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

By email [redacted]

Dear Review Team

Reshaping Queensland's cultural heritage laws

Thank you for the opportunity to provide feedback on Queensland's cultural heritage laws. The Queensland Law Society (**QLS**) appreciates being consulted on the Options Paper, *Finalising the review of Queensland's Cultural Heritage Acts*. Thank you also for the additional time allowed to finalise our submission.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS has previously been involved in the consultation process for the review of Queensland's Cultural Heritage Acts. QLS welcomes the further consultation as part of the review of Queensland's Cultural Heritage Acts, as consultation with all stakeholders and First Nations people is critical to ensuring the legislative framework achieves its objectives and identifying any improvements.

This response has been compiled by the QLS Energy and Resources Law Committee and the First Nations Legal Policy Committee, whose members have substantial expertise in this area.

Opening comments

QLS acknowledges and supports the necessity of a review of Queensland's cultural heritage laws and welcomes the Department's ongoing work to undertake this review. Continued consultation with First Nations people is a critical part of this reform process.

The Queensland Cultural Heritage Acts have been in place for a significant period of time. QLS members have given mixed feedback on that legislation.

Feedback from First Nations practitioners indicates that the legislation has not always achieved its objectives, and consequently, significant Aboriginal and Torres Strait Islander cultural heritage has been lost. For example, First Nations practitioners are aware of circumstances where landowners clear country resulting in the loss of cultural heritage including the loss of medicine trees, and Aboriginal native title parties only hear of the work after the event. They are concerned that the view prevails that land holders consider that they can undertake any activities on their land, even though this is contrary to the duty of care obligations in the current legislation, and this prevailing view has resulted in the significant loss of cultural heritage.

On the other hand, practitioners in the resources and energy sector indicate that the current law generally works well, but acknowledge a review of the legislative framework is appropriate to identify if any improvements can be made.

QLS is supportive of reform where it results in good law and certainty; providing certainty to all parties involved is an essential part of this reform process.

As highlighted below, there are many aspects of the cultural heritage process which require certainty, including:

- consultation processes and accurately identifying the correct people with whom to consult and engage during cultural heritage assessments;
- clear definitions of key terms and concepts throughout the legislation, including 'Aboriginal party' and 'Torres Strait Islander party';
- the duty of care guidelines (or any proposed replacement), to ensure that there is a relatively simple and effective means of assessing whether or not land users are in compliance with the duty of care;
- how and when compliance with the legislation is demonstrated;
- dispute resolution mechanisms - noting that the existing mechanisms (including by referral to the Land Court) provide legal certainty for all parties; and
- if any reforms do proceed, careful drafting of transitional provisions.

We are confident that Queensland's legislation regarding cultural heritage can be improved, however, QLS is concerned that the proposals outlined in the Options Paper are overly conceptual, high level, lack clarity and fall short of providing necessary legal certainty in the area. Given this, QLS is unable to provide a detailed response to many of the proposals.
We encourage the Department to revisit the Options Paper, to consult more widely and to propose options with greater detail for consideration by industry and Queensland's First Nations people.

However, we outline the following over-arching comments by way of preliminary response and we look forward to continuing our involvement in this important reform process.

Recognising and protecting cultural heritage – developing a better model and achieving good law

QLS supports good law for the public good. Good law should provide certainty to the community and balance the rights and obligations of all affected by it. In the cultural heritage context, good law needs to be informed significantly by a First Nations view.

It is incumbent on law makers to develop a legislative model which protects cultural heritage, whilst also recognising the critical role of First Nations lore. In Queensland, the Constitution's preamble states that the people of Queensland "honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community."[1]

The *Human Rights Act 2019* (Qld) clearly recognises the rights of Aboriginal peoples and Torres Strait Islander peoples to:[2]

- enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
- to 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.

