Options paper

Finalising the review of Queensland's Cultural Heritage Acts

December 2021

Queensland Government

Acknowledgement

We pay our respects to the Aboriginal peoples and Torres Strait Islander peoples of this land, their spirits and their legacy. The foundations laid by these ancestors — the First Australians — give strength, inspiration and courage to current and future generations towards creating a better Queensland.

We recognise it is our collective efforts and responsibility as individuals, communities and governments to ensure equality, recognition and advancement of Aboriginal and Torres Strait Islander Queenslanders across all aspects of society and everyday life.

We are committed to working with, representing, advocating for and promoting the needs of Aboriginal and Torres Strait Islander Queenslanders with unwavering determination, passion and persistence.

As we reflect on the past and give hope for the future, we walk together on our shared journey of reconciliation where all Queenslanders are equal and the diversity of Aboriginal and Torres Strait Islander cultures and communities across Queensland is fully recognised, respected and valued by all Queenslanders.

Contents

1 Finalising the review

1.1 Our commitment

The Queensland Government is committed to finalising the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* to ensure these Acts continue to protect and conserve Queensland's Aboriginal and Torres Strait Islander cultural heritage, while facilitating business and development activity.

The review began in 2019 but was paused in 2020 because of the COVID-19 pandemic. Consultation on the proposals in this options paper is a key step in its finalisation.

Building on the earlier consultation and analysis, the review is examining whether the Cultural Heritage Acts:

- are still operating as intended
- are achieving intended outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland
- align with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples
- are consistent with the current native title landscape
- comply with contemporary drafting standards.

1.2 Guiding principles

This final stage of the review continues to be guided by the *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government*[1] and the guiding principles for building a reframed relationship, including self-determination; locally led decision making; shared commitment, shared responsibility and shared accountability; empowerment; and free, prior and informed consent.

1.3 The review so far

Extensive consultation was undertaken across Queensland and stakeholders provided a wide range of feedback before the review was paused.

May to July 2019 — statewide consultation

300 participants attended 18 forums and a further 150 participants attended 22 stakeholder meetings. 70 written submissions were made by Traditional Owners, land users, peak bodies, local councils, Queensland Government departments, and individuals.

January 2020 — targeted consultation

The 70 stakeholders who made submissions[2] were consulted on options for legislative reforms.

March 2020 — pause

The review was paused because of the pandemic.

[1]See: www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/tracks-treaty/statement-commitment

[2] Submissions are published at: https://www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/culture/aboriginal-torres-strait-islander-cultural-heritage

1.4 Snapshot of feedback from 2019 and 2020

The following table summarises feedback from consultation in earlier stages of the review:

Themes	Feedback
Ownership and defining cultural heritage	• Traditional Owners called for recognition of 'intangible heritage' — mainly discussed in terms of cultural landscapes, e.g. pathways, storylines. • Proponents raised concerns that including intangible heritage would create uncertainty in land use processes.
Identifying who to consult	• Traditional Owners called for: o authenticity in speaking for country ('right people for right country') o assistance in meeting their obligations as custodians of their cultural heritage. • Proponents wanted certainty and raised concerns about consulting with multiple parties.
Land user obligations	• Traditional Owners called for: o early, respectful engagement with industry and government o more requirements for mandatory consultation/engagement. • Proponents did not support an increase in mandatory consultation; they argued for proactive planning, e.g. by state or local government. • Traditional Owners and proponents indicated they would welcome dispute resolution options.
Compliance mechanisms	• Traditional Owners: o held a strong view that legislation/guidelines were a 'toothless tiger', with too much reliance on industry and government to 'do the right thing' o called for active government presence in investigation/ enforcement of cultural heritage compliance requirements. • Proponents argued that education and awareness raising were mainly needed to enhance compliance.
Recording cultural heritage	• Traditional Owners and proponents: o questioned the effectiveness of the cultural heritage database and noted examples of stakeholders creating their own databases o recognised the value of formal cultural heritage studies (under Part 6 of the Cultural Heritage Acts) but noted the lack of incentives or resources to undertake these.
Engagement and innovation	• There were calls for: o opportunities for capacity and capability building to be provided o effective, coordinated engagement with regional stakeholders.

1.5 Recent national, state and territory developments

The review of the Cultural Heritage Acts is being finalised at a time of significant reform and change in Aboriginal and Torres Strait Islander cultural heritage regulation at the Commonwealth, state and territory levels. Its finalisation is also taking place in the broader context of the Queensland Government's commitment to building a reframed relationship with Aboriginal and Torres Strait Islander Queenslanders.

Reforms and events that have informed the development of proposals and options in this paper include:

- ***A way forward: final report into the destruction of Indigenous heritage sites at Juukan Gorge***[3]**:** The report of the Commonwealth Parliament's 'Inquiry into the destruction of 46,000 year-old caves at the Juukan Gorge in the Pilbara region of Western Australia' was released on 18 October 2021. It includes consideration of how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites.
- **Cultural heritage protection frameworks in other Australian jurisdictions:** Existing frameworks were considered, as well as the Victorian Aboriginal Heritage Council's review of the *Aboriginal Heritage Act 2006* (Vic) and the Western Australian Government's review of the *Aboriginal Heritage Act 1972* (WA).
- ***Dhawura Ngilan: a vision for Aboriginal and Torres Strait Islander heritage in Australia*** **which includes Best Practice Standards in Indigenous Cultural Heritage Management and Legislation**[4]: *Dhawura Ngilan* was developed by the Chairs of Australia's national, state and territory Indigenous heritage bodies, with support from peak organisations representing every major land council and native title body in Australia. Together, the vision and standards provide a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management.
- **Queensland's Path to Treaty**[5]**:** The Queensland Government started the Path to Treaty conversation with all Queenslanders in 2019, with truth telling and healing at the heart of this dialogue. On 15 June 2021, the Queensland Government announced the establishment of a $300 million Path to Treaty Fund as a major investment in reconciliation and healing. On 12 October 2021, the Treaty Advancement Committee delivered a report to government on options for progressing treaty making in Queensland. The government is currently considering this report.
- **Queensland's *Human Rights Act 2019*:** The Act protects the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28). This section is modelled on article 27 of the International Covenant on Civil and Political Rights, and articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples.

3 See:https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report

4 See: http://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage

5 See: www.dsdsatsip.qld.gov.au/our-work/aboriginal-torres-strait-islander-partnerships/reconciliation-tracks-treaty/tracks-treaty/path-treaty/about-path-treaty

Queensland's *Human Rights Act 2019* protects human rights in law.

Section 28 of the Act provides that Aboriginal peoples and Torres Strait Islander peoples in Queensland hold distinct cultural rights. These include the rights to practise their beliefs and teachings, use their languages, protect and develop their kinship ties, and maintain their relationship with the lands, seas and waterways.

