QSNTS
Queensland South Native Title Services

Level 10, 307 Queen Street
PO Box 10832, Adelaide Street
Brisbane QLD 4000
ABN: 88 114 581 556

P: (07) 3224 1200 | 1800 663 693
F: (07) 3229 9880
E: reception@qsnts.com.au
W: www.qsnts.com.au

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Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST Qld 4002

Queensland South Native Title Services Limited (**QSNTS**) welcomes the opportunity to comment on proposals to amend the *Aboriginal Cultural Heritage Act 2003* (Qld.) (**CHAct**) following publication of the Options Paper in December 2021.

QSNTS is a native title service provider funded by the Australian Government through the National Indigenous Australians Agency to perform the functions of a native title representative body under part 11 of the *Native Title Act 1993* (Cth.) for the Southern and Western Queensland Region. The Southern and Western Queensland Region covers about two-thirds of the State.

Over several years, QSNTS has made submissions and representations in relation to the reach and operation of the CHAct.

A focus of those submissions has been the unfortunate consequences of a part of Part 4 of the CHAct that has become known as the 'last claim standing' provision. Despite the statutory provisions which support it, it was the subject of an adverse judgment[1], the best the Government could do at the time was to re-enact that unfortunate provision in a way that overcame the defect identified by the Supreme Court, but not so as to address the fundamental mischief. QSNTS hopes that the Government takes the opportunity to carry out 'root and branch' revisions to the CHAct as foreshadowed by former Minister Trad.

In its submission on the *Consultation Paper – Review of Cultural Heritage Acts* of 16 August 2019, QSNTS began by submitting:

> ***The starting point and end point for defining Aboriginal cultural heritage should be that Aboriginal cultural heritage is what Aboriginal People say it is.***

[1] See: *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321

QSNTS considers this a threshold issue, particularly where the Aboriginal party is a prescribed body corporate (PBC) for a positive native title determination area.

QSNTS submits that Cultural Heritage identified by Aboriginal persons or an Aboriginal organisation whether, tangible, intangible or a place or location should (as a rebuttable presumption) be accepted and respected as being culturally significant and the highest level of protection arising from that identification.

It should not be far from any person's mind that the legislated main purpose of the CHAct is:

The main purpose of this Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage.

That main purpose must be retained and the legislation strengthened to bolster the Act's main purpose by legislating strong responses to any failure to comply with the Act including strong punitive provisions to be invoked against persons who elect to desecrate Aboriginal Cultural Heritage.

Is should be noted (and also not be far from the minds of those formulating changes to the CHAct and the regime that underpins it) that: **the main purpose of the act is <u>not</u> to make it easier or more convenient for proponents to avoid responsibility for recognising, protecting and conserving Aboriginal cultural heritage.**

It is critical that initiatives developed under any amended CHAct or replacement statutory regime are properly resourced to ensure that Indigenous persons can meaningfully take part in consultations or other activities associated with the legislative scheme.

The balance of this submission adopts the form of the Options Paper and addresses the questions asked by it.

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.

<u>Questions</u>

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

The Duty of Care Guidelines should be thoroughly overhauled to:

- mandate meaningful engagement, consultation and agreement making with the Aboriginal party engagement by the proponent
- remove any element of subjectivity or potential to make an election about the basis upon which works proceed on the part of the proponent.

The extant Duty of Care Guidelines[2] display a Gazettal Date of 16 April 2004. The importance of appropriate guidelines cannot be overstated and provision should be made for the applicable guidelines to be regularly reviewed to ascertain whether they are working and if they could be improved to better protect Aboriginal party or Torres Strait Islander cultural heritage.

2. Are there any improvements that could be made?

Early and meaningful consultation with right people to speak for the area on which an activity is contemplated must be mandated.

