the variability and flexibility in assigning significance and, hence, conservation requirements.

#### Response to specific questions

1. Do you support this proposal and option? Why or why not?

**No. The proposal is based on a flawed logic that:**

- a. like the current Duty of Care provisions of the QCHAs, focuses on the nature of development, rather than the requirements of cultural heritage;
- b. does not understand the nature of heritage (it is flexible, mutable, local, and variable);
- c. implies that a single surface survey of the entire state of Queensland can be undertaken and that such a survey will produce a lasting documentation of heritage;

- d. implies that such a survey can identify and categorise all heritage in a single pass;
  - e. still gives proponents the authority to make decisions about heritage when heritage needs to be managed by professionals and/or Indigenous knowledge-holders;
  - f. assumes heritage does not need oversight from a properly staffed and resourced regulatory authority.
2. Are there any improvements that could be made?
- No. The proposal is flawed from the outset and needs to be totally discarded. To reiterate: the proposal to undertake a (surface) survey of the entire state of Queensland -- aimed at providing a once only, time limited, snap-shot of (surface) heritage -- as the basis for decision-making about all heritage into the future, is simply unworkable and will lead to **massive site destruction** over time. Surface survey **cannot identify the existence of cultural heritage now or into the future.**
3. Should consultation occur for all activities in high-risk areas so there is no excluded activity? Given that this entire model is flawed from the ground up, any other considerations are null and void.
4. What are your thoughts on proactively mapping cultural heritage areas?
- It cannot be done. To reiterate: the proposal to undertake a (surface) survey of the entire state of Queensland -- aimed at providing a once only, time limited, snap-shot of (surface) heritage -- as the basis for decision-making about all heritage into the future, is simply unworkable and will lead to **massive site destruction** over time. Surface survey **cannot identify the existence of cultural heritage now or into the future.**
- ~~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?~~
- ~~6. Should consultation protocols be developed for each Aboriginal party and Torres Strait Islander party?~~
- ~~7. How should Aboriginal and Torres Strait Islander parties be supported to manage increased consultation about cultural heritage protection?~~
- ~~8. Should the development of a new assessment framework be led by a First Nations advisory group (with other experts as required)?~~

Questions 5-8 are irrelevant given the criticisms above.

## 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.

- The AAA argues that this proposal, **with some important modifications**, is workable and follows the precedent set in other jurisdictions, especially in Victoria and New South Wales, but that its implementation will require **adequate resourcing of the regulatory authority.**

This proposal, with modifications (see below), brings the Queensland Cultural Heritage Acts into alignment with other Australian states in the integration of cultural heritage assessment into the planning process for state and local governments. New South Wales and Victoria, in particular, have integrated decisions about the need for a cultural heritage assessment into the planning process for decades.

The modification required for the viability of Proposal 2 is that **mapping alone cannot replace active review of every development proposal** (see comments on Proposal 1 above). Integration of cultural heritage planning into the planning process requires an approach similar to that used in New South Wales and Victoria.

Although New South Wales and Victoria use different mechanisms to facilitate the integration of cultural heritage management planning into the planning process, both states use the following principles in ensuring that all planning incorporates a consideration of the need for cultural heritage assessment:

- Their acts specifically require that cultural heritage assessment (a CHMP or other heritage planning document) be undertaken whenever planning legislation triggers an environmental impact assessment (this is equivalent to s.87 of the Queensland Cultural Heritage Acts);
- Regulations trigger a required heritage assessment when
  - an activity is **listed** as a high impact activity; **AND**
  - the area in which the activity is proposed is **assessed** as being of cultural heritage sensitivity.

These regulations **mandate** an assessment of **every development proposal** to ensure that, if these two regulatory variables exist, then a CHMP is required.

The Queensland acts already meet the first point above, in terms of the existence of s.87 of the Queensland Acts.

To make this proposal workable in its entirety, the Queensland cultural heritage system would need to make three significant changes:

- A. Introduce **regulations** (developed in consultation with Traditional Owners/Custodians) that would determine which activities are high impact activities. This **cannot** be at the discretion of the proponents, but must be a defined list generated by the regulatory authority;
- B. Introduce regulations that mandate a review of every proposed development activity where an EIS is not required to determine whether the activity is planned for a landscape assessed as having a high likelihood of containing both tangible and intangible cultural heritage. Assessment should be undertaken by trained officers of the regulatory authority (**as happens in New South Wales**), with/or by trained, locally-based Traditional Owners/Custodians;
- C. Provide adequate resourcing of the regulatory authority to achieve these additional roles.

