Brisbane City Council ABN 72 002 765 795

Office of the Chief Executive
Brisbane Square, 266 George Street Brisbane
GPO Box 1434 Brisbane Qld 4001
T 07 3403 8888
www.brisbane.qld.gov.au

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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
CHA_Review@dsdsatsip.qld.gov.au

Dear Sir/Madam

Review of the Aboriginal Cultural Heritage Act

We refer to the Department's revival of the Review of the *Aboriginal Cultural Heritage Act 2003* (the ACH Act) and *Torres Strait Islander Cultural Heritage Act 2003*. The ACH Act is relevant to Council operations.

Council recognises and respects Brisbane's diverse Aboriginal and Torres Strait Islander communities. We particularly recognise and respect the specific role that Traditional Owners play in the city and their unique relationships with the land and water. We also acknowledge the Aboriginal and Torres Strait Islander communities within the City of Brisbane to protect cultural heritage, to educate about Aboriginal cultural heritage and to recognise the layers of connection that exist within the Brisbane local government area.

Council supports the fundamental principles that underlie the ACH Act, namely, the recognition, protection and conservation of Aboriginal cultural heritage and respect for Aboriginal knowledge, culture, and traditional practices. Therefore, timely and effective processes for the management of activities that may harm Aboriginal cultural heritage are important.

Council considers the current legislative regime to be broadly operating as intended, consistent particularly with the objects of the ACH Act. The layers of protection currently afforded to matters of Aboriginal cultural heritage align with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples and is consistent with the current native title landscape.

Council welcomes the opportunity to comment on whether the ACH Act is operating well and is achieving the recognition, protection, and conservation of Aboriginal cultural heritage.

Yours sincerely

Colin Jensen
CHIEF EXECUTIVE OFFICER

Att: Brisbane City Council's Submission to the Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

I acknowledge the Traditional Custodians of the land which is now known as Brisbane. I also pay my respects to Elders past, present and emerging, and the broader Aboriginal and Torres Strait Islander community of Brisbane.

Attachment: Brisbane City Council's Submission to the *Review of The Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

KEY OBSERVATIONS

Proposal 1 – replace the current Duty of Care Guidelines with a new framework

Both the ACH Act and the supporting Duty of Care Guidelines are effective but would be more effective with definitional and procedural clarification

1. Council considers the ACH Act to be operating as intended but considers it would benefit from amendments to ensure each stakeholder's obligations are clear and dispute resolution mechanisms are swift, effective, and minimise costs to all parties.

2. The current A*boriginal Cultural Heritage Act 2003 Duty of Care Guidelines* (the **Duty of Care Guidelines**) is a useful tool which generally serves its purpose well in assisting a land user when assessing whether it has complied with its cultural heritage duty of care. Based on Council's experience, the Duty of Care Guidelines <u>should not be replaced</u> with a new framework, but it would be more effective:

    a. with the introduction of an **excluded activity** category
    b. with the provision of further examples of activities that may generally proceed under each category
    c. if greater clarity was provided around when consultation should take place and the nature of such consultation
    d. if it provided some guidance on the types of land disturbing matters to be included in Cultural Heritage Management Agreements ensuring consultation is timely and effective.

3. Council encourages the State to include in the proposed **excluded activity** matters concerning:

    a. public safety
    b. minor extension of existing public sector entity infrastructure such as a walking track
    c. clearing along, or in preparation for, a fence line
    d. maintenance of existing cleared areas around infrastructure
    e. creation or maintenance of a firebreak.

4. In addition to the activities proposed in the example definition of excluded activity in the Queensland Government's Options Paper dated December 2021, the following are three examples that Council considers illustrate appropriate works to be captured within a new excluded activity category:

<u>*Illawong Way, Karana Downs*</u>

5. Council was required to install a significant stormwater pipe and fill an overland flow path to stabilise shifting ground which in turn supported residential dwellings.

6. In this scenario, Council considers that the Aboriginal Party should have been informed of Council's proposed activities but given the intended works were for public safety reasons, Council maintains that consultation (as opposed to a briefing) was inappropriate. This type of activity carried out for public safety reasons is appropriate to be considered an excluded activity.

Pooh Corner

7. Pooh Corner is 138 hectares of bushland in Wacol, approximately 17 kilometres southwest of Brisbane City. It was previously owned by the Department of Defence and was used as a live fire hand grenade range. The site had been surveyed for unexploded ordnance by the Department of Defence in 2004 and 2005, and as a result was designated by Defence as having a 'slight' risk of containing unexploded ordnance (UXO) or ordnance waste (EOW).

8. The land was later purchased by Council and is used for parkland and conservation purposes. Council engaged a specialist contractor to undertake UXO and EOW clearance of the portion of the land considered most likely to contain any ordnance or ordnance waste. Council considers the walking tracks and areas immediately adjacent to the tracks are safe. To further reduce any risk that may remain from undetected ordnance, Council wished to fence portions of the site to prevent access. Council also wished to establish fire breaks.

