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Heritage Review Team
Conservation Policy and Legislation
Environment and Heritage Policy and Programs
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By email [REDACTED]

Dear Heritage Review Team

Proposed reform to Queensland's heritage laws

The Queensland Law Society ('**QLS**') appreciates the opportunity to provide feedback on the proposed reforms to Queensland's heritage laws.

QLS has been able to review the submission provided to this review by the Queensland Environmental Law Association ('**QELA**') and we are supportive of the comments contained therein.

QLS broadly supports the areas of reform identified in the five focus areas in the discussion paper. Further detail is needed about the proposed reform prior to legislation being introduced into Parliament and any form of implementation, including in relation to third party notices and the miscellaneous amendments identified in the Delivering a fresh start for Queensland's heritage Discussion paper ('**discussion paper**').

Objectives of the legislation

We consider a more balanced approach to Queensland heritage is needed; specifically, one which seeks to streamline and clarify "heritage conservation" (which incorporates concepts of protection, stabilisation, maintenance, preservation, restoration, reconstruction and adaptation), rather than a focus on "heritage protection", alone.

Overall, the reform must be fit for purpose, noting the diversity of the heritage system, and should not change the parts of the system that work well and have well-established precedents and practices associated with them. Caution needs to be exercised to ensure the objects are not too complex and therefore difficult to implement. This is a common criticism from judges of the Planning and Environment Court ('**P&E Court**') when asked to implement the objects of the *Planning Act 2016* ('**Planning Act**').

Impact of reform on owners of heritage places

The discussion paper, for example in the table under the heading, "Impact analysis", does not sufficiently take into account the impact of these reforms on owners of heritage places. This is despite the fact that the owners of heritage places will be the most impacted by the proposed changes including in relation to cost, development delays and potential exposure to enforcement action. QLS urges further assessment of the potential impacts on owners, including those that may be unintended, the outcome of which should be published before the reform is pursued.

Introduction of a duty of care

The discussion paper outlines a proposal to introduce a general heritage duty of care to maintain and keep in good repair State and local heritage places. QLS adopts QELA's comments in respect of the need for further details and additional considerations relating to how the duty will be effective and absent unintended consequences.

In addition, our members note that currently, the *Queensland Heritage Act 1992* ('QHA') has limited repair and maintenance obligations, with these issues being considered when obligations were first introduced in 2007 by the *Queensland Heritage and Other Legislation Amendment Act 2007* and were subsequently amended in 2014 by the *Queensland Heritage and Other Legislation Amendment Act 2014*. The explanatory notes for these amendment acts suggest the intent was not to unreasonably impact on the owners of heritage places.¹ The imposition of a new duty of care should have regard to these considerations.

Impact on the duty of care in the Aboriginal Cultural Heritage Act and Torres Strait Islander Cultural Heritage Act

Members of our First Nations Legal Policy Committee note the *Aboriginal Cultural Heritage Act 2003* ('ACHA') and *Torres Strait Islander Cultural Heritage Act 2003* ('TSICHA') already impose a culturally specific duty of care. These acts require persons undertaking activities to take "all reasonable and practicable measures" to avoid harm to Aboriginal and Torres Strait Islander cultural heritage and failure to do so can result in injunctions and infringements.

If a new, generic duty of care was to sit within the QHA without clear legislative demarcation, there is a risk that developers, landowners, and even government agencies may conflate the two duties. While the cultural heritage duty of care attracts a penalty, there is no penalty proposed for a duty under the QHA. This could lead to the generic duty being treated as a substitute for the culturally specific consultation and avoidance of compliance with the duties required under the ACHA and TSICHA, potentially diluting the rigorous protections afforded to Aboriginal and Torres Strait Islander heritage.

QLS recommends legislative clarity to ensure a new duty in the QHA does not affect or practically replace duties in the ACHA or TSICHA.

Changes to the Queensland Heritage Council

QLS is broadly supportive of the proposed changes to the Heritage Council, but recommends members have appropriate and diverse experience and expertise.

¹ [Queensland Heritage and Other Legislation Amendment Bill 2007 - Explanatory Notes](#) and [Queensland Heritage and Other Legislation Amendment Bill 2014 - Explanatory Notes](#)

Heritage listing application process

The discussion paper proposes that the current, application driven process is to be repealed and replaced with an annual, community nomination process that allows the chief executive to identify priority heritage themes. As noted in the QELA submission, there is limited detail provided about how this community nomination process would work in practice, such as what information the chief executive will use to make recommendations and what the applicable timeframes will be.

We agree with QELA's concerns about the possible unintended consequences. Parties, in particular, owners, require certainty in the form of a clear process with timeframes and unambiguous appeal rights.

