



31 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

BY POST/EMAIL – CHA_Review@dsdsatsip.qld.gov.au

Dear Sir/Madam,

RE: Options Paper Finalising the review of Queensland's Cultural Heritage Acts December 2021

The Urban Development Institute of Australia Queensland (the Institute) welcomes the opportunity to comment on the *Options Paper Finalising the review of Queensland's Cultural Heritage Acts December 2021 (Options Paper)*. The Institute acknowledges the traditional owners of Queensland and their leaders past, present and emerging and the sentiments of the Options Paper of a 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.

The Institute supports the review of Queensland's Cultural Heritage Acts and as indicated in the Options Paper, the opportunities it presents to improve achievement of the objectives of the Acts to protect and conserve Queensland's Aboriginal and Torres Strait Islander cultural heritage, while facilitating business and development activity. The Institute supports many of the proposals in the Options Paper, however the Institute's concerns which are detailed below relate to the additional uncertainty and downstream impacts on housing availability and affordability. Presently many Queenslanders are excluded from housing, housing is becoming more unaffordable, and rental vacancy rates are at extreme lows. In regard to the Options Paper, the Institute seeks:

- clear arrangements to protect existing approvals and agreements
- detailed arrangements to ensure a clear path for development approvals
- processes to enable the identification of a party at the time of a development application to enable agreements to be reached
- confirmation that costly assessment will not be required for severely disturbed areas
- inclusion of transitional provisions to maintain existing processes for dealing with housing development to ensure new housing activity is not disrupted while any new changes are delivered
- improved definition of the roles of the state First Nations-led entity and local parties

- development relevant to significant cultural heritage be referred to the state under the State Assessment and Referral Agency for assessment and receive advice from the First Nations-led entity
- the proposed First Nations-led entity assist and advise state urban planning and mapping, and during the structure planning phase of new communities/new growth areas
- a positive action plan of initiatives, grants, or other mechanisms to enhance cultural heritage protection, education, capability, and leadership.

The Role of the Queensland Property Industry

The property industry is a critical element in meeting the housing aspirations and needs of the Queensland community. Around 37,000 new homes are delivered annually by the industry, the location of which is determined by both state and local government. The housing industry employs one in every ten Queenslanders in a diverse array of jobs including architects, surveyors, bricklayers and stonemasons, carpenters and joiners, plumbers, town planners, engineers, and property developers and a further 13% of Queenslanders are indirectly employed in roles such as in the supply chain that are spread the length of the Queensland coast. The industry directly contributes \$26 billion to the state's economy each year (or 8% of GSP) and a further \$35 billion through indirect economic impacts (11% of GSP).¹

General

The Institute considers a number of the proposals in the Options Paper are unnecessary as the present legislation effectively prioritises Aboriginal and Torres Strait Islander cultural heritage and provides a pathway for development proposals to effectively consider mitigation measures.

The Institute is concerned the proposals require some new Aboriginal and Torres Strait Islander parties to be established and new mapping to be put in place. The concern is that the implementation of these measures would require a considerable period, renewal of relevant Aboriginal and Torres Strait Islander parties, and lengthy consultative activity. It is critical that this occurs alongside maintenance of existing processes for dealing with housing development to ensure new housing activity is not disrupted. To deliver the housing Queenslanders need, the property development industry requires certainty that a relevant person is in place for engagement at the point of development application.

The Institute is concerned that the Options Paper is unresolved regarding the role cultural heritage groups can play in decision making, their autonomy, and employment of enforcement or compliance officers. The Institute recommends for the benefit of all, the state government should clarify what is possible or limited in the context of the legislative basis of the state.

The Institute considers that the proposed arrangements in relation to urban housing development are problematical and recommends the state should be responsible for development assessment of projects relevant to cultural heritage through the State Assessment and Referral Agency advised by a state representative aboriginal expertise entity. This would also address some issues with the present legislation that include:

- lack of notice of any change in Aboriginal party and status of mediation
- lack of clarification in Part 6 and 7 of the Act endorsement process, for identification of an Aboriginal or Torres Strait Islander party that has validly been endorsed under the Act

¹ Urbis 2018, The contribution of the development industry to Queensland

- the requirement for a Cultural Heritage Management Plan to be lodged with the Department of Aboriginal and Torres Strait Islander Partnerships before an Aboriginal or Torres Strait Islander party is locked in, that creates uncertainty regarding land users
- lack of a publicly available register of any Aboriginal or Torres Strait Islander parties subject to mediation over their status
- lack of clear timeframes and limits on steps to ensure fair and timely progress of the issues
- the currency of development approvals is put in jeopardy while the dispute resolution process is on foot.

