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[insert date] March 2022

Dear Sir/Madam

Finalisation of Queensland Cultural Heritage Review

We refer to the options paper released in late December 2021 (Options Paper) and thank you for the opportunity to provide this submission.

QYAC note that the guiding principles articulated in section 1.2 of the Options Paper are:

- *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government*[1];
- self-determination;
- locally led decision making;
- shared commitment, shared responsibility and shared accountability;
- empowerment; and
- free, prior and informed consent.

Consistency with International Human Rights

QYAC refers to the UN Declaration of the Rights of Indigenous Peoples (**DRIP**), and the Conventions it was drawn from such as the International Covenant on Civil and Political Rights (**ICCPR**), International Convention on the Elimination of all forms of Racial Discrimination (**ICERD**), the Aboriginal and Torres Strait Islander peoples and Tribal Peoples Convention (**ILO Convention 169**), Convention on Biological Diversity and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

QYAC draw attention to the fact that the Guiding Principles for this review do not use international human rights law ratified by Australia as the guiding principles for the Options paper. Self-determination and its incorporated principle of free, prior and informed consent are only two of those principles. There is no articulation of the others, nor any rationale provided as to why the Queensland State Government thinks they do not apply to the protection of Aboriginal Cultural Heritage, and the rights of future generations to enjoy such heritage.

Excluded activity erodes Aboriginal People's human rights

Why is a developer or a famer given more rights than Aboriginal People with respect to excluded activity? Is that not racially discriminatory? What about Aboriginal Cultural Heritage that are burials? What about Aboriginal Cultural Heritage which is personal property and does not form part of the freehold title to land? Is that being acquired by the State, and destroyed for profit? What are the costs of compliance to ensure that while being excluded activity is not destroying Aboriginal Cultural Heritage– or is that cost being socialised onto Aboriginal people to be ever present and watchful that a bulldozer is not going through their heritage?

Has the Department sought legal advice on consistency with the *Racial Discrimination Act 1975* (Cth)? Has the Department sought advice on consistency with the *Human Rights Act 2019* (Qld)? We doubt it is in

compliance with contemporary drafting standards but look forward to the Department publishing the legal advice they have relied upon prior to putting this Options Paper out for public consultation.

Either Aboriginal Cultural Heritage and the intergenerational human rights of Aboriginal people to enjoy that heritage is worth protecting, or it is not. For the Department to propose in this Options Paper that the significance of Aboriginal Cultural Heritage can be determined by reference to the s or type of development rather than the significance of the Aboriginal Cultural Heritage is very telling about the true purpose of the Queensland Government in their review of Aboriginal Cultural Heritage legislation.

QYAC submits that rather it is to protect and serve developers, companies and farmers, and the State and the Department cannot pretend it is also protecting and serving Aboriginal People's fundamental human right to experience their cultural heritage in situ, within its cultural landscape. To include exemptions based on development type, or size, is to fail to provide protection, and to encourage perverse outcomes which will destroy Aboriginal Cultural Heritage. The scale and impact of fencing in high-risk areas being an excluded activity, has been well demonstrated under the Native Vegetation laws.

In proposing 'excluded activity' undermining of the *Aboriginal Cultural Heritage Act 2003 (Qld)* (**Act**), the State will seriously erode current protective provisions of the Act, however faulty.

The recent Juukan Gorge Inquiry Final report "*The Way Forward*" (**Way Forward Report**) referred to in the Options Paper recommended national benchmarked standards consistent with human rights to assess state Aboriginal Cultural Heritage Act frameworks (Recommendation 3, Recimm (7.79)). It does not say except for excluded activity. If Queensland goes ahead with amendments prior to such legislation, it risks being required to revise it, and having State Development decisions challenged on a constitutional invalidity basis.

*Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (**Dhawura Ngilan**),* Appendix C articulates best practice standards and recommends a prohibition on all impacts, unless authorised. It also supports free prior and informed consent, both principles which would not be met under the Option for Excluded Activity proposed. It should be noted that introduction of legislated standards consistent with Dharwura Ngilan was a recommendation of the Way Forward Report (Recommendation 3).