As a matter of legal principle, the land of Australia was never ceded by Aboriginal and Torres Strait Islander people, as demonstrated by the High Court decision in *Mabo v Queensland (No 2)*,[3] overruling the doctrine of terra nullius as a 'fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent' and recognising the entitlement of First Nations to a form of native title to their traditional lands.[4]

Historically, Aboriginal cultural heritage both tangible and intangible has been taken from First Nations people and destroyed, damaged or denied. A recent and high profile example is the destruction of the Juukan Gorge rock shelters in the Pilbara region of Western Australia in May 2020.[5] Although this occurred under a different legislative framework to Queensland's approach, it demonstrates the need for continued caution, sensitivity and improvement in dealing with cultural heritage.

As noted by the Honourable Warren Entsch MP, Chair of the Joint Standing Committee on Northern Australia, when delivering the report into the Juukan Gorge parliamentary inquiry:[6]

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[1] *Constitution of Queensland 2001* (Qld) Preamble para (c).
[2] *Human Rights Act 2019* (Qld) s 28.
[3] [1992] HCA 23; 175 CLR 1
[4] *Mabo [No 2]* [1992] HCA 23; 175 CLR 1 at paragraph [42] and [2].
[5] See also Parliament of Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report/section?id=committees%2freportjnt%2f024757%2f77696>.
[6] Ibid.

> "Aboriginal and Torres Strait Islander cultural heritage, both tangible and intangible, is a key part of Australia's history. Loss of cultural heritage diminishes the heritage of our nation and deeply wounds the Aboriginal and Torres Strait Islander peoples for whom this heritage is sacred."

First Nations people need the acknowledgement that Aboriginal cultural heritage always was and always will be in the land, the waters, the air and the environment.

The current legislation is nearly 18 years old and much has changed in this area in recent years, particularly the relationships between Aboriginal people, proponents, landholders and the wider community.

Although Aboriginal and Torres Strait Islander cultural heritage values should not be confused with native title, it has largely been native title practice that has changed the dialogue and practice for cultural heritage. Native title still heavily influences cultural heritage in Queensland.

Unfortunately, there are landholders across Queensland who assume that because 'there is no native title' on their land, that there must also be no cultural heritage or no need to consider protecting Aboriginal cultural heritage.

This review is an opportunity to revisit the current framework and identify any improvements to be made, to address the risks to cultural heritage arising from this type of misunderstanding.

Concerns with proposed advisory group

Involving First Nations people in cultural heritage assessments is an absolutely vital part of any model.

However, the option of an advisory group raises a number of significant concerns about how this group will be formed. Some members are of the opinion that the consultation is lacking in detail about how this option would proceed.

On the information available, First Nations practitioners are hesitant to support this type of proposal.

When a group of Aboriginal and/or Torres Strait Islander people are selected to form advisory bodies, the immediate question raised is one of who do they speak for and who do they represent. It is also unclear how members of such a group will be selected or appointed and who would be making these decisions.

In any group, there will be people who support and others who do not support development within this area.

First Nations practitioners suggest that a better approach is for local groups and landholders to work together to develop a consultation framework for working together on cultural heritage assessments, based on an understanding and respect of First Nations cultural heritage.

As discussed further below, many Aboriginal people hold their cultural heritage as secret and sacred and part of its existence may only be known to certain authorised people within an Aboriginal group. Therefore it is critical that local First Nations people are involved in assessments, as persons who are most qualified to identify and assess potential impacts on cultural heritage.

We are also aware that consultation processes do not always reach all people who should be engaged with cultural heritage discussions. We suggest that native title representative bodies, local and relevant community legal centres, District Law Associations and cultural heritage bodies approved by the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) should facilitate discussions with local groups, to increase engagement with all affected people.

Transitional provisions

If or when any of the proposals in the Options Paper are progressed, the legislation will need to include carefully drafted transitional provisions to protect arrangements and agreements made under the previous legislation. As highlighted in the Options Paper, certainty is a critical feature for proponents and it ensures that all parties can be confident that they are acting in accordance with the relevant legislation.

