



Indigenous Cultural Heritage Acts Review

Review paper

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Indigenous Cultural Heritage Acts Review

Aboriginal and Torres Strait Islander cultural heritage is part of Queensland's heritage. Its protection is in the interest of all Queenslanders and effective legislation is central to ensuring that Aboriginal and Torres Strait Islander culture, traditions and customs are celebrated and protected.

The *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* protect Aboriginal and Torres Strait Islander cultural heritage and state how activities that may have an impact on it are managed.

The Indigenous Cultural Heritage Acts Review (the review) is being undertaken by the Department of Natural Resources and Water (NRW), and will examine the efficacy and efficiency of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*.

The review is being undertaken to determine if the Acts are working as planned and fulfilling their main purpose—that is, to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage.

The review will focus on:

- whether the legislation has done what it set out to do
- what is working well, and why
- what can be improved, and how.

NRW is seeking feedback from the community in relation to the provisions of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*, which include:

- ownership, custodianship and possession of Aboriginal and Torres Strait Islander cultural heritage
- protection of Aboriginal and Torres Strait Islander cultural heritage
- native title parties, Aboriginal and Torres Strait Islander parties and cultural heritage bodies
- Aboriginal and Torres Strait Islander cultural heritage databases
- Aboriginal and Torres Strait Islander cultural heritage registers
- cultural heritage studies
- cultural heritage management plans
- investigation and enforcement.

This review paper provides an overview of the legislation and poses questions that submissions may wish to address.

The questions contained in the review paper are suggestions only and submissions are encouraged in relation to any matter relevant to the legislation.

All interested persons and organisations are invited to make a submission to the review. For full details on how to make a submission or to contact the review team, see the 'Making a submission' section at the back of the review paper.

Review context and review paper

Cultural heritage

The *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the legislation) define Aboriginal and Torres Strait Islander cultural heritage as:

- an area or object significant to Aboriginal or Torres Strait Islander people because of Aboriginal or Torres Strait Islander tradition and/or history (including contemporary history) of any Aboriginal or Torres Strait Islander party for the area
- evidence, of archaeological or historic significance, of Aboriginal or Torres Strait Islander occupation of an area of Queensland
- or
- the area immediately surrounding an object or structure that is evidence of Aboriginal or Torres Strait Islander occupation.

Requirement to review

The legislation contains provisions that require the Minister to review its efficacy and efficiency by 16 April 2009. As a result, the review will focus on the legislation's implementation, operation and performance.

Scheduled reviews are an opportunity to determine if legislation is working as planned.

Review paper

This review paper is a descriptive summary of the legislation. The primary purpose of the review paper is to define the scope of the review—an examination of the efficacy and efficiency of the legislation.

The review paper encourages the consideration of:

- whether the legislation has done what it set out to do
- what is working well, and why
- what can be improved, and how.

The questions in this paper are designed to help people intending to make a submission identify matters that are within the review's scope. They do not comprehensively address all aspects of the legislation.

Submissions are encouraged in relation to any matter relevant to the legislation.

Queensland's Indigenous cultural heritage legislation

Prior to the introduction of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*, the management of Aboriginal and Torres Strait Islander cultural heritage was governed by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.

The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* was widely viewed as ineffective because:

- it regulated activities with the potential to impact on Aboriginal and Torres Strait Islander cultural heritage through a system of permits that related only to designated areas
- Aboriginal and Torres Strait Islander cultural heritage was defined in terms of objectively identifiable physical or tangible evidence of human occupation. Areas of Queensland that are significant because of their importance to Aboriginal or Torres Strait Islander traditions, customs or history were not recognised
- human remains, and secret and sacred objects, were the property of the Queensland Government
- penalties and enforcement provisions had proved ineffective
- guidance was not afforded to proponents about how they could address Aboriginal and Torres Strait Islander cultural heritage with certainty or in a timely and cost-efficient manner.

In order to address the shortcomings of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* the Queensland Government introduced the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

The purpose of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* is to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage. Central to this purpose are the following principles:

- The cultural heritage duty of care—all activities should avoid or minimise harm to Aboriginal and Torres Strait Islander cultural heritage.
- The recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage should be based on respect for Aboriginal and Torres Strait Islander knowledge, culture and traditional or customary practices.

- Aboriginal and Torres Strait Islander people should be recognised as the primary guardians, keepers and knowledge holders in relation to their cultural heritage.
- The recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage is important because it allows people to reaffirm their obligations to Aboriginal tradition or Torres Strait Islander custom.
- Processes for the management of activities that may harm Aboriginal or Torres Strait Islander cultural heritage should be certain, timely and efficient.

NRW administers the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

The Aboriginal Cultural Heritage Act 2003 and the Torres Strait Islander Cultural Heritage Act 2003

Following is an outline of the key areas addressed by the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*. The suggested questions, which focus on the implementation, operation and performance of the legislation, may assist in the preparation of submissions.

