Niche Environment and Heritage
Brisbane Office PO Box 540 Sandgate QLD 4017
T 0488 224 036 F 02 4017 0071
E info@niche-eh.com ABN 191 37 111 721
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22 March 2022

Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST Qld 4002
Via email: CHA_Review@dsdsatsip.qld.gov.au

Dear DSDSATSIP,

Re: Cultural Heritage Acts Review

Thank you for the opportunity to provide feedback regarding the current review of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the Acts Review).

It is our opinion that a full review of the Acts is required. Such a review must go back to first principles. A need to return to first principles is demonstrated by the recent failed attempt to prosecute alleged breaches of the Acts and their Duty of Care provisions on Kingvale Station in Cape York. A full review would also better enable the findings of the 2021 Juukan Gorge Inquiry to be given full consideration within the Queensland context and enable the concept of Free, Prior, Informed, Consent (FPIC) as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to be appropriately considered.

In lieu of a full review, we make the following submission on the proposals stated in the released Options Paper.

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.

The cultural heritage framework presented in the Options Paper fails to address the underlying Guiding principles as stated in section 1.2 of seeking to achieve Free, Prior, Informed, Consent (FPIC). The FPIC process requires the rights-holders (i.e. the Aboriginal stakeholders) to determine the process, timeline and decision-making structure. Information is to be offered to stakeholders transparently and objectively at their request. The process is meant to be free from coercion, bias, conditions, bribery or rewards. Meetings and decisions should take place at locations and times and in languages and formats determined by the rights-holders and all community members are free to participate regardless of gender, age or standing. Considering the numerous Indigenous stakeholders across Queensland (and Australia), a generic engagement process dictated by Government (and therefore the Acts) is not compatible with FPIC principles. It is recommended that the designated Aboriginal Parties (if they remain called that) formed to represent their broader communities, are supported (and funded) to devise their own consultation processes. These processes are to be informed by the FPIC manual and model to be inclusive, free of bribery, coercion, and manipulation.

The application of the Cultural Heritage Assessment Framework (CHAF) is opaque. As it stands, the CHAF will suffer from the same issues as the current Duty of Care Guidelines. To remedy this the terms

'Prescribed Activity', 'Excluded Activity', and 'High-risk Area' need to be clearly defined. Rather than lists of examples, DSDSATSIP need to provide an exhaustive list of Prescribed and Excluded Activities, as they will be critical to making the CHAF process functional and prevent a plethora of different interpretations of the Acts.

In the High-risk Areas, the mapping proposal as presented is unworkable and completely lacks the detail required to understand how it would be implemented. Providing Aboriginal People with an opportunity to proactively record and map areas of cultural significance would be beneficial. However, as the proposal stands, it is asking Aboriginal People to in effect designate parts of Country as more significant than others. This may result in a mapping showing that all of Country is culturally significant, because it is, and therefore contribute nothing to the CHAF process. The second major issue is who are the Aboriginal People who speak for that Country. Far more people than those involved in successful, current, or past Native Title claims have connection and knowledge of Country. If the principles of FPIC are to be achieved, the stakeholders consulted for the mapping exercise need to be more inclusive than the old definitions of 'Aboriginal Party'.

Changes to the Acts must take the next step forward learning from past mistakes. Revised Acts needs to recognise and enable regulation of approaches to the identification, assessment and management of Indigenous cultural heritage that better balance the need for technical understanding of such heritage (e.g. through scientific assessment by archaeologists, anthropologists and other relevant social scientists) and the recognition that social and cultural understanding of Indigenous cultural heritage by Indigenous people themselves is essential. This must therefore include:

1. Clearer processes, roles and responsibilities for technical professionals in the identification, assessment and later management of all forms of cultural heritage.
2. Essential changes to the Acts that more effectively stipulate clear, meaningful and inclusive process for consultation and direct engagement with actual knowledge holders about Indigenous cultural heritage, including those Traditional Owners who may not be involved in the Native Title process.

We therefore suggest a framework that is more inclusive and de-couples the processes for the identification of knowledge holders (and therefore the determination of who is that sole Aboriginal Party requiring consultation under the current Acts) from just those engaged in the Native Title process. A more inclusive framework that includes other knowledge holders will, by very definition, enable the underlying guiding principle for this review – seeking FPIC – to be more likely to be achieved.

As it currently stands, the Acts facilitate development with a heavy emphasis on legal areas such as legal agreements and dispute resolution, which have nothing to do with cultural heritage. Cultural Heritage Management Plans (CHMPs) as currently defined under the Acts, as well as "other agreements" possible under the Acts, must be plans that manage cultural heritage, and not legal agreements which focus on labour hire arrangements such as pay, hours or project-specific dispute procedures. CHMPs and other agreements should therefore be prepared through an informed decision-making process. This would require input by, but not necessarily limited to: specific knowledge holders about what is significant to them; qualified technical professionals who must have undertaken technical assessments to identify actual or potential cultural heritage and the scientific significance of such heritage to inform management recommendations and actions for inclusion in the CHMP or other agreements; proponents to understand impacts to the viability of their projects; Government and legal representatives for legislative compliance.

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.

We support the notion of the Acts integrating with the broader planning system. However, the proposal completely lacks the detail to understand how it would be implemented or its probable effectiveness. Integration of Indigenous cultural heritage matters must also move beyond the planning system, as not all developments pass through this system before commencing. Consistency of process needs to be achieved through better integration within major projects approvals processes, for example, but not limited to, EIS and IAR requirements under the *State Development and Public Works Organisation Act 1971* and *Environmental Protection Act 1994*, and other approvals like new or amendments to existing environmental authorities common in the resources sector.