9. The unique and complicated factual background to the use of the land (particularly for military purposes) suggested that matters of Aboriginal cultural heritage were unlikely to be present or to be disturbed by the proposed works. Notwithstanding, an issue arose about whether an agreement was required even where it was otherwise inappropriate for Council to expose anyone unnecessarily to UXO to determine whether there was cultural heritage on-site.

10. Again, while a briefing to the Aboriginal Party was appropriate in the circumstances, consultation was not. This type of public safety matter would ideally be included in an excluded activity category.

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11. Council considers itself to be a good heritage and environmental steward. Sporadically, primarily to accommodate increased visitors and ensure visitor safety, Council has sought to widen and/or grade an existing walking or bike track. The area to be widened has not previously been subject to significant ground disturbance (but it is unlikely that Aboriginal artefacts would not have been identified by reason of their location). While there will be ground disturbance, arguably insignificant, it is unlikely that the activity would harm Aboriginal cultural heritage by reason of its proximity to an already heavily trafficked path. Clarification regarding public sector infrastructure and the inclusion in a proposed excluded activity category would be welcomed.

Proposed ***prescribed activity*** category

12. In Council's experience, the current Aboriginal Cultural Heritage regime generally serves its purpose but could be improved through amendments including through the addition of another category of activity – namely, excluded activity.

13. Based on Council's involvement, it is unnecessary to include a new category - prescribed activity. The proposed definition has the potential to be interpreted very narrowly to the extent that any disturbance on virgin ground could have a lasting impact.

14. If the Queensland Government is minded to proceed with this inclusion, the current definition may prove problematic. For example, if a public sector entity wished to install a bench seat in a park, would the establishment of the footings be considered a "disturbance"? Would the digging of holes in which to plant trees trigger this definition? There is a need for a quantitative assessment like the "a subdivision of less than three lots" element that is mooted for the excluded activity.

15. Further guidance on what is meant by a lasting impact to the ground would also be welcome. For example, would the grading of an uneven road or walking track be a lasting impact?

16. Council kindly asks for greater clarification about what is meant by “an activity that causes disturbance that would result in a lasting impact…to the ground below the level of disturbance that currently exists”.

17. Deeper excavation or works within an already disturbed ground could, in a practical sense, include a range of activities where the potential for harm to matters of Aboriginal Cultural Heritage are negligible. The definition should include some ability to make a practical assessment of any proposed works in disturbed areas even where the level of disturbance will be below that already disturbed.

    Cultural Heritage Management Agreements (CHMA) – Duty of Care Guidelines should provide guidance on consultation which would result in CHMAs that improve cultural heritage protection.

18. Council generally relies on the non-statutory CHMA process which details the management of the land in such a way as to avoid harm to Aboriginal cultural heritage. A CHMA is generally quicker and less costly to negotiate than a Cultural Heritage Management Plan as CHMAs do not follow the formal statutory process under the ACH Act. Council supports this option.

19. However, from time to time, agreement cannot be reached between Council and the Aboriginal Party as to the coverage of the document. Sometimes the contentious issue is not about methodology of investigations but may be about other ancillary issues.

20. Greater guidance about the scope of consultation required to inform the contents of CHMAs to deal with land disturbance and associated investigations and monitoring would be welcomed. So too, prescribed timeframes in which the parties must engage and respond; failing which there is a default position would be helpful.

21. Where agreement cannot be reached between the parties, recourse could be provided to the Land Court (or another statutory body such as the Queensland Civil Administrative Tribunal (**QCAT**)) in an expedited way, where the issues in dispute are of minor or moderate significance. Procedural evidentiary rules could be relaxed, and each party would bear its own costs. See my other comments regarding dispute resolution.

Consultation protocols

22. Following from the comments above, Council has experienced considerable delays in some significant projects concerning:

    a. identification of the correct Aboriginal Party with authentic claim to “speak for country”
    b. uncertainty about consultation with two or more Aboriginal Parties and which party’s concerns should be prioritised where there is conflict
    c. prolonged discussions between the parties caused by long intervals between responses
    d. disagreement between parties on broader cultural issues, with Council seeking to focus on matters concerned with land disturbance, investigations, monitoring and possible redesign
    e. disagreement about the extent of invasive soil investigations and sampling.

23. General consultation protocols which provide guidance about the responsibilities (and timeliness) of parties engaged in a consultation for the purposes of a CHMA is welcomed.

24. General consultation protocols providing guidance on types of matters appropriate for managing activities that may harm Aboriginal cultural heritage is also welcomed.

25. Clarification of responsibilities should lessen the need to directly strengthen any legislative compliance machinery; although an expediated dispute resolution mechanism would be gratefully received where there is a dispute in this isolated area. See Council’s comments under Dispute Resolution for more detail.

Proposal 2 - Integration of cultural heritage protection and mapping into land planning

26. Council considers the existing framework is effectual, but it could be made more so by some amendments to both the ACH Act and the Duty of Care Guidelines. On that basis, a persuasive case for integrating Aboriginal Cultural Heritage matters into the *Planning Act 2016* (Qld) has not been made. If anything, this proposal would further complicate consultation between the parties.

