Submission on the Review of the Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003

March 2022

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Date	Name	Position	Action required (Review/endorse/approve)	Due
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☐ GACC major   ☐ GACC minor   ☐ High risk (but not GACC)   ☒ Medium risk

Prepared by	James Smith: james.a.smith@tmr.qld.gov.au or (07) 3066 4264
Title	Manager (Cultural Heritage & Native Title)
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1.0 <u>Introduction</u>

TMR moves and connects people, places, goods and services safely, efficiently and effectively across Queensland. We plan, manage and deliver Queensland's integrated transport environment to achieve sustainable transport solutions for road, rail, air and sea. Our integrated transport planning approach ensures we contribute to:

- people's quality of life
- Queensland's economic wellbeing
- a sustainable environment.

Central to our business is a proven commitment to actively listen and respond to Queenslanders. We then incorporate their views into decisions that may impact on people's lives. All Queenslanders, irrespective of where they live and work, can expect to have appropriate transport choices and fair access to the transport system.

TMR employs a group of full-time cultural heritage professionals across Queensland, with most staff based in regional locations. These staff focus on managing the impacts of transport infrastructure delivery and maintenance on Aboriginal, Torres Strait Islander and historical/European heritage. TMR operates under a Cultural Heritage Organisational Policy and Cultural Heritage Process Manual. More details are available here: https://www.tmr.qld.gov.au/Community-and-environment/Indigenous-programs/Protecting-cultural-heritage. It is envisaged that any amendments to the Acts will require TMR to review and update its internal policy and manual, including flow-on effects to projects, as such TMR has a keen and genuine interest in improving the cultural heritage legislation within Queensland.

The following document provides a submission from the Queensland Government's Department of Transport and Main Roads (TMR) on the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Acts) currently being conducted by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP).

TMR's submission is framed on the three key areas outlined within the *Options Paper: Finalising the Review of Queensland's Cultural Heritage Acts*, December 2021 published by DSDSATSIP, that being: (1) Providing opportunities to improve cultural heritage protection (see page 2), (2) Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party' (see page 7) and (3) Promoting leadership by First Nations peoples (see page 8). TMR's submission provides responses to each of these key areas and the questions posed in the *Options Paper*.

Disclaimer: Nothing within this submission document is official TMR or Queensland Government policy. The information contained within is based on the learnings and observations of various TMR staff members during their daily duties.

For any queries on this submission please contact:

Mr James Smith

Manager (Cultural Heritage & Native Title)

Program Management & Delivery, Program Delivery & Operations Branch

Infrastructure Management & Delivery Division, TMR

(07) 3066 4264 or james.a.smith@tmr.qld.gov.au

2.0 Key Area 1: Providing opportunities to improve cultural heritage protection

2.1 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

QUESTIONS

1. Do you support this proposal and option? Why or why not?
2. Are there any improvements that could be made?
3. Should consultation occur for all activities in high-risk areas so there is no excluded activity?
4. What are your thoughts on proactively mapping cultural heritage areas?
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)?

2.1.1 TMR response

In response to questions above:

1. TMR does not support a complete replacement of the Duty of Care Guidelines. DSDSATSIP should consider finalising the Guidelines review that commenced in 2016(?), which went through public seminars and submissions but was never finalised. The Guidelines are currently used by many as a scapegoat for what is wrong in the broader heritage management sector, which leaves the more complex and difficult to fix 'white elephants in the room' to be somewhat ignored. These being: a lack of compliance, lack of awareness and education (of both proponents and Aboriginal & Torres Strait Islander Parties) and a lack of consistent, professional standards (of both proponents and Aboriginal & Torres Strait Islander Parties). The *Options Paper* does touch on these themes which is where the focus should be, not on the Guidelines or a new Assessment Framework.

   Additionally, the Guidelines is only one means of meeting compliance (the others are listed in section 23(3) of the Act) and if the Guidelines are going to receive scrutiny, so should all the other means as it is well known in the industry that these also have significant flaws.