The Act requires each arm of government to act compatibly with the human rights protected by the Act. This means that:

- **parliament** must consider human rights when proposing and scrutinising new laws
- **courts and tribunals**, so far as is possible to do so, must interpret legislation in a way that is compatible with human rights
- **public entities** such as state government departments, local councils, state schools, the police and non-government organisations and businesses performing a public function must act compatibly with human rights.

The Act applies from 1 January 2020 and to Acts and decisions made on or after that date; it is not retrospective. The Act makes it clear that rights can be limited, but only where it is reasonable and justifiable.

Further information on the *Human Rights Act 2019* can be found on the Queensland Human Rights Commission website at: www.qhrc.qld.gov.au/your-rights/human-rights-law

1.6 Next steps: how to have your say

This options paper sets out proposals for reforms to the Cultural Heritage Acts based on consultation feedback to date and consideration of national, state and territory developments.

Most importantly, we want to hear from Queenslanders about the proposals.

There are several ways to provide feedback:

Online: Visit **www.qld.gov.au/CulturalHeritageActsReview** to make a written submission or complete a survey.
Email: Email your submission or comments to **CHA_Review@dsdsatsip.qld.gov.au**
Post: Mail your submission or comments to:

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

Please provide your feedback by **31 March 2022**.

All submissions will be publicly available and published on the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships website.

For enquiries: phone 1800 469 166 or email CHA_Review@dsdsatsip.qld.gov.au

2 Overview of proposals

2.1 Three key areas

The proposals in this options paper focus on three key areas:

1. **Providing opportunities to improve cultural heritage protection** through increased consultation with Aboriginal and Torres Strait Islander peoples, recognising intangible cultural heritage, and strengthening compliance mechanisms (see section 3 of this paper)
2. **Reframing 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 (see section 4 of this paper)
3. **Promoting leadership by First Nations peoples** in cultural heritage management and decision-making (see section 5 of this paper).

Proposals in key areas 1 and 2 build on the two options put forward in the options paper for the 2020 targeted consultation. These proposals take account of consultation feedback, as well as national, state and territory developments.

The proposal in key area 3 responds to feedback from the 2019 consultation, and a review of models and proposals in other jurisdictions which highlighted that First Nations peoples should have greater control over administrative, regulatory and decision-making structures for protecting cultural heritage.

2.2 Timeline for implementation

Depending on the outcomes of this consultation, preferred options would be subject to appropriate further government and budgetary considerations.

Any legislative reforms will consider the transitional arrangements needed to ensure continuity for existing arrangements and agreements, including Cultural Heritage Management Plans.

3 Providing opportunities to improve cultural heritage protection

3.1 Overview of current protection framework

The current protection framework in the Cultural Heritage Acts is based on:

- a duty of care that requires a land user to take all reasonable and practicable measures to avoid harm to cultural heritage
- agreement making between a land user and an Aboriginal party or a Torres Strait Islander party through a Cultural Heritage Management Plan or voluntary agreements under section 23 of the Cultural Heritage Acts.

A key part of this framework is the *Aboriginal Cultural Heritage Act 2003: Duty of Care Guidelines* which provide for an assessment of potential impact of a proposed activity on the cultural heritage values of an area based on the nature of the activity and the likelihood of it causing harm to Aboriginal cultural heritage. These categories are:

- **Category 1:** Activities involving no surface disturbance
- **Category 2:** Activities causing no additional surface disturbance
- **Category 3:** Developed areas
- **Category 4:** Areas previously subject to significant ground disturbance
- **Category 5:** Activities causing additional surface disturbance.

Under the Duty of Care Guidelines, where an activity is proposed under category 5, there is generally a high risk it could harm Aboriginal cultural heritage. In these circumstances, the activity should not proceed without cultural heritage assessment. Where an activity is proposed under category 5, it is necessary to notify the Aboriginal party and seek advice about whether it will impact Aboriginal cultural heritage and, if it does, agree about how best the activity may be managed to avoid or minimise harm to any cultural heritage.

The Cultural Heritage Acts provide that a person who carries out an activity is taken to have complied with the cultural heritage duty of care if the person acts in compliance with the guidelines. Failure to comply with the guidelines is not an offence.

The Cultural Heritage Acts also provide other compliance mechanisms such as:

- emergency enforcement actions where there is harm or threat of harm to cultural heritage (e.g. Ministerial stop orders, Land Court injunctions, prosecutions, and penalties)
- a mandatory Cultural Heritage Management Plan where an environmental impact statement is needed
- a Cultural Heritage Management Plan where other environmental authority is needed
- establishment of a cultural heritage database that is intended to maintain information about cultural heritage and is used by land users as a research and planning tool or to assess the risk of their activity impacting cultural heritage.

The Cultural Heritage Acts define **cultural heritage** as anything that is:

- a significant Aboriginal or Torres Strait Islander area in Queensland; or
- a significant Aboriginal or Torres Strait Islander object; or
- evidence, of archaeological or historic significance, of Aboriginal or Torres Strait Islander occupation of an area of Queensland.

A **significant Aboriginal or Torres Strait Islander area** is defined as an area of particular significance to Aboriginal or Torres Strait Islander peoples because of either or both of the following:

- Aboriginal or Torres Strait Islander tradition — it is noted that under Schedule 1 of the *Acts Interpretation Act 1954*, **Aboriginal or Torres Strait Islander tradition** means the body of traditions, observances, customs and beliefs of Aboriginal or Torres Strait Islander peoples generally or of a particular community or group of Aboriginal or Torres Strait Islander peoples, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships
- the history, including contemporary history, of any Aboriginal or Torres Strait Islander party for the area.

3.2 Guiding information for development of proposals

The table below sets out information that has guided the development of proposals about improving cultural heritage protection.

Guidance	Details
Consultation feedback	Feedback provided during previous stages of the review included the following: • Early consultation between land users and Aboriginal parties and Torres Strait Islander parties is an area where improvement is required. There was concern that the self-assessment framework resulted in many land use activities proceeding without any such consultation. • Greater oversight is required to monitor and report on compliance, including active monitoring of recorded cultural heritage. • Compliance officers could be introduced to audit compliance by land users, particularly in relation to self-assessment, and issue fines where appropriate. • There is a need for greater investment and presence by government in preventative compliance activities, including more education and awareness about the Cultural Heritage Acts, the guidelines and Aboriginal and Torres Strait Islander cultural heritage generally to move from a reactive system to a preventative one. Additional education and awareness raising would reduce the need for tougher compliance provisions. • Legislative reform should occur to facilitate more effective prosecution of offences committed under the Cultural Heritage Acts as well as stricter penalties for non-compliance. • Cultural heritage duty of care obligations should be integrated into planning legislation and government policy. • For heritage to be protected, it must first be identified, so the focus should be on preventative measures. • Greater protection of intangible cultural heritage is required. (continued)