#### Response to specific questions

1. Do you support this proposal and option? Why or why not?

No, not as written. Integrating a flawed mapping exercise into the planning system cannot address the planning issues that exist in the current QCHAs and associated regulations.

2. Are there any improvements that could be made?

Yes. A form of integration of cultural heritage planning into the planning system that introduces regulations that mandate an assessment of development proposals by trained and resourced officers of the regulatory authority, or by trained, resourced members of Traditional Owner/Custodian groups, bringing Queensland into alignment with heritage planning in New South Wales and Victoria, would vastly improve heritage management in planning, and address concerns raised above about the lack of adherence to human rights principles in the current QCHAs.

#### **Proposal 3**

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

- The AAA argues that this proposal is workable and follows the precedent set in other jurisdictions, especially that of Victoria, but that its implementation will require adequate resourcing for both the regulatory authority and Registered Indigenous Parties.

This proposal involves amending the definitions of **significant Aboriginal and Torres Strait Islander areas and objects** in sections 9 and 10 of the Acts to:

- recognise that an area or object may be significant for both tangible and intangible reasons;
- refer to intangible aspects of cultural heritage that Aboriginal and Torres Strait Islander peoples determine to be a significant part of their cultural heritage and identity (e.g. pathways, practices, representations, beliefs, knowledge, skills).

The first major international convention to include intangible cultural heritage values was the 1972 UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*. At this time, intangible values were largely embodied in the concept of natural heritage, as they relate to prominent environmental landscapes. **In 1994, the ICOMOS Nara Document on Authenticity provided a key turning point in recognising intangible heritage as part of the suite of heritage definitions.** This document emphasised respect for cultural diversity and understanding of the meaning attributed to an object or place, rather than simply looking to establish an object’s or place’s original ‘authenticity’. As a consequence, from 1994, international conventions on intangible heritage developed relatively quickly. Since 2003, the UNESCO *Convention on Intangible Heritage* (2003) (‘IHC’) has provided an extensive definition of intangible heritage and includes ‘practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage.’

This broad definition of intangible heritage is now recognised by many jurisdictions across the globe, as well as in Australia (see the Victoria *Aboriginal Heritage Act 2006*, and the AICOMOS *Burra Charter 2013*). The main components of intangible heritage recognised in these acts and conventions are:

- oral traditions and expressions, including language as a vehicle of the intangible heritage;
- performing arts;
- social practices, rituals and festive events;
- knowledge and practices concerning nature and the Universe; and
- traditional craftsmanship.

The AAA would support the inclusion of these provisions into the definitions of Aboriginal/Torres Strait Islander heritage in the QCHAs. In fact, the AAA would argue that **the existing QCHAs do not need very much in terms of modification to include intangible heritage.** For clarity, the Acts should specifically mention the word ‘intangible’, as the draft New South Wales (DRAFT) Aboriginal Heritage Bill 2018 does, and as the Victorian *Aboriginal Heritage Act 2006* does. Among the exemplars in the definition, the QCHAs could incorporate the concept of intangible heritage into defining elements of tradition, as follows:

- (a) Aboriginal/Torres Strait Islander tradition;  
Editor’s note— Under the Acts Interpretation Act 1954, section 36 (Meaning of commonly used words and expressions), Aboriginal/Torres Strait Islander tradition means the body of traditions, observances, customs and beliefs of Aboriginal/Torres Strait Islander people generally or of a particular community or group of Aboriginal/Torres Strait Islander people, and includes any such traditions, observances, customs and beliefs **or other aspects of intangible heritage** relating to particular persons, areas, **routes, pathways**, objects or relationships (emphasis added).

#### **Section 10 Meaning of significant Aboriginal/Torres Strait Islander object**

A significant Aboriginal/Torres Strait Islander object is a **cultural object or natural object** of particular significance to Aboriginal/Torres Strait Islander people because of either or both of the following—

- (a) Aboriginal/Torres Strait Islander tradition (**as above**);
- (b) the history, including contemporary history, of an Aboriginal/Torres Strait Islander party for an area (emphasis added).