2. The new, proposed Cultural Heritage Assessment Framework appears to simply be the current Duty of Care Guidelines but with different terminologies. "Prescribed activity" aka Category 5 or Category 4 with residual heritage features. "Excluded activity" aka Category 1-4. "High-risk area" aka sites registered on DSDSATSIP's database or Designated Landscape Areas. "Significant Aboriginal or Torres Strait Islander area or object" aka sections 8-10 of the Act. Moving away from well known, accepted terminology to new terminology of essentially the same meaning will not solve any of the current issues in the sector. The proposed Framework also appears to rely on purely desktop

assessments (i.e. "the land user would undertake a cultural heritage search of the mapping to determine whether the activity is in a high-risk area") and this is dangerous. A good, robust heritage assessment framework requires a combination of good desktop analysis supported by site inspections to determine what, if any, heritage is present, as heritage is frequently found in disturbed areas (TMR can provide numerous examples if requested). The proposed Framework needs to emphasise pre-work site inspections as a key tool in assessing any area.

Additionally, the new Framework/Guidelines should make it mandatory for anyone conducting an assessment to be appropriately qualified and experienced (or under guidance of experienced staff). DSDSATSIP should create a Cultural Heritage Practitioners register, where members need to abide by a code of conduct and meet minimum standards (such as appropriate qualification or experience). This could be managed by the proposed First Nations body.

The new Framework/Guidelines also needs to recognise when cultural sites/areas have been mitigated in the past, for example via monitoring, excavations, salvage, etc. These could be highlighted on the DSDSATSIP mapping and mean that consultation in those areas is no longer required.

3. The proposed Framework should not require consultation for all activities in high risk areas. The system should be based on whether the activity will harm heritage and not all activities (e.g. walking) will do this.

4. DSDSATSIP already has a system where cultural heritage sites/places/areas and high risk areas with heritage values can be easily mapped by Aboriginal Parties and registered users (https://culturalheritage.datsip.qld.gov.au/achris/public/home). It's well known in the industry that many Aboriginal Parties prefer not to put information on DSDSATSIP's database due to fear of vandalism, etc. It's not that areas need to be proactively mapped (e.g. some parties have their own mapping already), it's that the current database needs to be better utilised by Aboriginal Parties and this will require DSDSATSIP to work with Parties on a case-by-case basis and possibly provide incentives. Additionally, mandatory registration of newly discovered sites should be introduced (e.g. under the *Queensland Heritage Act 1992*, new archaeological discoveries must be reported). Where Aboriginal Parties choose to have the specifics of their heritage kept confidential or 'hidden' from publicly available mapping, they should be able to do so and have it registered under expressly confidential layers.

Related to sites and high risk areas, DSDSATSIP should consider proposing amendments to the *Land Act 1994* and/or *Aboriginal Land Act 1991* that allow Aboriginal and Torres Strait Islander Parties to acquire properties or segments of properties that contain significant sites. This could be a government funded program, with land trusted to Parties for day to day management. Attempting to appropriately manage heritage places on unsecure tenures has proven to be difficult, hence a solution where heritage sites are protected by tenure also would be beneficial.

5. Terms like prescribed activity, high-risk area, excluded activity, significant Aboriginal or Torres Strait Islander area or object are already well defined in the existing Duty of Care Guidelines and the Act, just under different names (e.g. "Prescribed activity" aka Category 5 or Category 4 with residual heritage features or "Excluded activity" aka Category 1-4). There is no need to re-invent the wheel when distinct definitions already exist. What is required, however, is a clear methodology for assessing past land disturbance so that proponents are all utilising the same tools and coming to the same conclusions and decisions. That is, the definitions are there but what is required is an explanation of how to match an activity against the right definition. Develop a Land Use Disturbance Methodology Tool.

6. There should be a single, consistent set of protocols for consultation regardless of the proponent and the Aboriginal and Torres Strait Islander Party. The specifics of each consultation can obviously vary, but the broad framework should be the same across the state. A Consultation Terms of Reference could be developed, which outlines what the proponent must do and what the Aboriginal or Torres Strait Islander Party must do per engagement (e.g. defining timeframes, templates, notifying DSDSATSIP, etc). Developing individual protocols for each Party will be costly, timely and problematic and likely lead to differing standards across the state, which defeats the purpose of attempting to improve legislation.

7. Aboriginal and Torres Strait Islander Parties require a number of things to support them:

- Consistent government funding
- Training in business acumen and the legislation
- Training modules on key heritage practices
- A business mentor to guide them during early development
- A heritage mentor to advise them of basic heritage principles

DSDSATSIP should also consider establishing a Standing Offer Arrangement with Aboriginal and Torres Strait Islander Parties so all government agencies are engaging under the same process and conditions. This should also include payment rates so that there is a consistent, whole of Queensland Government approach to procuring parties (and maybe even expand this to regulated rates for all parties). Currently there is a multitude of procurement processes and payments utilised and this often confuses parties.