Cultural heritage models in other parts of Australia	At the Commonwealth level, cultural heritage is protected under numerous laws, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984.* Under this Act, Aboriginal and Torres Strait Islander peoples can ask the Environment Minister to protect an area or object where it is under threat of injury or desecration and where state or territory law does not provide for effective protection. The states and territories have a range of mechanisms for protecting cultural heritage, with the provision of penalties in legislation being the most common approach to obtaining compliance. The listing of places on databases and registers is also a key feature of state and territory cultural heritage legislation and is supported by stop work orders and enforcement provisions. Victorian legislation and proposed legislation in Western Australia and New South Wales provide extensive provisions for mandatory due diligence assessments. **Intangible cultural heritage** Victoria is currently the only state in Australia that expressly refers to intangible cultural heritage in its legislation. The *Aboriginal Heritage Act 2006* (Vic) states: *… Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.* (section 79B) Victoria's framework also includes a registration process to assist in protecting intellectual property aspects of intangible cultural heritage. The New South Wales draft Aboriginal Cultural Heritage Bill 2018 has the following definition, which does not expressly name intangible cultural heritage, but contains several aspects of it: *… Aboriginal cultural heritage is the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.* (section 4[1]) Western Australia's Aboriginal Cultural Heritage Bill 2021 refers to intangible cultural heritage in its definition of Aboriginal cultural heritage. The Bill also recognises cultural landscapes as having both tangible and intangible elements. (continued)

Dhawura Ngilan **(Vision and Best Practice Standards)**	The Best Practice Standard on 'Resourcing compliance and enforcement' outlines three major issues regarding the regime around compliance and enforcement of cultural heritage legislation: *First, wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Second though, is the realisation that the structure of ICH [Indigenous Cultural Heritage] legislation is dependent upon proponents understanding that interference with ICH without an authorisation or a failure to comply with the terms of the authorisation will result in a significant sanction. This is true whatever organisation or agency is undertaking compliance and enforcement functions. This understanding by proponents will only occur if there are sufficient resources allocated to enforcement regimes for these to constitute a real deterrent to noncompliance. Third, there is a need to ensure there is national consistency in both the structure and penalty regime of ICH offence provisions. The severity of penalties needs to ensure the effective operation of the legislative regime.* **Intangible cultural heritage** The Best Practice Standard on 'Definitions' refers to the importance of intangible cultural heritage: *ICH [Indigenous Cultural Heritage] is at the heart of all Australian Heritage and should be celebrated by all Australians as the foundation of Australia's unique cultural heritage. However more than anything else ICH is the living phenomenon connecting Traditional Owners' culture today with the lives of our ancestors … ICH legislation must comprehend that, while physical artefacts provide an important ongoing physical representation of Indigenous Peoples' connection to their country over time, definitions of the manifestations of ICH must also comprehend the importance of the intangible aspects of physical places. It is in this way that a physical landscape can be properly understood as a living place inhabited by our ancestors and creators. Likewise, intangible ICH not necessarily immediately connected to physical places must also be recognised in legislation.*

3.3 Proposals to improve cultural heritage protection

The following suite of proposals (both legislative and non-legislative) outlines options for increasing the role of Aboriginal and Torres Strait Islander peoples in managing and protecting their cultural heritage, strengthening existing compliance mechanisms, and introducing new compliance mechanisms.

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.

Option

The option proposed for replacing the guidelines is a Cultural Heritage Assessment Framework (which could be prescribed in primary or subordinate legislation, with penalty units) to protect Aboriginal and Torres Strait Islander cultural heritage. The proposed framework would involve identification of two categories of activity — a **prescribed activity** (e.g. an activity that causes disturbance that would result in a lasting impact to ground that has not previously been disturbed) and an **excluded activity** (e.g. clearing along a fence line in a **high-risk area**) — and the steps outlined below. A diagram of the proposed framework and examples of definitions are provided on pages 11 and 12.

Early engagement

- Mapping of high-risk cultural heritage areas in Queensland would be undertaken. This mapping would involve engaging with Aboriginal and Torres Strait Islander parties to identify areas and assess cultural heritage to be protected.
- Before starting an activity, the land user would undertake a cultural heritage search of the mapping to determine whether the activity is in a high-risk area. It is recommended that this search be undertaken early in the project.

Consultation

- If an activity is a **prescribed activity**, the land user would be required to consult with the relevant Aboriginal or Torres Strait Islander party (regardless of whether the area is a high-risk area) to determine any potential impact of activity on cultural heritage and obtain more information about the significance of the area's cultural heritage.
- If an activity is an **excluded activity** in a high-risk area, the land user would not be required to consult and may proceed with their activity. 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.
- Any other land use activity in a **high-risk area** would require consultation with the Aboriginal or Torres Strait Islander party to determine any potential impact on cultural heritage.
- If an activity is not in a high-risk area, consultation with the Aboriginal or Torres Strait Islander party would not be required (except for prescribed activities) and may proceed. 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.

Cultural heritage assessment and protection

- The Aboriginal or Torres Strait Islander party would determine if the activity would impact the significant Aboriginal or Torres Strait Islander area or object.
- 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.

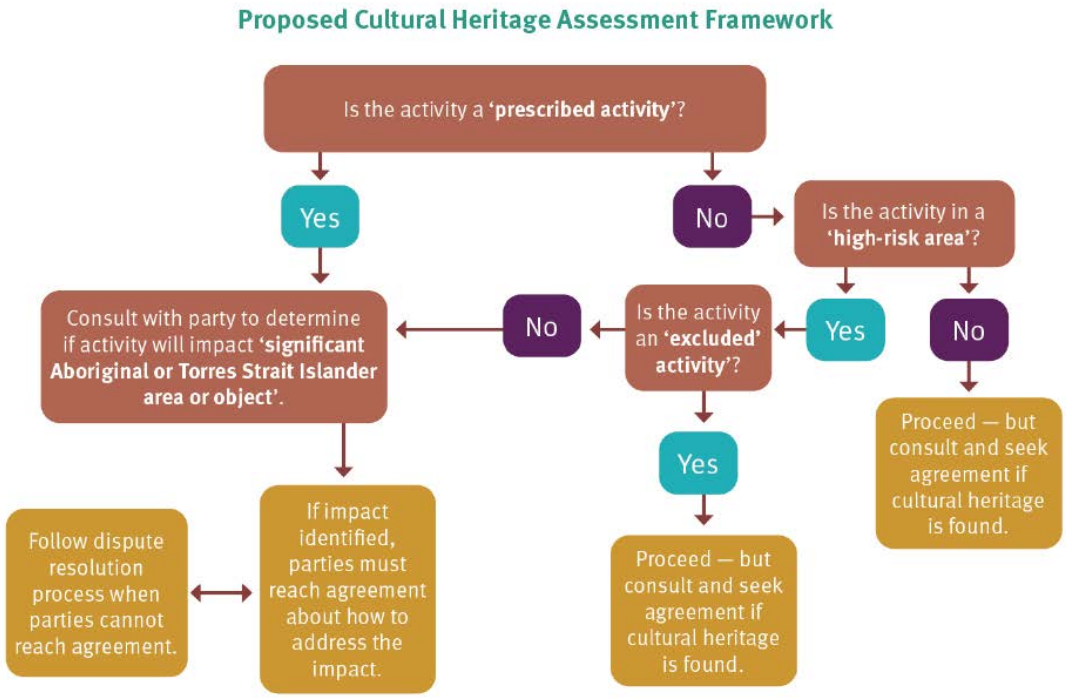
- The land user and Aboriginal or Torres Strait Islander party would be required to reach an agreement about how to address the impact with measures to be clearly identified in the agreement. The Aboriginal or Torres Strait Islander party is to be provided with sufficient information to enable full consideration of the risks before deciding whether to consent to the agreement.