In summary, the AAA finds that incorporating the concept of intangible heritage into the existing QCHAs would involve only **minor changes** to sections of the Acts that already incorporate it. There would also be a need to revise the definition of ‘Aboriginal Cultural Heritage’ and ‘Torres Strait Islander Cultural Heritage’ (section 8), however this definition refers directly to sections 9 and 10, which do not exclude intangible heritage.

#### Response to specific questions

1. Do you support this proposal and option? Why or why not?

**Yes. Recognising intangible heritage would bring the QCHAs into alignment with international best-practice, and national and other heritage jurisdictions, in regard to defining heritage. Achieving this goal would be a relatively minor change to the definitions sections of the Acts.**

2. Are there improvements that could be made?

**Yes. Please follow the recommendations above.**

3. Is there an alternative framework that does not necessitate changes to the Queensland CH Acts?

**No. Changes are needed to the QCHAs. Part 5A (specifically Section 79D) of the Victoria *Aboriginal Heritage Act 2006* makes excellent provision for the implementation of the definition of intangible heritage, and this should be used as a template for the necessary revisions to the QCHAs.**

#### Proposal 4

##### Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

- **The AAA argues that a *single* First Nations Body does not recognise the considerable variation that exists amongst First Nations peoples/communities across the vast state of Queensland, and that leaving all dispute resolution in the hands of the judicial system seriously disadvantages (often) impoverished First Nations communities. We suggest an alternative system under our comments on **Section 5** of the Option Paper.**

The principles of Proposal 4 relate to the formation of a First Nations Advisory body or group to assist with dispute resolution, and/or extending the Land Court’s alternative dispute resolution process.

The AAA’s concerns with this proposal are twofold:

- **A *single* First Nations body cannot represent the range of cultural variation across a vast state like Queensland; and**
- **Having disputes resolved at a judicial level significantly prejudices opportunities for First Nations Queenslanders to receive a fair trial, because of the financial burden imposed by court appearances.**

As a consequence, the AAA cannot support this proposal. The AAA would, however, support the formation of a series of First Nations bodies, potentially based regionally or in keeping with First Nations culturally unified entities (e.g. Wakka Wakka Nation), with regions/nations defined by First Nations peoples themselves.

### Response to specific questions

1. Do you support this proposal and option? Why or why not?

No. A **single** First Nations body cannot represent the cultural variability across a state the size of Queensland. Forcing a judicial review of disputes will discriminate against under-resourced First Nations communities.

2. Are there any improvements that could be made?

Yes. Develop regional or 'nation-based' First Nations bodies that can represent members of autonomous First Nations groupings, as defined by First Nations peoples themselves.

### Proposal 5

#### **Require mandatory reporting of compliance to capture data and support auditing of the system.**

- The AAA argues that the proposed reporting mechanisms are workable **provided that** the regulatory authority and Registered Indigenous Parties are adequately resourced to ensure implementation.

The AAA strongly supports the mandatory reporting of all CHMPs and other management planning documents, and Land Use Agreements, undertaken pursuant to the provisions of the QCHAs, with two provisos:

- That Aboriginal/Torres Strait Islander Parties and other Traditional Owners/Custodians (see below) are resourced to ensure that Indigenous input is properly recognised; and
- That sensitive, secret, and sacred materials are specifically exempt from the mandatory reporting requirements, with determination of what can and cannot be reported being at the discretion of local Indigenous Parties/Traditional Owners/Custodians.

### Response to specific questions

1. Do you support this proposal and option? Why or why not?

Yes, **providing that** Indigenous Parties are adequately resourced to oversee the process **and** that Indigenous Parties/Traditional Owners/Custodians can have the final say over the specific content or the materials to be reported, to protect sensitive, secret and/or sacred information.

2. Are there any improvements that could be made?

Yes. Ensure that there is specific provision in the QCHAs for Indigenous Parties are adequately resourced to oversight the process **and** that Indigenous Parties/Traditional Owners/Custodians can have the final say over the specific content or the materials to be reported, to protect sensitive, secret and/or sacred information.

