

Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander
Partnerships
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Dear ACHA Review team,

Submission for the Qld Cultural Heritage Acts Review

We, representatives of the Quandamooka Truth Embassy ('QTE'), write to provide our submission to the Queensland Cultural Heritage Act (QCHA) Review.

Background of the Quandamooka Truth Embassy

The QTE was established on 1 February 2021 to stop the construction of a whale interpretive centre due to be built on a sacred headland containing significant intangible cultural heritage on North Stradbroke Island. QTE is located on the site of the proposed centre and is the sole reason the construction of the whale centre has not commenced. The QTE is led by Elders of the Quandamooka community and is supported by a significant sector of the non-Indigenous community.

Representatives of the QTE have a pending application before the Federal Environment Minister, the Hon Sussan Ley seeking an emergency declaration under sections 9 and 10 of the *Aboriginal and Torres Strait Island Heritage Protection Act*. Whilst camping out at the Embassy, facing all kinds of weather is not ideal, especially for our Elders, it was the only option available to us to protect the sacred site. We had tried various other means to have our voices heard; however, we were continuously ignored by the project partners.

We hope that the legislative review of the QCHA will mean that the protection of cultural heritage is at the forefront of all decisions around development and resource extraction within Queensland. Resorting to setting up camp by way of an Embassy to protect a sacred country speaks to the backward nature of the current QCHA.

Juukan Gorge Review

Due to our lived experience with the cultural heritage legislation and its relatedness to North Stradbroke Island, we felt it only appropriate to provide a submission to the 2021 Juukan Gorge enquiry (*Annexure A*). We have reviewed the outcome of the Juukan Gorge review in the 2021 report titled, *A Way Forward*. In principle, we support its findings.

Comments on Legislation Reform

Similar to the reasoning for submitting to the Juukan Gorge Enquiry, we feel it is also appropriate to make this submission to the QCHA Review.

Our commentary on the QCHA Review relates to the following:

1. Traditional Decision-Making Processes;
2. Intangible Cultural Heritage;
3. Living Heritage;
4. Cultural Resource Management;
5. Intangible Cultural Knowledge - our intellectual property;
6. *Queensland Human Rights Act*.

1. Traditional Decision-Making Processes

Engaging and applying traditional decision-making processes to cultural heritage matters is vital to protecting tangible and intangible heritage. Due to the process of colonisation and the removal of Aboriginal people from country, the make-up of communities is complex. The impacts of colonial policies resulted in many who claimed Aboriginality from original value systems and their meaning, but who have, over time, replaced those original values with contemporary, foreign structures and models; for instance, applying democratic/ majority rules ways to make decisions rather than practicing traditional decision-making processes. Thus, it is essential to ensure that people with a pre-colonial, customary bloodline that connects them to country are directly consulted on all cultural heritage matters. Cultural heritage matters should not fall to simply those with an identified 'apical ancestor' who may not be connected to that particular country by pre-colonial customary bloodline.

A principle guiding this review is the Government's commitment to ensuring decision-making by Aboriginal and Torres Strait Islander peoples involves free, prior and informed consent. To be truly free and informed, decision-making on cultural heritage must be done in accordance with traditional decision-making processes.

In our experience, native title prescribed bodies corporate's (PBC) do not follow traditional decision-making processes. Instead, in our experience, they are exclusionary and have made decisions that risk the destruction of cultural heritage. Moreover, it is further concerning that as a result of the amendments made by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth), PBCs can bind native title holders to ILUAs without that ILUA being approved through traditional decision-making processes. Ultimately, those with pre-colonial, customary bloodline connection to country should be speaking for country - in fact, it is their responsibility to do so. This does not occur unless traditional decision-making processes are followed.

This is especially the case where the PBC also has a vested interest - or a direct financial interest - in activities that may affect cultural heritage. Our experience is a case in point. In our case, the PBC is the agent for native title holders - and thus the 'Aboriginal party' under the current Act (s35), the 'Aboriginal cultural heritage body' (s36), *and is also the developer*. This conflict of interest is endorsed by the framing of the current Act and should be corrected in legislative review to ensure the right people who can speak for country are directly engaged.