Proposal 1

Self Determination

The UN right to self-determination is contained within Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), but not considered by all States to be a right available to colonised Indigenous peoples. It was one of the reasons why Australia voted against adoption of the UNDRIP in 2007, joined by US, Canada and New Zealand, all settler colonies. This was remedied by the adoption of Article 3 of UNDRIP by Australia in April 2009, which defines it as:

> *"Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

The Australian Human Rights Commission notes that self-determination can operate on a number of levels, both individually and collectively, and the appropriate level needs to be informed by the context. For example, cultural heritage landscapes, tools, and art are usually collective assets, however a burial site, or particular art, and sites may have family, clan or individual rights that also need to be considered. For example, it may be law and custom that only certain families or clans can speak of a site, let alone for a site, and within families there may be particular people designated to speak for their family. It is for that family to determine. It may not be culturally appropriate to allow for a collective decision on some aspects of cultural heritage, other than at a broad level which is to protect the Aboriginal Peoples' rights to articulate their process.

The interdependent nature of the right to self-determine, being both collective, and individual, was expressed clearly by Lowitja O'Donoghue (then the Chairperson of the Aboriginal and Torres Strait Islander Commission) who noted:

> *"[Collective rights] complement, and indeed strengthen, our individual human rights. History has shown that it is precisely where our collective rights as peoples have been ignored, that our individual rights in such areas as equal opportunity to the provision of education, employment and health care, equity in application of law and justice or participation in the political process, have also been neglected.*
>
> *It is only when our collective rights are acknowledged that the disadvantage we suffer as individuals can be redressed."*[1]

It is important to recognise that decisions on cultural heritage are complex multidimensional decisions and important public rights, fundamental human rights, and private property rights are affected with these decisions. The decisions are intergenerational in nature, and the cumulative impacts of such decisions must be measured and acknowledged[2].

Self-determination requires that Aboriginal Peoples' should be able to participate in the design of any such laws, including allowing for self-government of those decisions.

The private and public rights of the Aboriginal Peoples' to make those decisions without improper influence or pressure, public opprobrium and political backlash also needs to be protected and upheld by our Governments and legal system, like other non-Aboriginal Peoples' private and public rights.

Otherwise the reforms risk leading to further subsidy of mainstream economic activity by Aboriginal people, and a worsening of the Closing the Gap targets. This brings us to the concept of free prior and informed consent.

Free, prior and informed consent

Free, prior and informed consent is one of the foundational principles of self-determination. Free, prior and informed consent means that any consent to a decision is not subjected to improper influence, is obtained prior to any decision to proceed, and people have adequate time and resources, including access to independent expert advice and information to properly determine the issue[3]. The consent which needs to be free, prior and informed needs to come from the appropriate cultural authority.

The FAO has provided this guidance:

> ***Free:*** *The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.*
>
> ***Prior:*** *The consent is sought sufficiently in advance of any authorisation or commencement of activities.*
>
> ***Informed:*** *The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.*
>
> ***Consent:*** *A collective decision made by the right holders and reached through a customary decision-making process of the communities*

The Juukan Gorge Inquiry Final Report (**Way Forward Report**) notes that implementation on Free Prior and Informed Consent should include:

- the timing and method of consent–timeframes and sign-offs must be culturally appropriate and reflect decision-making processes that abide by the traditional law and custom of an affected Aboriginal and Torres Strait Islander group
- ongoing consent issues–how to communicate and seek consent over the life of a project
- remediation processes

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[1] L O'Donoghue, 'Keynote Address: Australian Government and Self-Determination, in C Fletcher (ed), Aboriginal Self-Determination in Australia (1994), p 4.

[2] Justice Pain, *Anderson v D-G of the Dept of Environment and Conservation* (2006) 144 LGERA 43; [2006] NSWLEC 12; *Anderson v D-G of the Dept of Environmental and Climate Change* (2008) 163 LGERA 400; 251 ALR 633; [2008] NSWCA 337.

[3] In Australia, Rick Farley pioneered the implementation of this principle particularly in his advocacy for Aboriginal people being funded and given adequate time and resources for mediations, particularly in mining or development decisions. The World Commission on Dams was also an early leader in development of best practice in this area.