### Proposal 6

#### **Provide for greater capacity to monitor and enforce compliance.**

- The AAA argues that the proposed new/expanded mechanisms are workable **provided that** the regulatory authority takes responsibility for these activities. This activity should **NOT** be the responsibility of authorised officers who have limited support, functionality, and authority, but instead should fall to authorised compliance officers of the Department, supported by training, resources, and an authority to act.

The AAA strongly supports improving monitoring and enforcement of compliance of all aspects of the QCHAs. This is an area that has been sadly lacking from the outset of the implementation of the QCHAs and has led to significant destruction of heritage across Queensland. However, the AAA does **NOT** support this action being made the responsibility of authorised officers. Monitoring and compliance need to be the responsibility of authorised, properly trained compliance officers, employed by and stationed in the Department/regulatory authority, with such officers properly resourced to review and

implement actions where breaches are detected. Although members of Indigenous organisations and authorised officers may be the on-the-ground eyes and ears of the Department to notice non-compliance actions, their responsibilities should be to report evidence to formal compliance officers of the Department – officers who are fully resourced, trained, and supported by having government-backed authority to act.

#### Response to specific questions

1. Do you support this proposal and option? Why or why not?

Yes, **providing that** responsibility for implementing the improved provisions is **NOT** given to poorly resourced authorised officers.

2. Are there any improvements that could be made?

Yes. Ensure that responsibility for implementing improved monitoring and compliance is given to properly resourced compliance officers who have the authority of being government employees, and who have received training to facilitate this task.

## **B: Reframing definitions of Aboriginal/Torres Strait Islander parties (Section 4)**

### Proposal 1

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.

- The AAA argues that the proposed new system is cumbersome and does not recognise the importance of cultural heritage for Traditional Owners/Custodians who do not wish to seek native title, or who are not eligible to seek native title, for a variety of reasons. We provide an alternative mechanism that recognises both native title holders/claimants and Traditional Owners/Custodians, and offer an example of the workability of this model as provided in the *Victoria Aboriginal Heritage Act 2006*.

### Background

The current system for recognising Aboriginal/Torres Strait Islander parties is based on whether or not native title exists as determined by *The Native Title Act 1993* (Cth). The AAA argues that this is inconsistent with Queensland’s *Human Rights Act 2019*. Section 28 of Queensland’s *Human Rights Act 2019* provides that Queensland’s Aboriginal peoples and Torres Strait Islander peoples hold **distinct cultural rights**, including but not limited to the right to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas, and resources. Aboriginal and Torres Strait Islander cultural heritage is a unique resource and its protection for future generations is paramount. Failure to recognise the traditional cultural aspirations, responsibilities and obligations of **all** of Queensland’s Aboriginal and Torres Strait Islander knowledge-holders and custodians of areas because they are not currently nor have previously engaged with the native title system would perpetuate the imposition of Western systems of discrimination, to the detriment of cultural systems of Law, Lore, speaking for Country, and Caring for Country.

### Current proposal

The current proposal has two parts:

- the first part **retains** the native title-based framework for identifying Aboriginal/Torres Strait Islander parties where a registered native title claimant or holder exists. **The AAA argues that this system is flawed because it fails to recognise that many Traditional**

Owners/Custodians have rights to speak for Country and cultural heritage, even if they do not have native title status. To retain this coupling of rights in cultural heritage decision-making with rights in cultural heritage is to retain a discriminatory system.

- the second part proposes that where there is no registered native title holder or claimant:
  - any person with a demonstrated connection to heritage and Country can apply for Indigenous party status; and
  - the 'last man standing' provision (Section 35(7)) is removed.

The AAA supports any action that allows genuine Traditional Owners/Custodians, with a demonstrated connection to heritage and Country, to be considered for Indigenous party status. The AAA supports the removal of the 'last man standing' provision.

The AAA recommends the **removal of the coupling of party status and registered native title status** for all Indigenous parties. The AAA recommends a mechanism that recognises **both** native title holders/claimants **and** Traditional Owner/Custodians for all parts of the state, regardless of whether or not native title claimants/holders exist. The alternative mechanism is based on the model used in the *Victoria Aboriginal Heritage Act 2006*. Under the provisions of the Victorian Act, current Registered Aboriginal Parties must be able to demonstrate a system of connection to Country and heritage that recognises criteria other than a Native Title engagement.

<https://www.aboriginalheritagecouncil.vic.gov.au/victorias-current-registered-aboriginal-parties>.