Belonging to country involves being a part of a direct connection to the cultural fabric. The maintenance of cultural fabrics stems from generations of accepting and respecting the important values and meaning of being First Nations people. This involves earning cultural credibility by maintaining a commitment to the obligations and responsibilities of our First Nation's cultural values and their meaning. Earning cultural entitlement and credibility is an ancient traditional value - practiced in its traditional form through ceremonies handed down over millennia to allow for the attainment of social and cultural entitlements and eligibility. It was symbolised in the scarification that was traditionally put onto our ancestor's bodies. This ancient system did not allow for people to simply just claim cultural credibility or cultural integrity. The structure and process of native title contradict this ancient values system. In turn, native title allows people who have had no connection to Aboriginality, place or cultural fabric to simply claim cultural entitlements and credibility.

Ensuring the correct people speak for country aligns with our rights under s 28 of the *Human Rights Act 2019* (Qld).

- 1.1. **Recommendation 1:** To ensure decisions are made by 'the right people for country,' legislative review should ensure traditional decision-making processes are followed in the identification and protection of cultural heritage.
- 1.2. **Recommendation 2:** Legislative review should ensure that Aboriginal people who have been excluded from the native title and PBC processes are engaged in the identification and protection of cultural heritage.
- 1.3. **Recommendation 3:** An independent body, and therefore independent processes, are required that engage pre-colonial, customary bloodline connected people to identify and protect cultural heritage.
- 1.4. **Recommendation 4:** PBCs should not be appointed as Aboriginal cultural heritage bodies.

2. Intangible Cultural Heritage

The recognition and inclusion of Intangible Cultural Heritage is vital to this legislative review. Applying Recommendations 1-4 above would ensure that all intangible cultural heritage is identified. Currently, due to the complex make-up of Aboriginal communities

having various connections to country (as detailed above), and therefore different levels of cultural knowledge about country, intangible cultural heritage is not uniformly known or understood and therefore not adequately protected. Moreover, the current framing of the *Aboriginal Cultural Heritage Act* gives only weak recognition to 'significant Aboriginal areas' (s 9) as a form of intangible cultural heritage, which leaves that form of cultural heritage at risk of permanent desecration and damage.

The current Duty of Care Guidelines, which support the *Aboriginal Cultural Heritage Act*, also requires amendment in this legislative review. Though the Guidelines purport to impose due diligence in planning processes through a precautionary approach (Guideline 1.10), they do not afford adequate protection to cultural heritage (per se) but provide seriously inadequate protection to intangible cultural heritage. For example, the Guidelines endorse several presumptions about disturbances to the ground area:

- that past disturbances to the ground area render it 'unlikely that Aboriginal cultural heritage will be harmed' (Guideline 2.2); and
- activity involving 'no Surface Disturbance of an area it is generally unlikely that the activity will harm Aboriginal cultural heritage' so that it is 'reasonable and practicable for the activity to proceed without further cultural heritage assessment' (Guideline 4.1).

The endorsement of past activity is particularly egregious because many activities in the past occurred within a social and legal paradigm that was racially discriminatory and oppressive through giving no respect or recognition to Aboriginal and Torres Strait Islander peoples, their cultural intellectual property and heritage, and their law. Instead, despite the fact of prior disturbance, the Act and any associated duty of care guidelines should - consistent with our cultural heritage rights under s 28 of the *Human Rights Act 2019* (Qld) - ensure that the right people for country can assess the area to determine how the continuing tangible and intangible heritage can and should be protected.

The effect of all of these types of presumptions is that the right knowledge holders for that area are precluded from being involved in any consultation about the impact of the activity on their intangible cultural heritage. Accordingly, these types of presumptions are not safe and should not be supported in the duty of care guidelines.

For these reasons, the definition of cultural heritage needs to be broadened to include all forms of cultural heritage, especially intangible heritage. Legislation needs to recognise cultural heritage is all land, water bodies and waterways, hills, trees, animals, our yuri systems etc. Existing frameworks should be drawn upon, including Victoria's *Aboriginal Heritage Act* (2006), UNESCO's Convention on Intangible Heritage (2003) and the ICOMOS Burra Charter. In addition, ICOMOS Practice Notes that identify best practices in the identification of cultural heritage should be engaged. Recognising and ensuring the protection of intangible cultural heritage aligns with our rights under s 28 of the *Human Rights Act 2019* (Qld).

- 2.1. **Recommendation 5:** Absolute recognition of intangible cultural heritage is required within the legislation.
- 2.2. **Recommendation 6:** The definition of *'intangible cultural heritage'* must be holistic. This definition should draw on existing frameworks that define intangible cultural heritage, including Victoria's *Aboriginal Heritage Act (2006)*, UNESCO's *Convention on Intangible Heritage (2003)* and the *ICOMOS Burra Charter*.