Dispute resolution

- A dispute resolution process would be undertaken if agreement cannot be reached (see proposal 4).

Other considerations

- The government would be responsible for organising and carrying out the mapping of Country in consultation with, and with the consent of, Aboriginal and Torres Strait Islander parties.
- Timeframes for enquiries and consultation would be prescribed.
- This model would need to consider the level of support required for Aboriginal and Torres Strait Islander parties to manage increased consultation about proposed activities and mapping of Country.



Examples of definitions

The following terms are to be defined and developed in consultation with stakeholders. Examples could include:

- **prescribed activity:** an activity that causes disturbance that would result in a lasting impact to ground that has not previously been disturbed, or to the ground below the level of disturbance that currently exists.
- **excluded activity:** clearing along a fence line or to maintain existing cleared areas around infrastructure, or a subdivision of less than three lots.

- **high-risk area:** a mapped area requiring a greater level of consideration to ensure protection from desecration, damage or destruction due to the area having known cultural significance to Aboriginal or Torres Strait Islander peoples because of, but not limited to:
  - proximity to significant features such as landforms, coastal land, waterways, sand dunes, national parks, marine parks, previously recorded cultural heritage sites and any features or landscapes associated with those places
  - other tangible significance such as movement, ceremony, meetings, hunting and gathering
  - intangible significance such as historical connection (including contemporary history) and traditional and/or spiritual beliefs/knowledge.
- **significant Aboriginal or Torres Strait Islander area or object:** currently defined in the Cultural Heritage Acts as an area or object of particular significance to Aboriginal or Torres Strait Islander peoples because of either or both of the following:
  - Aboriginal or Torres Strait Islander tradition
  - the history, including contemporary history, of any Aboriginal or Torres Strait Islander party for the area.

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)?

I do not support the proposal in its current form.

The definition of disturbance excludes areas that have been disturbed but still hold substantial and significant heritage. Thus a prescribed activity under the proposed guidelines will reduce Aboriginal/TS ability to protect their sites. My recommendation would be to upgrade the existing Duty of Care guidelines to include areas that potentially contain cultural deposits. Aboriginal heritage is found almost everywhere and in my experience of 30 years as a consulting archaeologist, some of the most significant finds are made in areas of disturbance, such as ploughed fields. It is a sad inditement on archaeology that we persist with the myth that the only valuable heritage is in situ or intact sites.

To undertake mapping without a highly proficient landscape predictive model will be damaging. Turnstone Archaeology has developed predictive modelling to a high degree of accuracy (80% in southeast Qld; 90-95% in two huge projects in northern Qld). This uses a wide range of criteria, geology, land forms, soil, stream order, distance from water, aspect, regional ecosystems, aerial photography, a weighted system of measuring plant

and animal resources, oral and written histories, and detailed mapping data bases, to target areas considered to have a high degree of potential. It has been very successful. To compare the process however to the State's excellent regional ecosystem mapping would have a heavy impact of Aboriginal cultural heritage. In a recent project, we identified a regional ecosystem from Qld Globe as having low potential but ground-truthing produced a unsuspected category of food species that has major cultural and spiritual significance. We can reasonably accurately predict archaeological sites, but it is harder to predict intangible sites. Significant sites can be small and discrete in the middle of low risk areas.

We recently assessed a fence line that went through the centre of a large previously unknown archaeological site. The ground was undisturbed but under the proposed prescribed model it would have been excluded if the proponent had not agreed to a survey first.

Most Aboriginal and Torres Strait Islanders would say that all areas are significant and all their country is high risk and the best protection is robust and mandated consultation and on-ground investigation.

Many land users see white spaces on a map as an indication there are no constraints and this view is supported by the proposed legislation which uses proximity to a recorded site as a reason for requiring a cultural heritage assessment. It would be preferable that areas that do NOT have known sites are considered high-risk areas.

In summary, Turnstone Archaeology would oppose the proposal that consultation is not required for low-risk areas, as we believe this is too dangerous and limiting for the successful protection of cultural heritage. You cannot rely on proponents to halt a project once started and go through negotiation. Much safer to strengthen the existing Duty of Care.

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.

Option

The option proposed for achieving integration is to incorporate the mapping referred to in proposal 1 (if introduced) into planning processes for state and local government, so that risks to cultural heritage are identified and addressed in the early stages of project planning.

Questions

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

We do support this option and believe it is a very powerful tool for protecting cultural heritage.

Mandating to include all development in the planning process to include cultural heritage and providing resources to Aboriginal and TSI organisations to manage enquiries and impacts would be a stronger response to protecting cultural heritage.

Note above comments.

Proposal 3

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

Option

This option involves amending the definitions of **significant Aboriginal and Torres Strait Islander areas and objects** in sections 9 and 10 of the Acts to:

- recognise that an area or object may be significant for both tangible and intangible reasons
- refer to intangible aspects of cultural heritage that Aboriginal and Torres Strait Islander peoples determine to be a significant part of their cultural heritage and identity (e.g. practices, representations, expressions, beliefs, knowledge, skills).

Questions

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

Turnstone Archaeology supports this option. However, intangible sites first and foremost relate to spiritual beliefs and we recommend this should be inserted and be the first . Beliefs is too broad a category.

Proposal 4

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

Options

Some options for a mechanism could include:

- 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
- 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.

Questions

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

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

An Advisory group (perhaps 3) consisting of First Nations persons **who are acceptable across the State,** and supplementing these persons with perhaps two other non-indigenous persons who have a good understanding of cultural heritage processes would be a first step.

The Land Court in the past has been viewed by First Nations as unsympathetic to the preservation of cultural sites in favour of development. However, a mediator appointed by the Land Court with a bipartisan approach might be the next step.

Proposal 5

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

Option

The option proposed for mandatory reporting is to prescribe a requirement for land users to document and register all agreements and consultation under the Cultural Heritage Acts. This would involve:

- using reporting information for auditing purposes and to capture data about agreements and consultation undertaken
- creating templates and forms to assist with reporting requirements
- recording documents and information in a secure central system and holding these in compliance with privacy obligations and cultural protocols.