- processes for dealing with new information–if an agreement is already in place between a proponent and traditional owners and new information is unearthed, a clear process should be in place. Any new information about the significance of sites, or any associated knowledge that has potential to change traditional owners' consent, should be disclosed, and the consent decision should be able to be revoked or altered.

The importance of understanding the community level pressure which Aboriginal People are subjected to around these decisions cannot be overstated and is well documented in the Way Forward Report. Aboriginal people in remote or limited transport areas, and Elders, and community members can be harassed, abused or have their children exposed to all forms of coercion. This may not be officially sanctioned by the company, or government entity seeking the decision, but can make life very difficult for Aboriginal People living on country. This so called 'soft' pressure, is wearing as it is experienced daily, and is all pervasive.

Aboriginal people around Australia in communities who are being asked to consent to mining or development proposals are rightly questioning why they are being exposed and singled out within their community. Therefore any law, and resultant decision making must be designed so that consent occurs as an early part of the Government approval process, and cannot be characterised, or publicised by either politicians or proponents as Aboriginal People holding up development, otherwise it will add to the racism experienced by Aboriginal people. There should be serious penalties for making such statements publicly in the Racial Discrimination Act 1975 (Cth) as it undermines the integrity of the concept of free, prior and informed consent.

Further, if there is an appeal to a Minister from a decision to withhold consent by Aboriginal People, or exemptions such as the proposed three lot subdivision exemption in the Queensland cultural heritage reforms, it will result in a systemic failure to uphold, protect and recognise Aboriginal People's right to free, prior and informed consent.

Benchmarking Australian Cultural Heritage Laws against Human Rights

The Juukan Gorge Final Report (**Way Forward Report**) reviewed laws in each State and Territory and the Commonwealth and clearly articulated limitations on the compliance with fundamental human rights in every State.

Articles 11 and 12 are the most directly relevant and provide:

> "*Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
>
> *Indigenous Peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to use and control of their ceremonial objects; and the right to repatriation of their human remains.*
>
> *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples concerned*."

Article 31 provides: '*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'*

Articles 11, 18, 19, 23, 27, 28, 29 are international benchmarks articulating best practice, and requiring free, prior and informed consent to any administrative or legislative act which affects Indigenous people, or their cultural heritage, or their traditional lands and waters.

An important element of DRIP are those articles requiring restitution where human remains, objects, cultural knowledge and information, art, practices, extinguishing acts have been taken without prior, informed consent.[4] This is lacking in the Options Paper.

Supplementary, and important due to the need for Australia to annually report against race are the United Nations Sustainable Development Goals (SDGs) which require governments to incorporate inclusive decision-making and safeguards that will protect cultural heritage. This can be seen in the following Goals and Targets[5]:

Goal	***Target***
Goal 11 - Make cities and human settlements inclusive, safe, resilient and sustainable	Target 11.4 - Strengthen efforts to protect and safeguard the world's cultural and natural heritage
Goal 16 - Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels	Target 16.7 - Ensure responsive, inclusive, participatory and representative decision-making at all levels

QYAC submits that the above benchmarks must be specifically incorporated into the proposed Aboriginal Cultural Heritage Act reforms.

Mapping

QYAC Board and Elders have spent the last decade working with developers, Council and the State on preparing Part 6 Aboriginal Cultural Heritage Studies to ensure that their Aboriginal Cultural Heritage can be afforded the highest level of protection under the Act.

Having spent an enormous amount of money and time in protecting their Aboriginal Cultural Heritage, there are now surveys in place over much of the Quandamooka determined Native Title Area, and even prior to registration on the Database which takes DATSIP an inordinate amount of time to do, the Proponent is fully notified of the Aboriginal Cultural Heritage on the proposed development area, and therefore need to act accordingly in accordance with the Act, as they have been given very clear information to a high standard on the Aboriginal cultural heritage present in the proposed development area.

The proposal for some other unspecified body to map Quandamooka heritage in consultation with unspecified persons undermines this body of work. Presumably DATSIP is seeking resourcing to undertake that work which should be done by Aboriginal Peoples. It will allow the State to erode the protections provided at international law for Aboriginal Peoples. For their own purpose or for Council, or any other developer.