3. Living Heritage

Living heritage and cultural practices need to be recognised and protected when defining cultural heritage. This is to recognise that our cultural heritage is not just a thing of the past because ours is a living culture. The imposed policies of colonialism, Aboriginal protection and Aboriginal assimilation have had devastating impacts upon the value systems of many First Nations people, but regardless, ancient values have been and are retained. Accordingly, the ancient systems of heritage importance were retained and are continuously maintained to date. Hence, some of our sacred areas are more recently formed within our community.

Modern Bora case study

For example, in the late 1990s, a community bora ring was built in the local township of Goompi (Dunwich). Whilst it may be considered a modern bora, it is culturally significant to our community today and will remain so into the future and therefore needs recognition and protection. Since its formation, many highly significant cultural events have occurred at the Goompi Bora. Before colonialism, sacred boras existed that formed the cultural heritage significance of that place, but as a result of colonialism, those areas were desecrated and destroyed to facilitate colonial township development. Regardless, cultural heritage values, importance and living existence through Aboriginal people continued until today, where areas that were destroyed were reestablished based on the original values and importance of the original, ancient boras. The Goompi Bora has been established from our continuous, living heritage.

The protection of living cultural heritage aligns with our rights under s 28 of the *Human Rights Act 2019 (Qld)*.

- 3.1. **Recommendation 7:** The definition of cultural heritage within legislation must include modern living heritage and cultural practices.

4. Cultural Resource Management

Cultural resource management should be protected within cultural heritage. Whilst some legislation (eg *Fisheries Act 1994*) may protect certain areas from cultural resource extraction, over-fishing etc, they do not recognise these resources as cultural heritage.

For example, freshwater, shellfish, dugong and other sea animals are cultural resources that we rely upon for our sustenance and cultural practices.

Living cultural resource management continues to form contemporary, tangible cultural heritage sites that require intangible cultural heritage knowledge and values that have been retained regardless of the colonial impacts on our connection to and management of, all of our cultural resources. The connection and management that results from the intangible knowledge and heritage passed down through families and yuri systems is essential to our meaning, reason and our being as Aboriginal people. Many Aboriginal people have been disconnected from this cultural subsistence existence.

These practices are part of our living heritage and, therefore, should be included in definitions of cultural heritage. This aligns with our rights under s 28 of the *Human Rights Act 2019* (Qld). Living cultural resources management is regularly practiced, necessary for our subsistence and sustenance of emotional and cultural well-being.

4.1. Recommendation 8: The definition of cultural heritage in the *Act* should include the management and use of cultural resources.

5. Intangible Cultural Knowledge - our intellectual property

The definition of cultural heritage must also recognise that our intangible cultural knowledge is our intellectual property. This type of knowledge is not just a story (as understood in western terms) – it is a vital part of our cultural heritage and customary values. That is, our intellectual knowledge and intellectual property are part of our living cultural heritage, developed over thousands of years of Aboriginal scientific empiricism. It explains our ecological connectedness to the landscape – the Mother – and the sustainable management practices that we must observe to support the Mother. Our intellectual cultural knowledge and information is not shared automatically with everyone in our communities. When it involves sensitive and sacred knowledge, it is shared only with those considered to have the appropriate respect to receive that knowledge.

5.1. Recommendation 9: The legislative review must ensure that the *Act* not only defines cultural heritage accurately in all of its forms but that it also ensures that all intangible forms of our knowledge are protected, and our intellectual property in that knowledge is recognised and respected.

6. Queensland Human Rights Act

Currently, all Queensland legislation requires review against the *Human Rights Act* (2019) to identify and rectify inconsistencies. Applying the recommendations above would move the QCHA a few steps closer to being consistent with the *Human Rights Act*.

- 6.1. Recommendation 10:** The QCHA must be reviewed and amended to comply with the Queensland *Human Rights Act* (2019).

Concluding Remarks

The ongoing destruction of tangible and intangible cultural heritage across Queensland and Australia is devastating. We hope that this QCHA review will be a positive step forward to ensuring our cultural heritage's long-term and genuine protection.

We are happy to discuss any of the above matters further. Please do not hesitate to contact us via email: osprey.nsi@gmail.com.

Kind regards,

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