Questions

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

This proposal is ambiguous. We would support the lodging of all site records with Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships but there are some caveats required.

(a) This must be funded by the developer/proponent/ land user as it is a time-consuming and currently clunky process to enter sites on the data base.

(b) Some sites might have secret or sacred knowledge attached to them and provision would be required that only registered or acceptable knowledge holders have access. This should include archaeologists/ anthropologists if permission is provided by the relevant designated authorities.

(c) There are numbers of important sites unregistered because land users refuse to allow access or threaten to destroy them. DSDSATSIP needs enough legal teeth to be able to police and protect significant sites (such as art sites,

rockshelters, burials, stone arrangements, ceremonial grounds, quarries, etc) against destruction.

Proposal 6

Provide for greater capacity to monitor and enforce compliance.

Options

The following are some options that could strengthen monitoring and enforcement capacity:

- Introduce new types of orders that incorporate restorative justice principles allowing for rehabilitative and educational measures in parallel with pecuniary ones (e.g. educational orders, compulsory training).
- Expand the authorised officer role to include:
  - entry to premises despite refusal of consent by the land holder in circumstances where reasonable belief and immediate risk of harm to cultural heritage is occurring. A strict entry procedure would need to be developed and followed (e.g. an application may need to be made, and entry limited to a specified time period).
  - investigating complaints of harm and providing information relevant to stop order requests
  - conducting audits of mandatory reporting documents
  - issuing infringement notices (see below)
  - other matters requested by a First Nations body/Department/Minister
  - powers aligned with other Acts such as the *Environmental Protection Act 1994* (e.g. power to compel employees and contractors to provide statements and verbal evidence).
- Provide for authorised officers to have the power to issue infringement notices (modelled on the Penalty Infringement Notice System in Queensland). Infringement notices could be issued for breach of current offences as well as introduced offences such as non-compliance with the proposed Cultural Heritage Assessment Framework (regardless of actual harm occurring). Infringement notices would be a nominal figure to encourage compliance as well as reduce the administrative and evidentiary burden for prosecution.
- Increase the number of authorised officers to monitor and enforce compliance and provide them with specialised training. These officers would be employed by government or a First Nations body.

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?

Turnstone Archaeology agrees with and supports the proposal and all the options. However, we would advocate a substantial infringement penalty, such as we currently have, for instances where it shown to be a deliberate offence. It is not enough in many circumstances to plead ignorance. There should be a sliding scale in terms of damage done to significant sites. In the past, it has been poorly administered and officers have not had sufficient training to distinguish cultural heritage or recognise the cultural impacts.

4 Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

4.1 Overview of current definitions

The main purpose of Queensland's Cultural Heritage Acts is to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage. The Acts provide that this purpose can be achieved by ensuring Aboriginal and Torres Strait Islander peoples are involved in processes for managing the recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage, whether or not native title continues to exist.

The Cultural Heritage Acts rely on the *Commonwealth Native Title Act 1993* to identify the Aboriginal party or Torres Strait Islander party who is a native title party for an area by using the following hierarchy:

- registered native title holder
- registered native title claimant
- previously registered native title claimant (if the claim was the last claim registered and there is no other registered native title holder or claimant, this is the 'last claim standing' provision).

Where there is no native title party for an area, the Acts (section 35[7]) state that a person is an Aboriginal party or a Torres Strait Islander party for the area if they:

- have particular knowledge about traditions, observances, customs or beliefs associated with the area; and
- have responsibility under tradition for some or all of the area, or are a member of a family or clan group that is recognised as having responsibility under tradition for some or all of the area.

The native title party or Aboriginal party or Torres Strait Islander party for the area can:

- engage in statutory cultural heritage management processes (as an endorsed party) developed through a Cultural Heritage Management Plan under Part 7 of the Acts, or a Cultural Heritage Study under Part 6
- be consulted to determine the cultural heritage significance of an area
- enter into a cultural heritage agreement
- provide compliance to land users generally through informal processes.

The Cultural Heritage Acts (section 36) also provide a role for a cultural heritage body to serve as the first point of contact for cultural heritage matters. The sole function of a cultural heritage body is to assist land users identify an Aboriginal party or a Torres Strait Islander party for an area. A cultural heritage body applies to the Minister for registration.

4.2 Guiding information for development of proposal

The table below sets out information that has guided development of the proposal to reframe the definitions of **Aboriginal party** and **Torres Strait Islander party** under the Cultural Heritage Acts.

Guidance	Details
Consultation feedback	Feedback provided during previous stages of the review included the following: **Definition of 'native title party'** • A registered native title holder under the Native Title Act should remain as an Aboriginal party or a Torres Strait Islander party for an area under the Queensland Cultural Heritage Acts. • Reliance on the Native Title Act potentially excludes certain Aboriginal people who may be knowledge holders and custodians of cultural heritage within that area. **'Last claim standing' provision (a native title party for an area who is a previously registered native title claimant)** • This provision is seen to be problematic, especially in cases where a negative determination has been made. • It does not always result in the 'right people speaking for country' and another method of identifying the Aboriginal or Torres Strait Islander party should be developed. • It gives certainty to proponents. **Definition of 'Aboriginal party'** • There may sometimes be more than one Aboriginal party for an area. • Land users noted that with multiple parties (i.e. no registered native title holders) there is a significant resourcing impost to contact all parties. **Independent body** • In some submissions and community meetings, the potential establishment of an independent body to advise or make decisions on cultural heritage matters was discussed, including for dispute resolution and identification of parties.
Cultural heritage models in other parts of Australia	**Registered Aboriginal parties (RAPs) — Victoria** The Victorian Aboriginal Heritage Council registers Aboriginal parties (RAPs) under the *Aboriginal Heritage Act 2006* (Vic). The published criteria for assessing applications note that the following types • of groups will automatically be registered as a RAP[6]: • a native title holder with a native title agreement over the whole application area • Traditional Owner group entity (per the *Traditional Owner Settlement Act 2010)*. (continued)

[6] See: www.aboriginalheritagecouncil.vic.gov.au/fact-sheet-registration-aboriginal-parties

Cultural heritage models in other parts of Australia (continued)	No other applicant can become a RAP for that area, except another registered native title holder for that area. Other areas the council considers when assessing applications include: • whether the applicant represents the Traditional Owners of the area • whether the applicant is a body representing Aboriginal people that have an historical or contemporary interest in Aboriginal cultural heritage relating to the area, and expertise in managing and protecting Aboriginal cultural heritage.
***Human Rights Act 2019* (Qld)**	Queensland's *Human Rights Act 2019* is unique in the scope of Aboriginal and Torres Strait Islander rights. Section 28 of the Act provides that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights, including the right to: • enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings • maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom • conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
***Dhawura Ngilan* (Vision and Best Practice Standards)**	The Best Practice Standard on 'Incorporation of principles of self-determination' states: *The key to UNDRIP [UN Declaration on the Rights of Indigenous Peoples] is the principle of self-determination. In the context of ICH [Indigenous cultural heritage], this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects [of] any proposal that will affect that heritage.*

4.3 Proposal to reframe definitions

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.