8. Development of a new Cultural Heritage Assessment Framework/Guidelines should be led jointly by an advisory group of Aboriginal and Torres Strait Islander peoples, *as well* as key proponents including State government departments, Queensland Resources Council, peak agriculture bodies and academics. It is important that all affected stakeholders are taken on the journey and have active input.

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

QUESTIONS

1. Do you support this proposal and option? Why or why not?
2. Are there any improvements that could be made?

2.2.1 TMR response

In response to questions above:

1. TMR supports this proposal. Currently Aboriginal and Torres Strait Islander heritage management sits somewhat external from other planning and development processes, which means that it can be an afterthought rather than an upfront priority. Including Aboriginal and Torres Strait Islander heritage as a trigger/mandatory requirement under State and Local Governments' planning regimes would help ensure that more proactive management occurs.

2. Key improvements suggested:
   - Integrate Aboriginal and Torres Strait Islander heritage management into Local Government's planning schemes so that, for example, development applications must provide evidence of meeting the duty of care before being approved.
   - Integrate DSDSATSIP's database into standard mapping tools, such as Queensland Globe. Making information more readily available within other well known and well used mapping tools will ensure Aboriginal heritage is more prominent in planning decisions.

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

> **QUESTIONS**
> 1. Do you support this proposal and option? Why or why not?
> 2. Are there any improvements that could be made to the option or definitions?
> 3. Is there an alternative framework or option that might better recognise intangible cultural heritage, instead of amending the definitions in the Cultural Heritage Acts?

2.3.1 TMR response

In response to questions above:

1. TMR supports this proposal as intangible heritage is often overlooked or poorly understood by lay persons. Giving it prominence in the Acts will help ensure it is managed during projects/activities.

2. In the Act provide good, clear examples of intangible heritage that is both connected to places (e.g. Dreaming stories at a waterhole) as well as intangible heritage that is less connected to places (e.g. language, knowledge, etc).

3. Intangible heritage needs to be included in the Acts, as it is cultural heritage. However, it needs its own specialised framework, for example, managing an artefact scatter is different to managing language. DSDSATSIP should develop separate Frameworks/Guidelines for both Tangible and Intangible heritage.

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

> **QUESTIONS**
> 1. Do you support this proposal? Why or why not?
> 2. Do you support these options? Why or why not?
> 3. Are there any improvements that could be made?

2.4.1 TMR response

In response to questions above:

1. TMR supports this proposal. Often the issue is not the legislation, but rather as a result of differing opinions or expectations. A solution that provides a point of relief other than court action is highly desirable, particularly for smaller scale projects.

2. The outlined options are good, with preference to having an Aboriginal & Torres Strait Islander Heritage Council that could hear disputes, provide a mediator to parties and make binding decisions if needed.

3. The Council should also have powers around regulating who does Cultural Heritage Assessments to ensure that the sector has high quality, competent people doing assessments. For example, they could manage the Cultural Heritage Practitioners register mentioned above.

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

QUESTIONS

1. Do you support this proposal and option? Why or why not?
2. Are there any improvements that could be made?

2.5.1 TMR response

In response to questions above:

1. TMR supports this proposal, as having to provide data helps drive self-compliance.

2. DSDSATSIP should develop standard templates for assessments, agreements, reports, etc so that the whole industry is consistent. It should also be mandatory to report harm to heritage, new heritage finds as well as advise DSDSATSIP when new consultation has commenced.

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

QUESTIONS

1. Do you support this proposal? Why or why not?
2. Do you support these options? Why or why not?
3. Are there any improvements that could be made?

2.6.1 TMR response

TMR supports this proposal and the options outlined. The lack of compliance in the sector currently is a major issue and any improvements in this regard would be beneficial. On the ground compliance should be a priority, with government officers outside DSDSATSIP also given authorised officer powers as well as people from Aboriginal and Torres Strait Islander Parties.

The responsibility for prosecution should also be allocated to the proposed First Nations entity/Aboriginal and Torres Strait Islander Heritage Council, in the interest of self-determination. That is, allow the entity to lead prosecutions as needed.

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3 Key Area 2: Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

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

> **QUESTIONS**
>
> - Do you support Option 1? Why or why not?
> - Do you support Option 2? Why or why not?
> - If you do not support either option, please explain why?
> - Do you think the Cultural Heritage Acts should be changed so that all previously registered claimants are not native title parties for an area and not just those subject to a negative determination?