#### Response to specific questions

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

Yes, in part. The proposal is discriminatory in its first part in that it continues to disempower those Traditional Owners/Custodians who do not wish to be part of the native title process, or who are ineligible for native title, for a range of reasons. The coupling of Aboriginal/Torres Strait Islander Party status to the **Commonwealth Native Title Act 1993** is in contravention of Queensland's *Human Right Act 2019*. The second part of the proposal, however, **does** recognise a role for non-native title peoples who have a demonstrated connection to heritage and Country. The AAA supports this part of the proposal. The AAA **strongly supports** the removal of last-man-standing provision.

**2. Are there any improvements that could be made?**

Yes. Adopt the system used in Victoria to recognise Traditional Owners/Custodians **and** native title parties in the determination of registered party status. This system has been in place for over a decade and has been proven to work.

#### Proposal 2

##### Reframe the definitions of 'Aboriginal party' and 'Torres Strait Islander party' to allow for the retention of 'last man standing' provisions

- The AAA strongly rejects this proposal as it disenfranchises legitimate Traditional Owners/Custodians who do not wish to seek native title, or who are not eligible to seek native title, for a variety of reasons.

Using a prior negative native title claim as an eligibility criteria for cultural heritage responsibility in any area of Queensland is contrary to the intention of the native title legislation itself, is contrary to the provisions of Queensland's *Human Right Act 2019*, and is totally unsuitable to determine Aboriginal or Torres Strait Islander peoples' cultural connections, obligations, aspirations or responsibilities in respect to caring for the health and wellbeing of a place and Country, and those who depend on it.

Native Title holders have undertaken onerous assessment across lengthy time frames to have their traditional connections to an area (including for many reasons other than cultural heritage recognition, protection, and management) recognised and determined under the law. To categorise those who hold native title with those who are currently only registered as claimants and still have to undertake the process is problematic enough. But to also include those who have been through the process and have not had the court rule in their favour as a category of potential Aboriginal and Torres Strait Islander parties is inconsistent with the intent of the *Native Title Act 1993* and makes a mockery of that process.

Our alternative proposal is as set out in our response to Proposal 1 above.

#### Response to specific questions

1. Do you support this proposal and option? Why or why not?

No. The proposal continues to discriminate against, and disempower, those Traditional Owners/Custodians who do not wish to be part of the native title process. It is in direct contravention of Queensland's *Human Right Act 2019*. Continued recognition of failed native title claimants over the legitimate rights of Traditional Owners/Custodians contravenes both the *Native Title Act 1993* and the *Queensland's Human Right Act 2019*.

2. Are there any improvements that could be made?

No. The proposal is utterly flawed and should be rejected in its entirety.

## **C: Promoting leadership by First Nations peoples in cultural heritage management and decision-making (Section 5)**

### **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.**

- Although the AAA supports the concept of a First Nations-led entity, we argue that a **single** First Nations Body does not recognise the considerable cultural variation that exists amongst First Nations peoples/communities across the vast state of Queensland. We suggest an alternative system that is based on regional Advisory Committees, thereby recognising **local** rights to speak for Country and manage **local** heritage.

While it is desirable and necessary to have First Nations leadership in matters relating to cultural heritage protection, recognition, and management to promote greater self-determination, the notion that it can be achieved by a single entity is naïve and potentially detrimental.

Queensland covers a vast area with multiple Aboriginal and Torres Strait Islander peoples, with a range of different cultures and environments within which each group operates. Each cultural group has its own unique connection to Country, knowledge systems, and cultural heritage. It would be difficult enough to balance these multiple interests in a regional context, let alone one that attempted to reflect the expectations, aspirations, obligations, and responsibilities of all of Traditional Owners/Custodians across the entire geographical area of the state.

The concept of 'establishing a First nations-led entity', as proposed, perpetuates the idea of 'top-down management'. This approach has been shown not to work in other cultural contexts around the world and is contrary to the Aboriginal and Torres Strait Islander 'collective', yet local, way of doing business.