The options for this proposal focus on changes to the native title party definitions where the native title party for an area is a previously registered native title holder. There are no changes proposed in areas where there is a registered native title holder or a registered native title claimant.

Option 1

This option involves changes in areas of Queensland where there is no registered native title holder or registered native title claimant.

In these areas, it is proposed that:

- an Aboriginal person or a Torres Strait Islander person who claims to have a connection to the area under Aboriginal tradition or Ailan Kastom can request recognition as an Aboriginal party or a Torres Strait Islander party

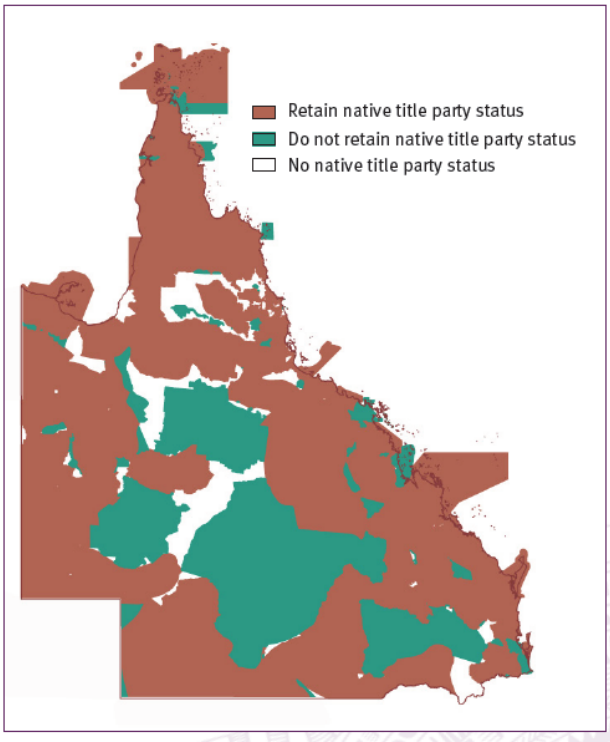
- the Cultural Heritage Acts are changed so that a previously registered native title claimant is not a native title party of an area, and section 35(7) is removed.

This option requires the establishment of a First Nations decision-making body.

Where would this option apply?

- This option would apply to areas where there is currently no registered native title holder or registered native title claimant.
- The Cultural Heritage Acts would no longer recognise previously registered native title claimants as native title parties for an area.
- The green areas on the map opposite show areas of Queensland where there are previously registered native title claimants that are native title parties for an area. These previously registered native title claimants would not retain their native title party status under this option.
- The white areas on the map show areas where section 35(7) currently applies. Section 35(7) would be removed from the Acts.
- All approved Cultural Heritage Management Plans existing before the amendments come into force would continue to be recognised.

Figure 1: The green and white areas show where option 1 would apply. (indicative boundaries current at 2 December 2021)



Who may apply for party status in areas without a registered native title holder or registered native title claimant?

- Another Aboriginal or Torres Strait Islander person claiming to have a connection to the area under Aboriginal tradition or Ailan Kastom could apply for recognition as an Aboriginal party or a Torres Strait Islander party.
- There may be more than one Aboriginal or Torres Strait Islander party for these areas.

Who would make decisions about applications for party status?

- Party status applications would be reviewed by a First Nations independent decision-making body (see section 5 of this paper).
- Before applications could be made, this body — in partnership with Aboriginal and Torres Strait Islander peoples — would be responsible for establishing what type of entity can apply (e.g. individuals or incorporated bodies) and what evidence would be required in an application to demonstrate connection to an area under Aboriginal tradition or Ailan Kastom.
- In making decisions about applications, the body may consult with registered native title holders and registered native title claimant in the surrounding areas.
- The body may also consult with other culturally appropriate and necessary entities to assist them in their decision-making (e.g. other Aboriginal or Torres Strait Islander parties, native title registered bodies, archaeologists, anthropologists, historians).
- When the body makes a decision not to recognise party status, applicants could appeal.

What would happen when a new native title claim is registered, or there is a new native title holder for the area?

- The new registered native title claimant/holder would automatically become the native title party for the area.
- The previous Aboriginal party or Torres Strait Islander party would no longer have party status.
- All Cultural Heritage Management Plans made with the previous Aboriginal party or Torres Strait Islander party would continue to be recognised.

Dispute resolution

As indicated in proposal 4 in section 3 of this paper, dispute resolution options could include:

- establishing a First Nations body or 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
- 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.

Option 2

This option involves changes in areas where the Aboriginal party or Torres Strait Islander party is a previously registered native title claimant subject to a negative determination (native title does not exist).

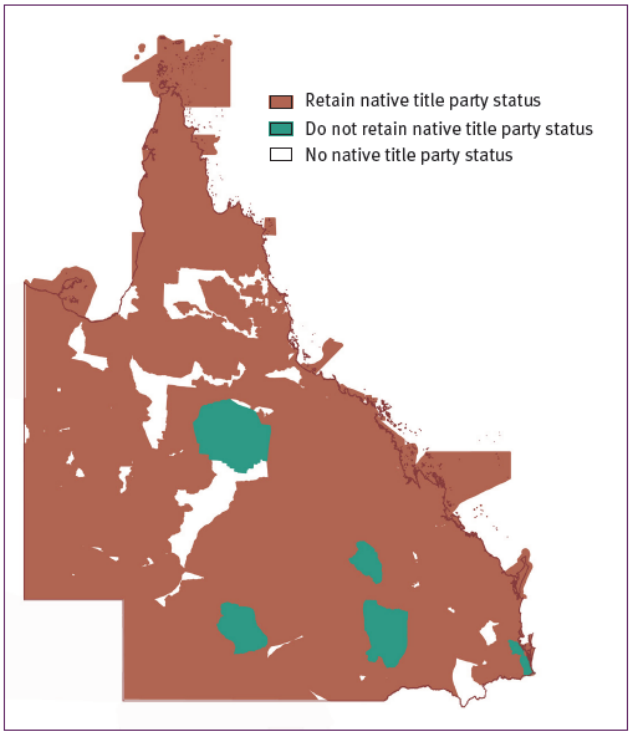
In these areas, it is proposed that:

- the Cultural Heritage Acts are changed so that a previously registered native title claimant subject to a negative determination (native title does not exist) is not a native title party
- section 35(7) of the Acts applies.

Where would this option apply?

- This option would apply only to areas of Queensland subject to a negative determination (native title does not exist). These areas are shown in green on the map opposite.
- All Cultural Heritage Management Plans made with the previous native title party (i.e. before the amendments come into force) would continue to be recognised.