Comments on Options Paper

Proposals to improve cultural heritage protections

> *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*

Concerns with current Duty of Care Guidelines

Our members consider, on balance, that the Duty of Care Guidelines (**Guidelines**) should be revisited, but any replacement framework must also provide certainty to all parties.

The Guidelines have provided certainty to landholders acting in good faith.

However, First Nations practitioners consider the existing framework has not always given sufficient protection to First Nations groups.

The scope of the statutory duty of care currently imposed by the Cultural Heritage Acts is considerably broad, as in essence, it applies to any landholder undertaking any activity.

As noted by resources practitioners, an important role of the current Guidelines is to provide a means by which landholders can undertake low impact activities in circumstances where the risk to cultural heritage is likely to be very low, with certainty that they will not be in breach of their statutory duty of care in doing so.

For example, the Guidelines recognise that driving along an existing track or road poses no additional risk to cultural heritage and the person or entity undertaking such an activity is not obliged to undertake any additional steps to ensure they meet their duty of care obligations.

The self-assessment process reflects the overall 'duty of care' concept in the legislation, which does not stipulate specific steps to be taken for every activity, because what is reasonable and practical depends on the circumstances.

However, by definition, the self-assessment process permits landholders to complete their work without engaging with the local First Nations people.

If the assessment is flawed, whether deliberately or not, cultural heritage may be lost and offenders can be prosecuted.

First Nations practitioners are concerned that this process often leads to the loss of cultural heritage, because the actions occur on land and areas where First Nations people are not permitted access or entry. This means that they do not have enough information to be able to identify a breach or enforce the relevant guidelines.

If new guidelines are developed, there should be:

- an adequate timeframe allowed for sufficient and proper consultation on any proposed new process;
- a way to bring all parties together to develop commonalities between the parties as to the richness and sacredness of the land and what it holds;
- some definition of when landholders must engage with local First Nations people; and
- a degree of certainty for industry and land users.

First Nations practitioners suggest that when developing any replacement guidelines, consideration be given to providing for a higher degree of obligation on the landholder compared to the current Guidelines. This will involve revisiting the current approach and consultation on any replacement standard.

Given the breadth of the statutory duty of care, having a relatively simple, effective means by which landholders can ascertain with certainty whether or not they are in compliance with the duty of care is very important.

The Options Paper does not include a clear proposal on which to comment with respect to the above mentioned points. However, we acknowledge that the State is seeking to develop a new guideline process which is fit for purpose in 2022.

We have suggested the points above as issues to be taken into account, both from a resources perspective and a First Nations perspective, as the Department continues to develop this proposal.

We look forward to commenting on a replacement framework as the definitions are refined and the proposal is developed in more detail.

Mapping

Mapping can be a useful mechanism, but there are a number of challenges associated with this, including the establishment of accurate maps and maintenance of their currency and accuracy.

Specific challenges include:

- Significant difficulty in mapping cultural heritage areas without strong support from Government (including funding) and permission from landholders to facilitate Aboriginal and Torres Strait Islander parties surveying the area.
- Many Aboriginal people hold their cultural heritage as secret and sacred and part of its existence is that only authorised people may have knowledge of its existence and location. Only certain people within an Aboriginal group hold this knowledge and not all Aboriginal people from that group may be privy to that knowledge. This is consistent with Aboriginal lore and custom.
- Some data base systems may show a larger extended area but do not pinpoint the cultural heritage in that area and where it is precisely located. This is for cultural integrity as well as safety and protection. The practice is still prevalent in some identified areas containing Aboriginal cultural heritage, that once it is identified and made public, it is in danger of being defaced, damaged or destroyed.

These challenges need to be balanced in any proposals to map cultural heritage.

More detail is required to be able to understand and comment on the proposal to map 'high-risk cultural heritage areas', such as:

- how the mapping exercise would be undertaken and administered;
- how such areas would be defined and determined and whether they can they be disputed;
- whether such areas will be relatively discrete or whether they will cover large parts of the State;
- how this information would be disseminated so that any person may be aware if they are undertaking an activity in a high risk area, as well as how long the mapping process would take; and
- which measures would apply in the interim.