#### Response to specific questions

1. Do you support the proposal to establish a First Nations-led entity? Why or why not?  
No, not as proposed.
2. Should the First Nations-led entity be incorporated into an already existing entity?  
Absolutely not. A designated entity is required, but it must be at the local level – regionally constituted at the broadest – with the scope of the entity being solely focused on cultural heritage management, with details of that scope left up to the First Nations members of the area.
3. Should there be two separate entities: one for the mainland and one for the Torres Strait?  
No. Even across the Torres Strait a **single** First Nations body is unlikely to be representative.
4. What functions should the entity(entities) have?  
The functions need to be determined in consultation with First Nations representatives from across the state. It is not appropriate for the AAA to comment, although the AAA would endorse functions that relate to heritage management, including (but not exclusively) the following:
  - a. identification of heritage;
  - b. identification of landscapes that are at high risk of having cultural heritage adversely affected by damaging development activity;
  - c. determination of when a cultural heritage assessment needs to be undertaken;
  - d. identification of who has the right to speak for specific landscapes;
  - e. action to resolve disputes relating to cultural heritage.

## **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.**

- Although the AAA supports the concept of First Nations-led entities to oversee cultural heritage decision-making in Queensland, the specific functions of these bodies need to be determined in consultation with Indigenous representatives across Queensland.

## **Conclusion**

The AAA is pleased to see that there has been some advancement in the Queensland Heritage Acts Review process to include the development of Options and Proposals that address serious concerns about the functionality of the QCHAs, identified in earlier reviews. The AAA is disappointed, however, that many of the proposals make only superficial changes to the Acts, with some of the proposed changes being utterly unworkable. In particular, it is disappointing to see that the principles frameworks for best-practice heritage management, as set out in the Juukan Gorge Review, Dhawura Ngilan, Queensland’s Path to Treaty, and Queensland’s *Human Rights Act 2019*, do not appear to have provided the foundation for the proposals as presented. In particular, the AAA finds that the following principles have not been met:

- there is no culturally appropriate way to identify those with a right to speak for Country and heritage;
- the coupling of Aboriginal/Torres Strait Islander party status with native title status continues to disenfranchise Traditional Owners/Custodians who are not native title parties but who have legitimate rights to cultural heritage decision-making;
- Proposals 1 and 2 in relation to Duty of Care still do not provide an adequate role of Traditional Owners/Custodians to control the heritage assessment process;
- there remains a *laissez-faire* role for government to be involved in cultural heritage management planning;

- there is no opportunity for Traditional Owners/Custodians have a right to veto the destruction of significant heritage.

### Specific problems remain as follows:

- Duty of Care: both proposals require a single, once-only, surface mapping of heritage across the entire state of Queensland on the flawed assumption that this will allow development activity to occur anywhere that significant heritage has not been identified.
  - The AAA has proposed a modification to Proposal 2 whereby decisions relating to when cultural heritage assessment is required will be linked to the planning process, with resourced officers of the regulatory authority, and/or resourced Indigenous parties, making assessments of all developments that do not already require a CHMP to be undertaken because of their need to undertake an EIS.
- Dispute Resolution, Compliance, and Mandatory Reporting: although the AAA supports proposals for improving opportunities for dispute resolution, compliance enforcement, and mandatory reporting of planning agreements, this cannot be done through the auspices of a single First Nations Advisory Body, or through the courts.
  - The AAA proposes that a series of regional First Nations Bodies be established with responsibilities to **oversee** enforcement of cultural heritage laws and regulations, but with actual implementation being the responsibility of resourced officers of the regulatory authority.
- Reframing definitions of Indigenous parties: the AAA finds the two proposals to revise the ways in which Aboriginal and Torres Strait Islander parties are identified are cumbersome and confusing, and continue to disenfranchise Traditional Owners/Custodians with legitimate rights to speak for heritage and Country, in contravention of Queensland's *Human Rights Act 2019*.
  - The AAA recommends adopting the system used in Victoria to recognise those with legitimate rights to speak for heritage.

### AAA supports the following proposals:

- Recognition of intangible heritage: amending the definitions of cultural heritage to include intangible heritage would require minimal changes to the existing QCHAs, and mechanisms to manage intangible heritage exist in other jurisdictions (e.g. New South Wales and Victoria), which can act as a template for adoption in Queensland.
- Promoting leadership by First Nations peoples: but not as one single body for the entire state of Queensland.
  - The AAA recommends the establishment of regional advisory bodies, with geographic boundaries based on cultural determinants of connection and belonging to Country.