QYAC notes that both the Way Forward Report (2, 7.70) and the *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* ***(****Dhawura Ngilan), (*Appendix C Best practice standard 7) recommended that the Aboriginal Peoples be supported to map their Aboriginal cultural heritage, and importantly control access to it recommendation 3 (7.80). Neither recommended a State government entity undertake that process.

QYAC does not support any other body, such as a Department, or a First Nations Advisory group, or regional or local decision making entity, other than properly determined Traditional Owner Group (ie where native title has been determined positively, the Prescribed Body Corporate, and elsewhere through a Treaty style process).

[4] Article 11(2), Article 12(2), Article 20(2), Article 28, Article 32(3).

[5] United Nations (2017) *Sustainable Development Goals*. Available at: https://sustainabledevelopment.un.org/sdgs.

Proposal 1 Conclusion

QYAC does not support Proposal 1, it is inconsistent with international law and human rights, and it does not incorporate the benchmarks articulated in the Way Forward or *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan),* Appendix C.

Proposal 2

QYAC has in two prior submissions called for early integration with the planning system to ensure that proponents are advised very clearly and early in their pre-planning of a proposed development that the **State** will need to provide cultural heritage authorisation.

QYAC submits that the State and Local Government should very clearly and early in the process advise proponents that development consent, and cultural heritage authorisation will only occur with the consent of the Traditional Owner Group (ie where native title has been determined positively, the Prescribed Body Corporate, and elsewhere through a Treaty style process).

All pre planning advice and government website information should be reviewed to ensure that this occurs.

As in Victoria, the onus should be on proponents to prove that their development to the State and or Council that it does not impact on Aboriginal Cultural Heritage, not for Aboriginal People to prove that it does. The reversal of onus is required to properly allocate the burden of the Aboriginal Cultural Heritage regulation on the party profiting rather than the cost on Aboriginal People.

Otherwise, Aboriginal People are subsidising private and State development in Queensland which would be contrary again to the recommendations of the Way Forward Report (Recommendation 3, 7.79) and the *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan),* (Appendix C Best practice standard 8).

Proposal 2 Conclusion

QYAC supports early integration, but only if it also supports the upholding of their fundamental human rights and the benchmarks contained within Way Forward Report (Recommendation 3, 7.80) and the *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan), (*Appendix C Best practice standard 8).

Proposal 3

QYAC supports the intent of Proposal 3 to incorporate intangible heritage into the definitions of Aboriginal Cultural Heritage.

QYAC is of the view that it should be done in a manner consistent with the *UNESCO Convention for the Safeguarding the Intangible Cultural Heritage 2003.*QYAC notes the comments of the Federal Court in *M*, Payunka, Marika & Others v Indofurn Pty Ltd 30 IPR 209* (**Carpet's case**). QYAC agrees with recommendation 2, and 5 (7.30) of the Way Forward Report, and the call from the Heritage Chairs for national protection of intangible cultural heritage in *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan)* which are both likely to be incorporated into National Aboriginal Cultural heritage benchmarks legislation.,

QYAC notes that along with amending the definition to incorporate intangible heritage, the definition of Aboriginal cultural heritage, and area should also specifically protect cultural landscapes more, and other human rights such as intergenerational rights to experience their cultural rights in context[6]. QYAC notes there is considerable support for that approach in the Way Forward Report, and *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia (Dhawura Ngilan).*

Proposal 4

QYAC does not support proposal 4 as all court processes have mediation as a pathway for litigants, and there is nothing to stop Parties agreeing to voluntary mediation prior to court proceedings. There are

[6] Justice Pain, *Anderson v D-G of the Dept of Environment and Conservation* (2006) 144 LGERA 43; [2006] NSWLEC 12; *Anderson v D-G of the Dept of Environmental and Climate Change* (2008) 163 LGERA 400; 251 ALR 633; [2008] NSWCA 337

however some issues with a body purporting to conduct mediation. First, mediation is a skill which needs to be properly accredited. Secondly, accreditation for culturally appropriate mediation practices is not widespread, and further, few of the culturally appropriate mediation pathways are also skilled in native title law.