Other considerations:

- The review team should consider whether a new, simplified process will encourage, rather than reduce, unsupportable nominations being made and the effect this may have on resources.
- Further details are needed about what information the chief executive and Heritage Council will rely on to make recommendations, including in relation to a priority assessment list.
- As stated, the changes to this process are not well explained and unless appropriate measures are put in place, could lead to significant adverse impacts for the owner of the place. The current processes for affording the owner natural justice and procedural fairness in the heritage listing process need to be present in any reform, in addition to adequate appeal rights. These appeal rights should not be extended to members of the public who make heritage nominations.

Temporary protection notices

Queensland heritage places

The discussion paper outlines a process for the chief executive or minister to issue temporary protection notices that will require the assessment of development proposals against the heritage values of a place that is temporarily entered on the Queensland Heritage Register (QHR). The place will be on the QHR temporarily until a decision is made by the QHC.

As noted in QELA's submission, this proposal appears to essentially reinstate the concept of a provisional entry of a heritage place that existed when the QHA was first enacted (see repealed s.24(4)).

The discussion paper states that an owner will be able to make "a submission about a recommendation to enter the place in the register". We query if this refers to a submission about the temporary listing. It appears from the discussion paper that a temporary protection notice will commence the usual heritage listing application process, where the owner is entitled to make a heritage submission to the heritage listing, a heritage response to the chief executive's representations, to be heard before the QHC and to appeal against the decision of the QHC to the P&E Court.

A temporary protection notice will likely mean the place is deemed to be listed for the purpose of the assessable development triggers in Schedule 10, *Planning Regulation 2017* (Qld).

This reform, therefore, has the potential to add significant steps to the assessment process and we are concerned by the current lack of detail provided to stakeholders. We support QELA's submission that the implications of a temporary protection notice have not been well-articulated in the discussion paper, including with respect to the rights of owners. Further details, including through the public release of an exposure draft, should be provided.

This should include details about the application of this reform. We note that at the recent information session, it was stated that temporary protection notices will be prospective, only affecting development applications lodged after the order is made. This is not clear from the discussion paper and should be clarified. If prospective, presumably the orders will not apply to development approvals that have been granted, development that has commenced and development applications that have been made prior to the order being made. With respect to the latter, there is a concern that if an impact assessable development application has been made but not decided prior to the order being made, the order may be treated by the assessment manager as "another relevant matter" that may be considered as part of the assessment and decision-making criteria. This would have consequences for the developers including increased costs and delays.

If this proposal is implemented, there must be a reasonably high threshold for issuing a temporary protection notice, in addition to appropriate procedural fairness and natural justice for the owner. The owner should have the right to appeal the matter to the P&E Court.

Local heritage places

QLS reiterates our concerns in relation to the proposal for the issuing of temporary protection orders for local heritage places, including with respect to the lack of detail in the discussion paper. We also raise the following, additional concerns.

1. The proposed duration of a local temporary protection order is 12 months, with the ability for a 12-month extension, which in our view is too long and will mean that the default period will be 24 months.
2. We note that one of the proposals in the discussion paper is to make administrative changes to accelerate the process for making local heritage places under a planning scheme, however, no details are provided about how this will occur.
3. There are no consistent or rigorous cultural heritage criteria (either existing or proposed) for a local government to base a local temporary protection order on. Without these criteria, there is likely to be a lack of objective assessment, for example, decisions could be made based on community pressure, without sufficient justification.
4. From the information in the discussion paper, the owner will have limited rights; for example, they will have only one opportunity to make a submission. This contrasts with the rights in relation to a proposed entry of a place on the QHR where owners have a right to make a submission to the heritage listing, a heritage response to the chief executive's recommendation, to be heard by the QHC and to appeal to the P&E Court.

Removal of local heritage registers

Similarly to QELA's position, this change is broadly supported by QLS. However, it is imperative the owner's rights are recognised in any change and they are afforded appropriate natural justice and procedural fairness.

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Enforcement provisions

Any reform to enforcement provisions in the QHA must be considered and fit for purpose. These provisions cannot simply replicate those in other legislation.

Changes to the QHR listing

Section 34 of the QHA is proposed to be amended to enable the chief executive to propose major changes to an entry in the QHR by following a process that mirrors the decision-making process for an applicant-driven register entry.

This amendment is supported where changes are required to update information in the entry or to correct an error in the entry but only if the owner of the heritage place retains the rights currently available under the applicant-driven register entry process, including their right to make a heritage submission about the proposal and a heritage response to the chief executive's recommendation, as well as the right to be heard before QHC and the right to appeal the QHC's decision to the P&E Court.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED] [REDACTED]

Yours faithfully



Peter Jolly
President