3.1.1 TMR response

- TMR supports an option where previously registered native title claimants and claimants who received a negative determination are no longer native title parties under the Acts. In these cases, given the circumstances, it seems reasonable and fair to allow other Aboriginal and Torres Strait Islander people to apply for recognition as an Aboriginal Party or a Torres Strait Islander Party (as per the process proposed under Option 1). The application process should be the same regardless of whether the area was a previously registered claim or negative determination. Registered native title holders and currently registered claimants should be native title parties.

- This proposal needs to account for the potential that areas may be under dispute while proponents are attempting to conduct activities, therefore consultation may be problematic. In these cases, the option for proponents to proceed with agreement from one Aboriginal or Torres Strait Islander party should be considered.

- The functions and benefits of Cultural Heritage Bodies should also be analysed and, if appropriate, removed from the Acts if the above proposal is implemented as it makes bodies redundant.

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4 Key Area 3: Promoting leadership by First Nations peoples

4.1 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.

QUESTIONS

1. Do you support the proposal to establish a First Nations-led entity? Why or why not?
2. An alternative to establishing an entirely new entity for this purpose could be to incorporate the proposed First Nations-led entity's responsibilities into another already existing entity or body. Do you support this alternative approach? If yes, what existing entity or body could this become a part of?
3. Do you think there should be two separate entities — one for Aboriginal cultural heritage and another for Torres Strait Islander cultural heritage?
4. What are your views on the proposed functions? What other functions could this entity have?
5. Should this entity have decision-making responsibility for approving 'party status' for an area and approving Cultural Heritage Management Plans?
6. Is it culturally appropriate for this body to have a role in cultural heritage management and protection?
7. Should the entity have a dispute resolution function?
8. Should the entity be independent of the government?

4.1.1 TMR response

In response to questions above:

1. TMR supports the creation of an entity led by Aboriginal and Torres Strait Islander people focused on cultural heritage management, to help ensure that decisions being made are in the interest of their heritage. TMR acknowledges First Nations people as the primary source of knowledge for their cultural heritage. Consistent with principles of self-determination, a First-Nations-led entity should allow for nomination of members from existing Queensland Traditional Owner groups. This allows for Council representation of registered Traditional Owner groups, as well as the broader community of Aboriginal and Torres Strait Islander people — some of whom may not participate in registered groups.

2. The proposed entity should be similar to the Queensland Heritage Council (i.e. the Department of Environment and Science does the bulk of the administrative and technical work, but key decisions are escalated to the QHC). Similarly, DSDSATSIP could retain most of the administrative and technical work for Aboriginal and Torres Strait Islander heritage, but key decisions could be escalated to a Aboriginal and Torres Strait Islander Heritage Council.

3. One entity for Aboriginal and Torres Strait Islander heritage should be adequate, but there could be different offices under the same banner.

4. The bulk of the proposed functions, particularly administrative and technical items, should be retained within a DSDSATSIP Cultural Heritage unit, with key decisions being escalated to the entity (e.g. dispute resolution, policy direction, advice to the Minister, etc). The relationship between the DSDSATSIP unit and the entity should be developed as a mutually beneficial one, with both bodies supporting each other.

5. Yes, under guidance from DSDSATSIP's Cultural Heritage unit.

6. The functions and membership of the proposed entity would need to be carefully thought out, to ensure that decisions about Aboriginal and Torres Strait Islander people's heritage on the ground are being made in their best interest and not in the government's or the entity's interest. For example, if the members of the entity are not representative of all/most communities then the decisions they make may not be seen as appropriate.

7. Yes, the entity should have a dispute function. This could be supported by DSDSATSIP's Cultural Heritage unit. Formalised options and processes should be made available to Traditional Owner groups in regards to disputes arising under the Acts so that groups are better able to meet the significant costs associated with going to court when their considerations on Cultural Heritage are disputed.

8. The proposed entity should sit under government but have very clear scope and powers so that it can function without government interference, unless the entity requests it or the government needs to intervene (e.g. if it suspects misconduct, etc).

4.2 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.

QUESTIONS

1. Do you support this proposal on historical connection?
2. Why or why not?

4.2.1 TMR response

TMR supports this proposal. Aboriginal and Torres Strait Islander people are the primary source of knowledge for their heritage and should be considered optimum advisors for Cultural Heritage in regards to the recognition of historical connection to an area for cultural heritage management.