First Nations practitioners consider that mapping is also critical to protect cultural heritage that is found during surveys by native title applicants, because the decision is then made to leave the cultural heritage in-situ if it is not in the way of any development. As a result, the artefacts are on country, and if clearing or other work is conducted, these can be moved or destroyed without any notice to the Aboriginal party.

First Nations practitioners recommend that this critical issue needs to be addressed as part of the review and in any new legislation.

Keeping places should be funded to do the following:

- protect the cultural heritage;
- ensure it remains in close proximity to where it was found; and
- allow others to view and understand the connection that Aboriginal people have had with the country for thousands of years.

Also, the definitions of things such as 'prescribed activities' and 'excluded activities' will be crucial, as this will identify the appropriate threshold for which activities require something more to be done (such as consultation with traditional owners) by somebody undertaking an activity. The requirement of protecting cultural heritage needs to be balanced with the practicalities of everyday activities undertaken by landholders.

Consultation protocols

A generic set of principles, values and protocols could be developed with respect to Queensland. However, our First Nations practitioners have recommended that included in this should be more specific local guidelines of how this will be managed between all parties. Evidence of local party agreements would be beneficial.

We suggest that a useful model might be similar to that which has been adopted with local government area Reconciliation Action Plans (**RAP**), whereby groups of Aboriginal people representing separate interests and groups meet to talk with local government about how their shared interests and concerns may be addressed in the plan. The Rockhampton Regional Council RAP is a good example of this.

However, resources practitioners have queried whether this would require the negotiation of a variety of differing local protocols across the State and if so, how this would be done and by whom. There are benefits in any legislative consultation protocols applying consistently across the State, whilst still permitting individualised agreements to be made between proponents and local groups within the framework.

Ultimately, resourcing the Department will be critical to ensure that protocols are updated as required and that there is support and information available for all parties who seek to use the protocols.

Proposals to improve cultural heritage protections

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

This proposal is stated to be contingent on Proposal 1 being implemented, that is, high risk areas in the State being mapped. More detail is required in order for QLS to understand and

comment on what is intended by 'integrating the mapping into planning processes' with respect to the benefits and disadvantages of this proposal.

The key improvement which is needed to achieve effective integration is greater understanding that cultural heritage compliance is necessary, regardless of the existence of native title.

All parties should recognise Indigenous cultural heritage as having the same value as other regulatory compliance mechanisms, such as planning and environment legislation where protection measures are required for approval. Parties should also recognise that a balance can be struck between the interests of the Aboriginal party protecting their cultural heritage, and the objectives of a project.

Adding cultural heritage to the planning legislative framework will not provide any additional protection if the *Planning Act 2016* does not apply to the particular activities being undertaken. However, it may be that the limited and minimal reference in the planning framework to Indigenous cultural heritage contributes to a lack of understanding or commitment to cultural heritage compliance.

By way of general comment:

- If there are areas of 'high risk' or cultural sensitivity that are known, then it would make sense to have regard to such matters when the State or local government is considering approvals for projects and land use;
- The current application of the Cultural Heritage Acts is much broader than land planning laws, as the statutory duty of care and legislative regime apply to any landholder undertaking any activity, at any time;
- Further, the duty of care applies to taking steps to protect heritage that is not yet known to exist but may be discovered during the undertaking of an activity; so it is not possible for planning laws, based upon what is known, to comprehensively address the issue; and
- Based on the detail provided, it is not clear how the proposal would result in a different outcome to the existing legislative regime. For example, under the existing regime:
    - significant projects that require an environmental impact statement must have an approved cultural heritage management plan in place before statutory project approvals can be granted;
    - for anything else, the duty of care obligation applies and a common step in meeting that duty is to have regard to significant cultural heritage sites and areas that are searchable on the Cultural Heritage Register.