Evidence of that consultation and the outcomes of it ought to form part of any planning (or other) application required for the activity to be undertaken. That evidence must be more than a 'tick box' and be capable of persuading the application assessor on the balance of probabilities that:

- meaningful consultation has occurred
- the persons consulted have cultural authority to 'speak for' the area
- that free prior and informed consent has been obtained in relation to:
    - the proposed activity; or
    - any cultural heritage management plan developed as an outcome of the consultation

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

Yes.

It is not acceptable that a proponent may make:

- a subjective assessment of how the proposed activity may impact Indigenous cultural heritage; or
- a decision to 'assume the risk' related to any impact on Indigenous cultural heritage caused by the activity.

4. What are your thoughts on proactively mapping cultural heritage areas?

Indigenous Australians must be afforded the opportunity to have their cultural heritage recognised and protected.

That might occur through mapping particulars sites, but it could also include mapping in general sense areas which contain cultural heritage without a site (in the sense of GIS co-ordinate specific) being identified with particularity.

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

[2] Published at: https://www.qld.gov.au/firstnations/environment-land-use-native-title/cultural-heritage/cultural-heritage-duty-of-care

- prescribed activity?

The example contained in the Options Paper to the effect that *an activity that causes disturbance that would result in a lasting impact to ground that has not previously been disturbed* is a poor one.

The fact that ground has been previously disturbed (subject to and assessment of the degree and type of disturbance) ought not relieve a proponent of the obligation to ensure that cultural heritage is not placed at risk or damaged.

A prescribed activity should be defined as any activity which may result in risk or damage to Indigenous cultural heritage

- high-risk area?

As a starting point, all of Queensland should be presumed to be a high risk area unless it can be shown not to be. For some areas / places that would be easily done (for example; paved roads, highly developed areas of cities and towns, significant infrastructure installations) but for other areas the main purpose of the legislation should be observed and the area be assumed to be high risk until it is objectively shown not to be.

The proposed mapping exercise would likely be a long and expensive process that unless planned and executed with great care may not achieve its purpose. The mapping exercise requires an area to be identified as "high risk" as a starting point. That is a wrong premise and contrary to the main purpose of the CHAct.

- excluded activity?

Identifying a sub-division of fewer than three lots (= 2 Lots?) as an excluded activity is imprecise and arbitrary.

Language in the Options Paper such as:

> *However, if **significant** cultural heritage is identified during the activity, or the activity is **likely to harm** known cultural heritage, the land user would be required to consult with the Aboriginal or Torres Strait Islander party.*

Reverts to the land user or proponent forming a subjective view of the significance of the cultural heritage or the consequence of the activity. That is not an acceptable outcome as the land user / proponent may act unconscionably or may lack and appreciation of cultural heritage (let alone what may be significant cultural heritage).

Use of language of that type and the creation of a means to avoid compliance suggests that a desired outcome for Government may be to create excuses for land users / proponents to ignore cultural heritage or the potential of an activity to harm cultural heritage.

- significant Aboriginal or Torres Strait Islander area or object?

This concept should be widened to include intangible Indigenous cultural heritage.

As a first position Indigenous cultural heritage (whether 'significant' or cultural heritage of an order lesser than "significant" must be protected and should not be exposed to the possibility of harm/

Language in the Options Paper such as:

> *If the activity will impact the significant Aboriginal or Torres Strait Islander area or object, the land user would be required to* ***consider options****, in consultation with the Aboriginal or Torres Strait Islander party, to protect the area.* ***This should include plans to avoid harm, as well as mitigation strategies****.*

while cloaked with concepts of consultation and (presumably agreement reached with the free prior informed consent of the Indigenous persons holding relevant cultural authority) this proposal does not prohibit harm but allows 'considering options' to avoid or mitigate harm to cultural heritage.

Avoidance of harm must be mandated as a starting point.

Any deviation from avoidance must be documented so that it can be objectively demonstrated on the balance of probabilities that the free prior informed consent of the Indigenous persons holding relevant cultural authority has been given.

6. Should consultation protocols be developed for each Aboriginal party and Torres Strait Islander party?

A minimum standard consultation protocol should be developed and enshrined in the suite of legislative instruments.