Figure 2: The green areas show where option 2 would apply. (indicative boundaries current at 2 December 2021)



How would party status be determined?

- Section 35(7) of the Cultural Heritage Acts would apply in these areas. This section states that a person is an Aboriginal party or a Torres Strait Islander party for the area if:
  - the person is an Aboriginal person or a Torres Strait Islander with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
  - the person:
    - has responsibility under Aboriginal tradition or Island custom for some or all of the area, or for significant Aboriginal or Torres Strait Islander objects located or originating in the area; or
    - is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition or Island custom for some or all of the area, or for significant Aboriginal or Torres Strait Islander objects located or originating in the area.
- Under these existing provisions, a land user wishing to undertake an activity that requires a Cultural Heritage Management Plan would need to conduct a public notification process and invite any Aboriginal or Torres Strait Islander persons to be an Aboriginal party or a Torres Strait Islander party.
- There can be more than one Aboriginal or Torres Strait Islander party for an area.

Questions

1. Do you support Option 1? Why or why not?
2. Do you support Option 2? Why or why not?
3. If you do not support either option, please explain why?
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?

Turnstone Archaeology in principle supports the proposed changes with the following caveats.

(a) We regard this primarily as a matter for First Nations to arbitrate about.

(b) That a rigorous investigation is undertaken by an appropriately authorised and funded independent body to determine the legitimacy of claims and the removal of past claimants. In some cases, such as Southeast Qld, the Land Councils are not considered objective enough to make this determination.

(c) Where possible even persons with historical association but with knowledge should be encourage to be part of a new cultural heritage body.

(d) Note comments regarding the Land Court in Section 3.3 Option 4 which apply to this proposal

5 Promoting leadership by First Nations peoples in cultural heritage management and decision-making

The Cultural Heritage Acts afford a level of input and participation by First Nations peoples in relation to cultural heritage matters. However, feedback from previous consultation, the Commonwealth Government's final report on the destruction of Indigenous heritage sites at Juukan Gorge, and a review of models and proposals in other jurisdictions have highlighted that First Nations peoples should have greater participation in the control, protection and administration of cultural heritage, and decision-making about cultural heritage matters.

5.1 Guiding information for development of proposals

The table below sets out information that has guided development of the proposals for promoting leadership by First Nations peoples in cultural heritage matters.

Guidance	Details
Consultation feedback	Feedback from the 2019 consultation highlighted that First Nations people should have a greater and more active role in cultural heritage decision-making and consultation processes.

Cultural heritage models in other parts of Australia	In most states and territories, decision-making about Aboriginal cultural heritage is mainly the responsibility of the relevant Minister. **Victoria** Victoria's Aboriginal Heritage Council (AHC) is a decision-making body comprised of Traditional Owners. The council decides who the registered Aboriginal parties (RAPs) are for an area, grants permits, approves Cultural Heritage Management Plans when there is no RAP, oversees RAP operations, and provides advice to the Minister. A RAP is an independent body comprised of native title holders, Traditional Owners or Aboriginal people with an historical or contemporary interest in cultural heritage. RAPs are funded by the government and are the primary source of advice and knowledge for the Minister, Secretary and AHC on matters about Aboriginal places and objects relating to their registration area. RAPs also decide whether to approve or refuse a Cultural Heritage Management Plan. **New South Wales** The New South Wales draft Aboriginal Cultural Heritage Bill 2018 would establish a new model for protecting Aboriginal cultural heritage. Under this model, decision-making would be placed with Aboriginal people through establishing Local Aboriginal Cultural Heritage Consultation panels and an Aboriginal Cultural Heritage Authority (ACHA). The ACHA would approve Cultural Heritage Management Plans, administer cultural heritage legislation, provide advice to the Minister, enter into conservation agreements, issue stop work orders and establish local panels that play an advisory role in local cultural heritage expertise and participate in cultural heritage plans. **Western Australia** The Western Australian Aboriginal Cultural Heritage Bill 2021 provides Aboriginal peoples with a decision-making role about matters affecting their culture. This includes having an Aboriginal Cultural Heritage Council comprised of Aboriginal people to approve Cultural Heritage Management Plans, grant or refuse cultural heritage permits, administer legislation, provide advice and recommendations to the Minister, and determine the Local Aboriginal Cultural Heritage Service (LACHS) for different areas of the state. An LACHS is comprised of Aboriginal members that follow native title hierarchy and determine the right people to speak for country. (continued)
Cultural heritage models in other parts of Australia (continued)	**South Australia** South Australia has established Recognised Aboriginal Representative Bodies (RARBs) which are incorporated bodies that enter into local heritage agreements with proponents. There are currently two RARBs. RARBs must represent the views of Traditional Owners and are appointed by the State Aboriginal Heritage Committee. The committee provides advice to the Premier on entries in the central archives, measures for cultural heritage protection and preservation, appointments of inspectors, Aboriginal heritage agreements, matters relating to administration of the *Aboriginal Heritage Act 1988*, and functions assigned by the Premier or Act. **Northern Territory** The Northern Territory's cultural heritage legislation is administered through Land Councils which can issue or refuse permits for access and works near sacred sites on unalienated Crown land. The Aboriginal Areas Protection Authority (a statutory body made up of 12 members, 10 of whom are Aboriginal custodians of sacred sites, nominated by the 10 Land Councils in the Northern Territory) has decision-making powers, registers and records sacred sites, and issues authority certificates for development. The Minister has the power to override decisions of this body.

***Human Rights Act 2019* (Qld)**	Queensland's *Human Rights Act 2019* is unique in the scope of Aboriginal and Torres Strait Islander rights. Ensuring the right and appropriate Aboriginal peoples and Torres Strait Islander peoples are involved in managing and protecting cultural heritage is consistent with section 28 of the Act, which states that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
***Dhawura Ngilan* (Vision and Best Practice Standards)**	The basic principles of the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation state: *The rights set out in UNDRIP [United Nations Declaration on the Rights of Indigenous Peoples] are also recognised in a range of domestic legislation such as the* Human Rights Act 2019 *(Qld) and the Charter of Human Rights and Responsibilities 2006 (Vic). This principle is already applied in practice in a number of jurisdictions in Australia such as NT and Vic, where administrative, regulatory and decision-making structures related to Aboriginal heritage are under the practical control of Aboriginal people.*
National Agreement on Closing the Gap	The Queensland Government, through the National Agreement on Closing the Gap, has committed to the outcome that 'Aboriginal and Torres Strait Islander peoples maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters' and to priority reforms including: • strengthening and establishing formal partnerships and shared decision-making • improving and sharing access to data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions.
Recognising historical connections	*The Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government* is guiding the journey to heal the past and create a new relationship between Aboriginal and Torres Strait Islander peoples and non-Indigenous Queenslanders. The statement recognises 'the past acts of dispossession, settlement and discriminatory policies' and states that 'we will move forward together with mutual respect, recognition and a willingness to speak the truth about our shared history'.