Proposals to improve cultural heritage protections

Proposal 3 - Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage

QLS strongly supports the recognition and protection of intangible elements of cultural heritage.

A member provided the following explanation of the need to recognise intangible elements of cultural heritage:

> "The spirit and essence of Aboriginal people is connected to the land and the cultural heritage of the land demonstrates how First Nations people incorporated the land into all aspects of lore and culture. The indescribable feelings and connections that are found in the landscape are told of often in stories, songs, ceremonies and rituals.
>
> When the time is taken to sit down with non-Aboriginal people who have lived or worked on the land, they will tell you of their experiences with intangible elements and events which to them have no reasonable or practicable explanations. But they have felt them at times and often over time came to recognise them as part of the land even if the people from that land were not there.
>
> Local Aboriginal people are moving to take non-Aboriginal people out on country to share what the country means and how we can come to a shared vision of what the land is about for all people."

QLS supports including some reference within the Cultural Heritage Acts to recognise the significance and impact of intangible cultural heritage.

However, the current structure of the Cultural Heritage Acts does not easily fit with respect to protecting intangible cultural heritage. Given this, it is not clear how the proposal would advance the protection of intangible elements of cultural heritage within the current legislation. The Cultural Heritage Acts currently protect "significant Aboriginal areas" and/or "significant Torres Strait Islander areas", being areas of significance due to tradition and/or history. Under each Act, 'tradition' is given a broad meaning, so that intangible cultural heritage which is linked with land would fall within the definition and may be the reason an area is recognised for its cultural significance.

The Cultural Heritage Acts are structured to protect areas of land and regulate land use and activities to avoid or minimise harm to cultural heritage. Unless the intangible heritage in question has a connection with land, significant work will be required to amend the Cultural Heritage Acts in such a way as to be an effective mechanism by which to secure such recognition and protection.

We therefore query how, for intangible heritage that is not connected directly to land, the Cultural Heritage Acts are intended to operate in recognising that intangible heritage. We would welcome further detail on such a proposal.
However, it may be that other legislation might provide an appropriate model, for example, recognition and moral rights under copyright legislation.

First Nations practitioners have a strong preference for reference to protecting intangible cultural heritage within the Cultural Heritage Acts.

We raise the following options for consideration, recognising that this is a complex concept and will require further consultation and discussion to identify the best model:

- A preamble to the Cultural Heritage Acts that addresses all elements of cultural heritage, supported by a section defining what Aboriginal and Torres Strait Islander tangible and intangible cultural heritage is.
- The concept must be upfront and clear so that users of the Cultural Heritage Acts become familiar with it and understand it.
- Ideally, intangible cultural heritage would be referenced in the Cultural Heritage Acts, but we also suggest that other legislation could be considered as a model - e.g. as noted earlier, moral rights under copyright legislation.
- We suggest that regard be had to the work of the United Nations Education, Scientific and Cultural Organization (**UNESCO**) on protecting intangible cultural heritage around the world,[7] particularly in relation to their work in the Philippines.[8]

Proposals to improve cultural heritage protections

Proposal 4 - Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts

The scope of this proposal is very unclear. There are existing dispute resolution mechanisms in the Cultural Heritage Acts (e.g. by the Land Court), which provide legal certainty for all parties and any reforms should also provide this degree of certainty.

However, there may be some merit in further resourcing the Land Court's alternative dispute resolution function with qualified mediators to assist with disputes and potentially conferring jurisdiction to deal with disputes.

Given the concerns expressed above regarding a First Nations body or advisory group, QLS would not support this option. However, if it is progressed, then further detail on this proposal is required, including:

- which disputes would be referred to a First Nations or advisory group;
- the nature, composition, administration and governance of the proposed First Nations or advisory group);
- any appeal mechanism available;
- how any decisions or determinations would be enforced; and
- whether the State will be responsible for funding the body and its operations (including any dispute resolution functions).