Proposal 3 - Intangible cultural heritage

27. Identifying the existence of Aboriginal cultural heritage may be difficult particularly when dealing with matters of intangible heritage but the ACH Act currently provides for recognition of intangible heritage. This is, however, a highly complex issue that incorporates nuanced traditions which may seek to limit the knowledge of matters to a particular gender or group. A land user such as Council is unlikely to be aware of such matters (even on making reasonable investigations) and inadvertent or unintentional conflicts may arise as a result.

28. Council would welcome guidance from the Queensland Government about when it should be investigating intangible cultural heritage elements and how consultation with the Aboriginal Party should be framed.

29. While from an operational practical perspective, detailed, proactive mapping to identify intangible aspects such as trade or travel routes, ceremonial or birthing areas would be welcome, in Council's experience this may be difficult to achieve in practice.

Proposal 4 - Dispute resolution mechanisms to deal with issues under the ACH Act

30. Cases involving Aboriginal cultural heritage are rare, indicating that most matters are resolved amicably and without litigation. This demonstrates the ACH Act is operating, for the most part, effectively.

31. However, as discussed above, Council has experienced considerable delays in some significant projects concerning:

    a. identification of the correct Aboriginal Party with authentic claim to "speak for country"
    b. uncertainty about consultation with two or more Aboriginal Parties and which party's concerns should be prioritised where there is conflict
    c. long intervals between responses
    d. disagreement between parties on broader cultural issues, with Council seeking to focus on matters concerned with land disturbance, investigations, monitoring and possible redesign
    e. disagreement about the extent of invasive soil investigations and sampling.

32. An expedited dispute resolution mechanism that is less formal and organised than Part 7 of the ACH Act is appropriate for discreet matters arising from CHMA. This process could be facilitated by use of approved court/notification forms lodged with the Land Court for determination by a judge or registrar (or other statutory body such as QCAT) with expectations of informal court procedures.

33. While the extension of the Land Court's alternative dispute resolution function to allow the appointment of a mediator to deal with disputes under the ACH Act may be satisfactory, we think a decision by a Judge or Registrar on single points, particularly regarding CHMA content, would be timelier and more effective.

34. See also our comments under Identification of Aboriginal Parties.

Proposal 5 – mandatory reporting

35. Based on Council's experience, the current ACH Act and Duty of Care Guidelines largely operates as designed but could be made more successful with amendments.

36. Mandatory reporting may result in an increased administrative burden to all parties. Council would require further information before it could make an informed response on this proposal.

Reframing the definition of Aboriginal Party

Identification of Aboriginal Parties

37. How to identify the appropriate Aboriginal Party for them to be consulted has occasionally been difficult, particularly where there is an overlap of native title claimant areas. The identification of the appropriate parties is made more challenging in circumstances where various Native Title claimants do not share common views on every cultural heritage issue.

38. By way of example, in circumstances where two Aboriginal parties assert rights under the ACH Act, a land user may find itself in the position of having to engage independently with two parties. This has the very real prospect of inherent conflict between agreements which may result in delays or present unforeseen obstacles to project development. Such potential conflict should not stand in the way of balancing between development and the appropriate protection of cultural heritage.

39. Operationally, this has resulted in project delays and has increased the financial burden upon Council. These delays may have been curtailed or avoided had the ACH Act provided adequate and expediated dispute resolution options. This is a significant issue for Council.

40. In general terms, Council considers from an operational perspective that a land user should only be required to engage with one Aboriginal Party in terms of securing an agreement to ensure compliance with the cultural heritage duty of care.

41. To the extent that multiple Aboriginal Parties claim an authentic right to "speak for country" for a defined area, a mechanism for consultation amongst the Aboriginal Parties (with only one focal point for the land user) should be preferred. Such a mechanism would ensure there is a balancing of interests between the Aboriginal Parties while providing certainty for the land user and alleviating the need for the land user to navigate divergences in cultural understandings between the Aboriginal Parties.

42. The State may wish to consider incorporating a timely dispute resolution procedure into the ACH Act where, for example, notice (on an approved form) could be filed within the existing framework of the Land Court for a hearing on this discrete issue (not longer than, say, 2 hours) before a Judge or the registrar to determine party priority or common interest, with the determination being made on an expedited basis.

FINAL COMMENTS

43. Council looks forward to collaborating further with the Department in a way that better recognises, protects, and conserves Aboriginal Cultural Heritage while fostering ever developing and growing relationships between Council and the Aboriginal and Torres Strait Islander community of Brisbane; allowing all parties to enjoy certainty; to collaborate on issues of cultural heritage; and to avoid unnecessarily protracted and sometimes ineffective consultation.

44. Council acknowledges that the ACH Act currently has ability to deal with intangible cultural heritage. In Council's experience, not all intangible cultural elements can, or should, be mapped.

45. Council looks forward to having procedural matters clarified and a timely and informal dispute resolution mechanism for ACMAs (perhaps a Court that can deal with single issues promptly). It seems unnecessary to further complicate this already intricate area by integrating it into the planning legislative regime.

46. Council is happy to meet with the Department's officers to discuss further.