In general, the Options Paper points to regulatory actions but lacks a positive action plan of initiatives, grants, or other mechanisms to enhance cultural heritage protection, education, capability, and leadership. Additional consideration should be given to this aspect to enhance positive outcomes of the work.

3.3 Proposals to improve cultural heritage protection

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. This also includes:

- Mapping of high-risk cultural heritage areas in Queensland
- Land users undertaking a cultural heritage search of the mapping to determine whether the activity is in a high-risk area
- For 'prescribed activities', 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)
- Activities may be an 'excluded activity' in a high-risk area (such as fencing or 1 into 3 subdivision) and the land user would not be required to consult and may proceed with their activity unless significant cultural heritage is identified.

The Institute does not support the replacement of the current Duty of Care Guidelines, without certainty that this change will not lead to further delays for the industry in the provision of housing. Timely and certain arrangements for development sites to enable the delivery of much needed homes for a growing population is essential. This is critical at this time of very strong housing need, rapidly rising home prices, and increasingly scarce housing land supply, negatively affecting the ability to deliver homes affordably.

The proposal may be reasonable for rural and remote locations that may be affected by large scale mining or other projects. It, however, does not adequately respond to the typical South East Queensland housing project that is located on a small site (e.g. 5 hectares), already zoned for residential purposes, and that represents only an incremental expansion of existing urban areas. These sites generally have previously been used as farms or acreage and are extensively cleared and tilled. While home foundations and some earthworks could excavate below former till levels, they are unlikely to equal the cultural change that has previously occurred.

The Institute supports proactive mapping of country to define culturally sensitive areas. However, areas previously disturbed and in urban zoned areas should generally be excluded as high risk. High quality mapping could relieve the need to assess proposals on a site by site basis and contribute to defining positive action plans and guidelines for activities in the sensitive area. A consultative mapping process could allow for education and creating understanding in the community of important country matters and inform the state planning framework.

The outcomes of mapping work need to be coordinated and implemented at the state level to ensure consistency and utility for land users, and for project assessment processes across Queensland and local government areas. This approach could also minimise the existing load on cultural heritage groups around assessment. It is clear to the Institute, determination of 'excluded activities' needs to be well considered to avoid an abundance of minor development activities over taxing Aboriginal and Torres Strait Islander parties, creating delays, and diverting focus from the critical matters. 'Excluded activities' (acknowledging well considered mapping has been put in place) should include subdivision within residential zoned areas, work on previously disturbed land, and urban development in general unless significant cultural heritage is encountered.

Retention of the existing Duty of Care guidelines framework and categories is preferred and could include enhanced auditing and compliance activities, to give greater confidence.

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.

The Institute supports the integration of cultural heritage protection and mapping into state land planning processes in a streamlined manner. The Institute envisages preparation of the mapping in a consultative process designed by Aboriginal and Torres Strait Islander persons and experts, that comprehensively identifies areas risks of harm to cultural heritage.

The integration of this mapping, with referral and assessment provisions should aim for efficient processes, consistency of approach, consistency of appearance to enhance community understanding, and avoid site by site assessment. The Institute recommends a state managed system that avoids individual local government planning scheme variations and approaches. Some local governments are not adequately resourced for the task or may not incorporate cultural heritage maps. Cultural heritage is not bound by local government boundaries and the state is better placed to coordinate the advice of interested indigenous persons and experts to develop comprehensive mapping and if needed development referral arrangements.

Proposal 3

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

This is supported, and education for the community is recommended on what intangible cultural heritage is and how it may be respected and integrated into planning and community activities.

Proposal 4

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

The options of a state First Nations-led entity as an advisory group and land court jurisdiction to resolve disputes are supported.

Proposal 5

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

The Institute supports documentation and registration of all agreements and consultation under the Cultural Heritage Acts including:

- 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.

This would require clear resolution of the matters that need to be reported and should not require reporting of activities in non-high risk areas or 'excluded activities', unless significant cultural heritage impact is identified. Limiting any reporting would reduce the impost on government and particularly industry in non-critical areas.

Proposal 6

Provide for greater capacity to monitor and enforce compliance.

This is supported to give greater assurance that cultural heritage is being protected.

4.3 Proposal to reframe definitions

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.

Option 1

It is proposed where there is no registered native title holder or registered native title claimant, an Aboriginal person or a Torres Strait Islander person can request recognition as an Aboriginal party or a Torres Strait Islander party, previously registered native title claimants are not the native title party of an area, and a First Nations decision-making body would determine party status.