Cultural heritage management agreements (**CHMA**) and cultural heritage management plans (**CHMP**) between parties are further mechanisms which could provide negotiated dispute

[7] UNESCO, *What is Intangible Cultural Heritage* <https://ich.unesco.org/en/what-is-intangible-heritage-00003>.
[8] UNESCO, *Elements on the Lists of Intangible Cultural Heritage* <https://ich.unesco.org/en/state/philippines-PH?info=elements-on-the-lists>.

resolution options to better manage relationships between all parties. CHMAs and CHMPs are used regularly in native title to enable proponents' access to resources.

Increased funding for community legal centres to assist parties in disputes would also be valuable.

Proposals to improve cultural heritage protections

Proposal 5 - Require mandatory reporting of compliance to capture data and support auditing of the system

The objectives of this proposal are unclear, including what its scope is or how it would be administered.

Currently, a party undertaking activities that may pose a risk to cultural heritage is incentivised under the Cultural Heritage Acts to collate evidence that demonstrates how it has complied with its duty of care, in order to prove compliance, should it be alleged otherwise. This could include entering an agreement with an Aboriginal or Torres Strait Islander Party or consulting with them. On the detail available, there may be a risk that the 'broad brush' positive obligation mooted under the proposal could be onerous for some parties to comply with. For example, individual persons may not have a secure central repository for documents and information, or otherwise be subject to privacy obligations.

Whilst QLS is not opposed to agreements being documented, there is detail lacking on what the 'registration' process for such agreements would be, including:

- where these agreements would be recorded;
- whether the agreements are 'assessed' in some way before registration; and
- whether there would be an additional cost involved; and whether the register would be searchable.

Further, we query which 'consultations' need to be documented and registered. For example, would it be applicable to any communications with traditional owners about heritage? There would be a concern that it may be overly onerous.

QLS suggests that another approach is to build relationships between parties so as to develop mutually acceptable processes to identify, protect, preserve and safeguard Aboriginal and Torres Strait Islander cultural heritage. For example, the legislation currently provides for local CHMAs to be developed which give certainty and surety for both landholders and Aboriginal groups.

Proposals to improve cultural heritage protections

Proposal 6 - Provide for greater capacity to monitor and enforce compliance.

Compliance or punitive regulations should be a last resort. However, it is important that laws are appropriately enforced and complied with.

Local relationship building, story-telling and shared experiences should be enabled through local CHMAs. However, we suggest that monitoring and compliance could perhaps be built into these agreements.

If any of the options are pursued, the Department would require appropriate resources and training to carry out these additional capacities.

It would also be helpful if the Options Paper provided further information as to whether or not breaches of the Cultural Heritage Acts are currently enforced or whether there is a particular issue with compliance and enforcement of the Acts which needs to be addressed.

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.*

QLS does not wish to confirm that Option 1 or 2 is a better option. These are largely mechanical issues in relation to implementation of the legislation.

However, we do express reservations about Option 1, given that it will require the establishment of a First Nations decision-making body. We have previously expressed our concerns about the proposed First Nations decision-making body.

The paper poses the question "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?"

Practitioners involved in the resources industry consider the use of *Native Title Act 1993* (Cth) definitions has been helpful and would continue to be so, especially in the context of providing legal certainty.

Whichever option is taken by the State should be the one that provides greater certainty as to the correct Aboriginal party to consult and engage with. This may be through amending definitions and establishing a reliable mechanism for mapping.

First Nations practitioners suggest that all people, both native title parties and others outside the native title process who claim connection to country, should be involved in discussions regarding cultural heritage management once material has been identified. Section 28 of the *Human Rights Act 2019* (Qld) provides every Aboriginal and Torres Strait Islander person the right to protect their cultural heritage.

In our view, for areas where there is a negative determination, this should not negate the identification of the correct Aboriginal party with whom to consult, as the burden placed by the *Native Title Act 1993* (Cth) on Aboriginal groups should not impact their rights to ensure that there is good management and appreciation of their cultural heritage.