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.

Creating a First Nations-led entity would promote greater self-determination by moving away from government making decisions for Aboriginal and Torres Strait Islander peoples. Consistent with its proposed functions, a First Nations-led entity could lead the co-design of cultural heritage policies and advice — including, for example, an approach to recognising historical connection (see proposal 2 on page 24).

Options

The following are some key elements to consider in establishing a First Nations-led cultural heritage entity:

Element	Considerations
Number of entities	There could be one entity for Aboriginal cultural heritage, one for Torres Strait Islander heritage, or one representing both (which can be flexibly and appropriately constituted depending on the type of cultural heritage). The entity would also need to be flexible to be appropriately constituted according to specific areas in Queensland.
Legal status of the entity	Depending on the functions and powers of the entity, options for its legal status could include: • statutory body (e.g. council or board) • advisory panel or advisory committee established in legislation • non-statutory advisory body (established without legislation).
Funding	The Queensland Government would provide funding for the entity.
Leadership	The entity would be led by First Nations peoples with the expertise, knowledge, connection to country, and skills relevant to protecting and managing cultural heritage.
Functions	The overall purpose of the entity could be to provide dispute resolution support, assistance, advice and/or decision-making for managing and protecting cultural heritage in Queensland. Specific functions could include: • administering any proposed new legal frameworks of Cultural Heritage Acts • assisting local Aboriginal and Torres Strait Islander groups with decision-making on matters such as applications for Aboriginal or Torres Strait Islander party status for an area where this is required (noting the entity would not override the status of native title holders and claimants), and determining whether to approve Cultural Heritage Management Plans and Cultural Heritage Studies • managing and maintaining the cultural heritage register and database • managing compliance (e.g. employing compliance officers and conducting audits and investigations) • assisting with dispute resolution between proponents and Aboriginal and Torres Strait Islander groups through mediation and conciliation (continued)
Functions (continued)	• providing recommendations and advice to the Minister and the Land Court with input from local Aboriginal and Torres Strait Islander groups • developing policy — including co-designing policies and guidelines with local Aboriginal and Torres Strait Islander groups to support administration of the Cultural Heritage Acts; and making recommendations for policy review (e.g. on compliance and 'party' definitions as discussed in sections 3 and 4 of this paper) • educating and raising awareness — including promoting education and awareness about First Nations peoples' enduring cultural heritage and appreciation of this heritage; and advising proponents about consultation.
Local or regional engagement	Local Aboriginal and Torres Strait Islander panels or groups could be established by the entity to manage cultural heritage matters. The entity could determine membership and develop roles and responsibilities consistent with the principles of traditional ownership and rights in land.

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?

As a general principle, Turnstone Archaeology regards this proposal as a matter for First Nations to adjudicate upon.

The critical thing is that appropriately elected and registered Traditional Owner bodies, with demonstrated connection to country, continue to be the first point of contact and decision making, not some body with no connection to that country. We do not think it is culturally appropriate for this responsibility to be subsumed by any other body.

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.

Options

Key matters that may need to be considered include, but are not limited to:

- how to define historical connection
- where historical connection might apply
- who could assert historical connection (e.g. an individual or a corporation) and how would they participate in decisions affecting cultural heritage to which they have an historical connection.

Questions

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

In principle we would support the inclusion of appropriate historical connections to an area for the purposes of cultural heritage management where there is no existing or recognised traditional custodians. However, under no circumstances can they replace or dominate a group with traditional connections. Certainly they can not be nominated by a proponent land user.

Appendix: Key terms

The following are key terms that have specific meanings within the context of cultural heritage:

Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003

These two Acts are often referred to collectively as the 'Cultural Heritage Acts' due to having the same effect while applying to two distinct groups of people. It is also common for the Cultural Heritage Acts to be referred to as 'CHA'.

Aboriginal and Torres Strait Islander cultural heritage

Have the same meanings as defined in their respective Cultural Heritage Acts at sections 8, 9 and 10. However, refer to section 3 of this options paper for details of proposed amendments to these definitions to expressly recognise intangible cultural heritage.

Consultation party

Is a party to a Cultural Heritage Management Plan. This could be the sponsor for the plan, or an endorsed party for the plan.

Cultural Heritage Management Plan (CHMP)

Is a plan made under Part 7 of the Cultural Heritage Acts between consultation parties to identify how activities for a project are to be managed for their impact on Aboriginal and Torres Strait Islander cultural heritage.

Cultural Heritage Study (CHS)

Is a study carried out under Part 6 of the Cultural Heritage Acts by a sponsor in consultation with an endorsed party, which assesses the level of significance of areas and objects included in the study area that are, or appear to be, significant for Aboriginal or Torres Strait Islander areas and objects.

Duty of Care Guidelines

Are guidelines made under section 28 of the *Aboriginal Cultural Heritage Act 2003* and gazetted on 16 April 2004. The guidelines are used to identify reasonable and practicable measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage. There are no gazetted duty of care guidelines under the *Torres Strait Islander Cultural Heritage Act 2003*.

Endorsed party

An endorsed party for a Cultural Heritage Study or Cultural Heritage Management Plan is an Aboriginal party or a Torres Strait Islander party under the Cultural Heritage Acts.

Land user

Has the same meaning as defined in the Cultural Heritage Acts, which is a person carrying out, or proposing to carry out, activities on land likely to materially affect the land (e.g. farming, construction work).

'Last claim standing' provision

This refers to section 34(1)(b)(i) of the Cultural Heritage Acts, which is when a person's claim has failed and:

- the person's claim was the last claim registered under the National Native Title Tribunal's Register of Native Title Claims for the area; and
- there is no other registered native title claimant for the area; and
- there is not, and never has been, a registered native title holder for the area.

The application of the 'last claim standing' provision may potentially be contentious where there has been a negative determination (by consent or litigation), i.e. native title does not exist for an area. In this situation, the last registered claimant becomes the Aboriginal or Torres Strait Islander party under the Cultural Heritage Acts. This has the effect of granting a party rights in relation to consultation about cultural heritage management even though it has been determined that the party is not a native title holder.

Registered native title holder

Is:

- a registered native title body corporate; or
- an entity, other than a registered native title body corporate, that is the subject of a determination of native title under the Commonwealth *Native Title Act 1993* and is registered on the National Native Title Register as holding native title rights and interests.

A registered native title holder has had their native title rights and interests for an area recognised by the Federal Court of Australia.

Negative determination

A negative determination refers to instances where the Federal Court or High Court of Australia has determined that native title does not exist.

Prescribed Body Corporate (PBC)

Is a corporation nominated to hold and manage native title rights and interests before native title is determined and/or registered. Once registration of native title has occurred, the corporation will be referred to as a registered native title body corporate (RNTBC).

Proponent

Is another term used to describe a land user.

Sponsor

Is a person who accepts responsibility for a Cultural Heritage Study or Cultural Heritage Management Plan.