The Queensland Government must note that the ability to effectively integrate Indigenous cultural heritage management within the local planning system would be fraught on numerous levels. These include, but are not necessarily limited to:

- Significant financial and human resourcing implications for local councils to have suitably qualified and knowledgeable in-house expertise on Indigenous cultural heritage.
- Whether planning scheme codes and overlays could be used to help identify and manage intangible heritage requirements.
- The need to involve numerous different stakeholders with potentially different views on what's significant to an area.

It is our concern that an ineffective and underfunded model for integration with local planning requirements is most likely to foster a lazy development checklist approach to Indigenous cultural heritage matters such as checklists prepared by and then assessed by planners without input by knowledge holders or technical specialists. Such models are likely to result in attitudes to Indigenous cultural heritage that match the existing and prevailing "if it's not on a map then it's not important or doesn't exist" attitudes taken with other heritage matters at the local government level.

Proposal 3

Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

We are supportive that the Acts should expressly recognise intangible elements of cultural heritage. However, we also note that the Acts already protect intangible heritage via expressed connection through the concept of significance that is assigned to an object, location or specific site or place. To improve current practices, all assessments of cultural heritage must therefore include an adequate assessment of significance. Any revised definition to expressly recognise intangible cultural heritage will need to be well-defined.

Proposal 4

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

The proposal completely lacks the detail to understand how it would be implemented, and therefore, if effective. How would the proposed First Nations Body be established? Who would it include? Funded? What's it's legal standing? Would this body make a decision under the Acts if there is no Aboriginal Party

for an area? We note that only the Federal or High Court of Australia can do this – based on legal precedent. Where does this body sit, who sits on it? We suggest that to ensure FPIC is demonstrated, disputes should be elevated to the proposed First Nations Body for a decision, not the Land Court. We further suggest that if the First Nations Body couldn't make the decision, then such matters could then move to the Land Court. This would also reduce the need for the Land Court, and the expensive legal proceedings that result, to be the default for any disputes.

Proposal 5

Require mandatory reporting of compliance to capture data and support auditing of the system.

We are supportive that the Acts should expressly have a mandatory reporting requirement. The system should require mandatory reporting on an agreed system for the capture of data and record by whom, how, when etc. The Acts need to more clearly define the role of the Indigenous Party and the roles that technical specialists (e.g. archaeologists, anthropologists, community consultation specialists) have for identifying, assessing and managing cultural heritage. The Acts must equally acknowledge the need for properly informed consent on all decision-making. Information must be prepared and provided by Indigenous stakeholders and other interests in the assessment process, including the developer, land owner, Government and any scientific advisors necessary to understand significance. This must include a process which ensures independent technical assessments are included (e.g. archaeological survey, testing, salvage, management, anthropological studies) that are prepared by suitably qualified technical experts.

Proposal 6

Provide for greater capacity to monitor and enforce compliance.

We are supportive that the Acts should have greater capacity for monitoring activities and compliance. This is a current weakness in the Acts which does not enable any real ability for the effective monitoring of any activities taking place, including quality of technical assessments, effectiveness of consultation processes, independence or bias in assessments, or the possibility of coercion, manipulation, bribery, corruption and/or intimidation of participants throughout the cultural heritage process.

The Kingvale Station outcome highlights the fundamental weaknesses of the Acts and the ability of the Department to enforce compliance. This was the first time someone was charged with alleged criminal breaches of the *Aboriginal Cultural Heritage Act 2003*. While a case had been built based on evidence of land clearing without proper cultural heritage management, the Judge removed the possibility of conviction of the property owner as an option for the jury. The Court also noted "a clumsy Aboriginal Cultural Heritage Act". The outcome of this case demonstrates that a more holistic revision of the Acts needs to be conducted, not just the sections focused on in the Options Paper.

Proposal 7

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.

We are supportive of Option 1 as it aligns with the purposes of the Acts and the role of Indigenous people in the process. It would enable more Indigenous knowledge holders to participate in the cultural heritage management process. Removal of the 'last claim standing' rule allows more people who have a right to speak for Country to be involved, not just those who once had an unsuccessful claim.

Proposal 8

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.

The establishment of the First Nations body proposal as presented completely lacks the detail required to understand how it would be implemented. The government department is responsible for administering the law and should not outsource its responsibilities to another body. While we are supportive of the establishment of a body composed of different Indigenous People who advise the government on the Acts, develop and policy review, and educate the public, we believe that the involvement of a third party in cultural heritage management will lead to conflict.

Proposal 9

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.

The proposal as presented completely lacks the detail required to understand how it would be implemented.

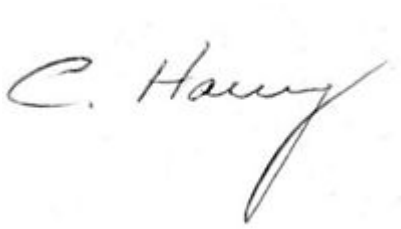
Summary and conclusions

Thank you for the opportunity to provide this submission. In summary, it is our view that the Options Paper and the majority of the Proposals presented in it, lack sufficient detail to enable extensive review and consideration. The Proposals also raise more questions than they are attempting to help provide answers.

Our position on the Acts Review is that only a comprehensive review, informed by a return to first principles and thorough consideration of current best practice principles in the identification, assessment and management of the heritage of Indigenous peoples, is what is required to facilitate real and meaningful change in the way Indigenous cultural heritage is addressed in Queensland.

We do look forward to participating further in the review process and would welcome further discussions with the review team on the matters raised in our response.

Yours sincerely,



Jill Reid *BA (Hons)*
Discipline Manager Cultural Heritage
Niche Environment and Heritage

Cameron Harvey *BA (Hons)*, MEIANZ
Queensland Regional Manager
Niche Environment and Heritage