However, resources practitioners indicate that such an approach is not consistent with the current legislative framework, which currently provides a high level of certainty as to the Aboriginal party one has to consult with on cultural heritage.

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

QLS considers that the involvement of First Nations groups in the control, protection and administration of cultural heritage is absolutely essential, particularly local people who have first-hand experience with cultural heritage in the area.

Leadership by First Nations people is a development in the evolution of heritage legislation in Queensland, and would also contribute to ensuring legislation accords with principles of good law.

> *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.*

As noted earlier, significant concerns have been raised about the options of a First Nations body as proposed in the Options Paper.

If this is pursued, then such an entity could meet with native title representative bodies and native title applicants, to seek their views on these issues. The consultation net could then be extended further to other native title claimants.

Another mechanism to increasing engagement with First Nations people is to provide funds to community legal centres to assist in these matters. Funding community legal centres to consult with, provide evidence and expert advice, and take on matters of concern for Aboriginal people would help all interested and affected people to be heard.

The following comments relate to some of the other questions under this heading in the paper, if the decision is taken to pursue one of these proposals:

- Question 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?
    - QLS confirms its view that whichever approach is taken to promote leadership by First Nations peoples in cultural heritage management and decision-making, it must provide greater legal certainty for parties involved in these processes.
- Question 3 – Do you think there should be two separate entities — one for Aboriginal cultural heritage and another for Torres Strait Islander cultural heritage?
    - No. There are two pieces of legislation for these reasons: being that one recognises Aboriginal cultural heritage and one recognises Ailan Kastom.

Aboriginal and Torres Strait Islander people should not be grouped when it comes to recognition of their cultural heritage.

- Question 4 - What are your views on the proposed functions? What other functions could this entity have?
    - In terms of any proposed First Nations leadership body, the body needs to complement or improve the regulation of heritage legislation, the understanding of the importance of cultural heritage in Queensland, and provide project proponents, Aboriginal parties, and legal counsel alike with good and certain leadership in these areas. Examples could be in relation to providing education, guidance as to identification of the correct Aboriginal groups to consult and engage with, review and approval of CHMPs, dispute resolution processes, and to be an advocate for First Nations and protection of Aboriginal cultural heritage.
    - Questions remain as to how such a body will interact with what the Land Court currently provides? Further, would this require a certain level of expertise, particularly in relation to the dispute resolution functions?
- Question 5 - Should this entity have decision-making responsibility for approving 'party status' for an area and approving Cultural Heritage Management Plans?
    - We have some concerns about the body having a decision-making or approval responsibility for the reasons outlined earlier. Further detail would be required to understand how this decision making responsibility would work. However, if the option is pursued, there is the potential for an independent decision maker, acting with procedural fairness and natural justice, to provide greater certainty to both project proponents and Aboriginal parties, including about the consultation to be undertaken.
- Question 8 - Should the entity be independent of the government?
    - QLS does not have an opinion on this issue apart from the fact that any body needs to add to and not detract from good implementation of the cultural heritage legislation and ensure legal certainty for all parties involved.

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

Proposal 2 refers to recognising historical connection to an area for the purposes of cultural heritage management.

The concept of 'historical connection' has been understood as a reference to people who lived in a particular area, but their traditional linkages and connections were to other places. As such, they had no right to make decisions about or over people who could prove their traditional connection to that area.

The traditional people link their connections to the land through their ancestors and the cultural heritage that is tied to the land has been passed down from their ancestors. Other people do not have these connections as their connections are on their own ancestors' country.

Historical people can lend their stories to strengthen traditional peoples connections to land by virtue of their living or working in an area, but not with respect to decision making.

If the proposal is pursued, then a benefit of the entity exploring the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management is that it would provide greater certainty for the intersection between different parties' interests and Aboriginal cultural heritage.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

[redacted]

Kara Thomson
President