The Institute has concerns that this change could:

- undermine the present clear and robust method of determining the relevant Aboriginal and Torres Strait Islander parties for the Acts, arrived at from Aboriginal parties' own actions
- substantially increase uncertainty in operation of the Act in the development context and thus increase costs to homebuyers
- lead to increased disputation between groups, costly processes, and delays with substantial implications for providing much needed homes for the community in a timely and affordable manner.

The Institute considers Aboriginal and Torres Strait Islander people should determine who speaks with authority for their country. However, it is noted that the role of Aboriginal and Torres Strait Islander parties and the state First Nations-led entity is not succinctly defined. The Institute considers that in the interests of efficient planning assessment, the role of local representation should be focused on providing input to the state based mapping.

The role of local parties should involve managing the recognition, protection, conservation, education, and promotion of Aboriginal and Torres Strait Islander cultural heritage as the local party sees fit. The Institute supports the suggestion that all Cultural Heritage Management Plans made with previous Aboriginal party or Torres Strait Islander party/s would continue to be recognised.

Option 2

This option involves declaring that a party is not a native title party where the Aboriginal party or Torres Strait Islander party is a previously registered native title claimant but is subject to a negative determination.

The Institute has concerns that this change can:

- undermine the present clear and robust method of determining the relevant Aboriginal and Torres Strait Islander parties for the Acts, arrived at from Aboriginal parties' own actions
- substantially increase uncertainty in operation of the Act in the development context and thus increase costs to homebuyers
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The Institute considers Aboriginal and Torres Strait Islander people should determine who speaks with authority for their country. However, it is noted that the role of Aboriginal and Torres Strait Islander parties and the state First Nations-led entity is not succinctly defined. The Institute considers that in the interests of efficient planning assessment, the role of local representation should be focused on providing input to the state based mapping.

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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.

The Institute supports the establishment of a First Nations-led entity determined by Aboriginal and Torres Strait Islander peoples as a legislated advisor or non-statutory advisory body. The state government however must initially lay out the matters that the entity can deal with having considered all legislative, sovereignty, and governance principles. It would be concerning if misleading expectations were given to the community and entity members, or a dual governance framework were created. The Institute supports a First Nations-led entity that is advisory to the state and advances recognition, protection, conservation, education, and promotion of Aboriginal and Torres Strait Islander cultural heritage. It could be a focussed and expert advisor to the government and support local cultural heritage parties. It could also assist to develop policy for example around mapping, parties, Cultural Heritage Management plans, the cultural heritage register, auditing and reporting, compliance, and assist with dispute resolution. The Institute recommends that the entity not act as a compliance agency.

The Institute considers the key early focus of work of the First Nations-led entity should be to advance the development of cultural heritage mapping of the state and provide if needed, an advice service to the state on development assessment referrals regarding major development proposals, through the State Assessment and Referral Agency.

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.

See comments above.

Conclusion

The Institute supports the review in seeking to improve the operation of the legislation for the benefit of First Nations peoples and all Queenslanders. The Institute strongly counsels that proposals should not lead to less certainty and timeliness in the delivery of housing. This is most at risk in regard to additional requirements on disturbed urban land and disruption to cultural heritage decision making around development projects.

The Institute recommends:

- clear arrangements to protect existing approvals and agreements
- detailed arrangements to ensure a clear path for development approvals,
- processes to enable the identification of a party at the time of a development application to enable agreements to be reached
- confirmation that costly assessment will not be required for severely disturbed areas
- inclusion of transitional provisions to maintain existing processes for dealing with housing development to ensure new housing activity is not disrupted while any new changes are delivered
- improved definition of the roles of the state First Nations-led entity and local parties
- development relevant to significant cultural heritage be referred to the state under the State Assessment and Referral Agency for assessment and receive advice from the First Nations-led entity
- the proposed First Nations-led entity assist and advise state urban planning and mapping, and during the structure planning phase of new communities/new growth areas
- a positive action plan of initiatives, grants, or other mechanisms to enhance cultural heritage protection, education, capability, and leadership.

Thank you for the opportunity to provide the Institute's views on the Options Paper. We encourage the department to further consult with the Institute in the progress of the review. If there are any matters that you wish to discuss, please contact Policy Manager, Martin Zaltron (mzaltron@udiaqld.com.au) or 07 3229 1589.

Yours sincerely,

Urban Development Institute of Australia Queensland



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