That protocol would necessarily include consulting with and obtaining the free prior informed consent of the Indigenous persons holding relevant cultural authority for the potentially affected place has been given according to the decision making process of the People represented by the Aboriginal and Torres Strait Islander party.

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

Aboriginal and Torres Strait Islander parties should be supported by a robust legislative suite that affords primacy in decisions to be made about activities that may affect Indigenous cultural heritage with the relevant Indigenous persons and, in particular, those who hold cultural authority relating to the potentially affected place.

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

Yes.

First Nations persons must be at the forefront of, and have primacy in, the development of any new assessment framework.

The First Nations advisory group should have relatively unfettered access to, and assistance from, other experts as required.

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?

QSNTS considers it to be essential that cultural heritage protection and mapping is integrated into land planning as an essential element of the first order.

If the State is serious about identifying and conserving Indigenous cultural heritage it must act to ensure those concepts become part of the fabric of planning and construction throughout Queensland and ingrained in the thought processes of land user and those who assist and advise them.

That can only be achieved by mandating compliance with processes that go to the identification and protecting of Indigenous cultural heritage and legislating robust enforcement and punitive provisions.

2. Are there any improvements that could be made?

The legislative suite should be premised on the current purpose of the CHActs.

That purpose should be mandated for incorporation into planning schemes throughout the State.

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?

Yes.

The issues already addressed in these submissions are apposite.

The criticality of accepting Indigenous persons with relevant cultural authority as the content experts on identification and conservation of Indigenous cultural heritage, including intangible cultural heritage, cannot be overstated.

2. Are there any improvements that could be made?

The fact that there is some knowledge of intangible cultural heritage in the public domain (or known outside the relevant Indigenous group or persons) should **not** diminish the significance of that cultural heritage.

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?

Proposal 4

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

Questions

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

QSNTS supports each of the proposals listed as options:

- establishing a First Nations body or an advisory group to assist with disputes arising under the Cultural Heritage Acts (including to help the parties when there is a disagreement) and appointing a suitable mediator, or other appropriate form of alternative dispute resolution, when required.

  This option is suitable for inter-Indigenous or intra-indigenous disputes

- extending the Land Court's alternative dispute resolution (ADR) function to allow it to appoint a suitable mediator, including from the Land Court's ADR panel, to deal with all disputes under the Cultural Heritage Acts

- giving bodies, such as the Land Court, jurisdiction to hear disputes about, and enforce, agreements

those options are better suited to disputes between Indigenous parties and proponents and could be implemented as an ascending set of interventions.

The decision of Kingham P in *Conlon & Ors v QGC Pty Ltd* [2020] QLC 3 underlines the desirability of the jurisdiction of the Land Court of Queensland being extended to hear and determine disputes arising from cultural heritage management plans.

It is desirable that the options be available to allow for disputes to be dealt with as informally and costs efficiently as possible

~~**2. Do you support these options? Why or why not?**~~

~~**3. Are there any improvements that could be made?**~~

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?

QSNTS supports this proposal.

It is of benefit to all parties to a cultural heritage agreement that a definitive copy of the agreement is registered and available in case of disagreement or dispute.

While the register (perhaps recording the parties and the area to which the agreement relates) could be public, the substance of the agreement, in particular commercial aspects should remain between the parties.

2. Are there any improvements that could be made?

See [1] above

Proposal 6

Provide for greater capacity to monitor and enforce compliance.

Questions

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

QSNTS supports the creation of greater capacity to monitor and enforce compliance with the legislative regime intended to protect Indigenous cultural heritage.

It is important that land users are educated about the:

- existence
- importance
- criticality of preservation

of Indigenous cultural heritage.

Congruent with the argument above, a range of educative, assessment and enforcement processes and options should form part of the legislative suite. That is, there ought to be a holistic approach to the way Indigenous cultural heritage is protected.