Even the National Native Title Tribunal which is probably the most appropriate body does not have a pool of culturally appropriate accredited mediators.

Perhaps DATSIP and the Minister could consider curating a list of best practice culturally appropriate mediators with experience in native title and cultural heritage law, as an alternative to Proposal 4.

Proposal 5

QYAC supports Proposal 5 and notes that it could be improved by a best practice manual and benchmarking process to ensure that the Act includes a process which rewards and drives continuous improvement rather than Aboriginal Peoples' being kept in the dark about good precedents and practice.

This process should be driven by feedback from Aboriginal Peoples' experience, rather than a Departmental or Panel process which may be prone to believing marketing and spin from mining companies and developers.

Proposal 6

In every review of the Duty of Care guidelines and Act, QYAC has called for additional compliance powers.

First for the Act to be in compliance with international human rights law, and the Way Forward Report, and *Dhawura Ngilan*, Aboriginal Owners must have compliance powers.

If this is undertaken by a Native Title prescribed body corporate it is no additional risk, but rather gives proponents and Aboriginal Owners a more cost-effective jurisdiction than Federal Court.

Second, Aboriginal Owners such as QYAC who have repeatedly called for compliance and enforcement of breaches of the Act have had to stand by while DATSIP fails to Act. A breach of the Act should be enforced by the State as part of protecting the public interest served by the Act. A cultural of compliance should be fostered, similar to the Natural Resources Commission model in NSW.

Third, for Aboriginal Owners, and the State to be limited in their ability to enter and investigate breaches of the Act renders it impossible to enforce.

Further, the time within which to investigate and lay charges needs to b e extended to two years.

Leadership Proposals

QYAC does not support either Proposal 1 or 2.

Neither proposal is consistent with international human rights law, the Way Forward Report or *Dhawura Ngilan.*

They call for Aboriginal Peoples to say how they cultural heritage should be identified, managed, and for free prior and informed consent regarding any potential impacts.

DATSIP was an Indigenous led body. Yet at no time was there an Aboriginal person appointed to the role of the Registrar of the Act. Further, during that time period, senior DATSIP officials in meetings with Aboriginal people expressed openly that their leader was a 'figurehead'. QYAC was shocked at the open disrespect.

Non-Aboriginal people have no role, except when asked by Aboriginal People, in cultural heritage matters. They have presided over the destruction of Aboriginal People, and lorded it over them in a "we know best" attitude which has been openly expressed.

QYAC does not support any proposal where Native Title Prescribed Body Corporates are subjected to any third-party entity determining where their culture is, or its significance. Any such proposal fails to meet international human rights law and risks being inconsistent with a Federal law, namely the *Native Title Act 1993* (Cth).

DATSIP should provide the legal advice they procured prior to these proposals being put out for public comment.

Historic connections are a matter for Aboriginal Peoples' to determine, in a cultural appropriate manner, and no Aboriginal native title holder should have to be subjected to such a person determining their cultural heritage.

QYAC points to the utter debacle in NSW where Aboriginal knowledge holders from all over the State register to speak on behalf of other Aboriginal People's country, such a system divides and conquers Aboriginal People.

Even in locations where there is not yet a native title body registered, the Queensland Government should prioritise their Treaty process to properly determine the right people for that Country, notwithstanding the impacts of colonisation may be so great that they cannot currently obtain a consent determination. It is the very least they can do after 200 years of State sanctioned dispersal mechanisms.

To instead promote others will entrench discord and conflict within our Aboriginal Peoples and reinforce the original acts of dispossession.

Conclusion

QYAC is very concerned with the Proposals in the Options Paper as they will seriously erode very important mechanisms in the existing Act. The Proposals largely erode fundamental human rights of Aboriginal People, and risk failing the flagged National Benchmark process.

Contrary to the Options Paper narrative, the Proposals are not consistent with international human rights,

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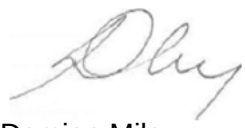
Yours sincerely,



Damian Miley

Chief Executive Officer

Quandamooka Yoolooburrabee Aboriginal Corporation