As with other measures discussed in the Options Paper, it is essential that measures developed to support the identification, recording and protection of Indigenous cultural heritage is properly resourced.

2. Do you support these options? Why or why not?

QSNTS supports each of the options identified.

The notion of including rehabilitative measures (presumably environmental) suggest that there is tacit acceptance that 'rogue' land users will continue to desecrate Indigenous cultural heritage. That acceptance is a powerful reason for the introduction of each of the other options discussed with this proposal.

As noted previously, proper resourcing of the measures is essential. There is little sense in having a solid set of responses available but insufficient resourcing for those responses to be rolled out.

3. Are there any improvements that could be made?

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

1. Do you support Option 1? Why or why not?

QSNTS supports Option 1 in part.

It is critical that in the hierarchy of persons or entities which may be the Aboriginal part or Torres Strait Islander party for an area is based upon the primacy of persons who have cultural authority for a relevant area arising from the traditional law and custom.

The flaw in Option 1 is the blanket proposal to not recognise previously registered native title claimants. That approach is justified where:

- a native title determination application (**ntda**) has been withdrawn / discontinued / struck out; or
- a ntda has been dismissed after a trial in circumstances where the claimants have not been found to be traditionally associated with the claim area

That approach is not justified where a ntda is dismissed after trial but the court's decision is based on a loss of continuity of connection to country during the post-invasion colonisation process while finding that the claimants had traditional association to the claim area. In that circumstance, the dismissed claimant should be recognised as the Aboriginal party.

A further flaw in Option 1 is the ongoing recognition of established Cultural Heritage Management Plans (**CHMP**) in circumstances where a new native title claim is registered, or there is a new native title holder for the area. In circumstances where the existing CHMP is with persons who are not part of the native title claim group or native title holding group the proposal to keep old CHMPs on foot is repugnant to the notion of people with traditional cultural authority having primacy in relation to cultural heritage matters and decisions.

The removal of section 35(7) is sensible. The mischief in s. 35(7) is that it potentially affords primacy in decision making around cultural heritage matters to people with historic rather than traditional association to place.

QSNTS recognises that people become very attached to, and gain knowledge of the cultural heritage fabric of, places through long familial association. That has happened throughout Queensland as a consequence of Government policies following the invasion and subsequent colonisation processes. But that historical association should not displace persons with traditional association to place.

The establishment (with proper resourcing) of a First Nations decision making body is a sensible proposal.

2. **Do you support Option 2? Why or why not?**

   QSNTS does not support Option 2 for the reasons discussed in the response to Option 1.

3. **If you do not support either option, please explain why?**

   Discussed above

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

   Discussed above

5.2 Proposals to promote leadership by First Nations peoples

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?**

   QSNTS supports the establishment of a First Nations-led entity.

   It is critical that, as content experts, First Nations persons have primacy in ensuring that the objects of the cultural heritage legislative suite are achieved.

   The key elements identified in the Options Paper provide a good starting point for the design of the entity.

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?**

   QSNST supports the establishment of a bespoke 'for purpose' entity to undertake this critical role.

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

   One approach could be for one body but with specialist panels to deal with the cultural heritage bifurcation.

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

   The proposed functions appear to be comprehensive. However, the range and scope pf functions should be considered as 'for discussion / negotiation' and a work-in-progress.

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

   Yes. However, decisions of the type must be evidence based and the entity should be able to have recourse to appropriate advice and assistance in reaching its decisions.

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?**

   Yes.

8. **Should the entity be independent of the government?**

   Yes – but it is essential that the entity is purely resourced by Government.

Proposal 2

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

Questions

1. **Do you support this proposal on historical connection?**

   As noted throughout these submissions, persons with traditional association with Country or place should have primacy.

   There may be limited circumstances (perhaps subject to the way cultural heritage is conceptualised and defined) in which historical connection merits recognition. That should never be in circumstances where the primacy of traditional connection / association is displaced.

2. **Why or why not?**