Ownership, custodianship and possession of Indigenous cultural heritage

The basic purpose of the legislation is that Aboriginal and Torres Strait Islander cultural heritage should be protected. Supporting this, Aboriginal and Torres Strait Islander cultural heritage is owned by Aboriginal and Torres Strait Islander people with traditional or familial links to it, if it comprises:

- human remains
- secret and sacred objects in the custody of the Queensland Government

or

- cultural heritage lawfully taken away from an area after the legislation commenced on 16 April 2004.

With the exception of human remains, the legislation affirms the ownership of Aboriginal and Torres Strait Islander cultural heritage lawfully obtained by a person before the commencement of the legislation.

The legislation does not affect the ownership of land.

Ownership of human remains and secret and sacred objects

All Aboriginal and Torres Strait Islander human remains, and secret and sacred objects in the custody of the Queensland Government, are owned by Aboriginal or Torres Strait Islander people. Ownership is determined by traditional or familial links.

In support of this declaration of ownership, the legislation states that:

- persons holding Aboriginal or Torres Strait Islander human remains, who are not the owners, must give the remains to NRW
- persons with knowledge of Aboriginal or Torres Strait Islander human remains, who are not the owners, must inform NRW
- the Queensland Government (including the Queensland Museum and NRW) must follow the instructions of the owners of human remains and secret and sacred objects.

The Queensland Museum

The Queensland Museum may accept the custody of Aboriginal and Torres Strait Islander cultural heritage but is subject to the requirements of the legislation in relation to that heritage.

Questions to consider

- Has the legislation ensured that all human remains, and secret and sacred objects in the custody of the Queensland Government, are controlled and protected by their owners?
- Has the Queensland Museum's authority to accept custody of Aboriginal and Torres Strait Islander cultural heritage worked to protect this cultural heritage?

Protection of Indigenous cultural heritage

Cultural heritage duty of care

The legislation establishes a cultural heritage duty of care. The duty of care requires a person carrying out an activity to take all reasonable and practicable measures to ensure that the activity does not harm Aboriginal or Torres Strait Islander cultural heritage.

Penalties can be imposed on persons:

- breaching the duty of care
 - harming Aboriginal or Torres Strait Islander cultural heritage
 - excavating and taking away Aboriginal or Torres Strait Islander cultural heritage
- or
- unlawfully possessing Aboriginal or Torres Strait Islander cultural heritage.

The cultural heritage duty of care is satisfied if a person is acting:

- under an approved cultural heritage management plan
 - under a native title agreement, or another agreement with an Aboriginal or Torres Strait Islander party
 - in compliance with the duty-of-care guidelines
- or
- in compliance with native title protection conditions (for mineral exploration).

Cultural heritage duty-of-care guidelines—outlining reasonable and practicable measures to avoid or minimise harm to Aboriginal cultural heritage—have been established under the *Aboriginal Cultural Heritage Act 2003*.

Stop orders and preservation by the Minister

Stop orders are designed to protect Aboriginal and Torres Strait Islander cultural heritage from imminent unlawful harm. The Minister for Natural Resources and Water may order a person to stop an activity that is harming, or that will harm, Aboriginal or Torres Strait Islander cultural heritage.

The Minister may also take other actions, including the acquisition of Aboriginal or Torres Strait Islander cultural heritage, for the purpose of preserving Aboriginal and Torres Strait Islander cultural heritage.

Rehabilitation or restoration

On the conviction of a person for an offence involving the unlawful harming or possession of Aboriginal or Torres Strait Islander cultural heritage, a court may order the person to pay for repair or restoration.

Information about Indigenous cultural heritage

Information about Aboriginal and Torres Strait Islander cultural heritage must be handled appropriately. The legislation restricts the inclusion of information of a

secret or sacred nature in reports relating to Aboriginal or Torres Strait Islander cultural heritage.

Questions to consider

- Has the cultural heritage duty of care worked to protect Aboriginal and Torres Strait Islander cultural heritage?
- Have the cultural heritage duty-of-care guidelines, under the *Aboriginal Cultural Heritage Act 2003*, provided clarity and assisted people to comply with the Act's cultural heritage duty of care?
- Has the legislation achieved its objective of enabling the Aboriginal and Torres Strait Islander owners of secret or sacred information to have control over it?
- Have the following been effective in averting and repairing damage to Aboriginal and Torres Strait Islander cultural heritage?
 - stop orders
 - court orders requiring rehabilitation or restoration
 - ministerial power to act to protect Aboriginal and Torres Strait Islander cultural heritage.

Native title parties, Indigenous parties and cultural heritage bodies

In certain circumstances, the legislation requires that a person must consult Aboriginal or Torres Strait Islander people with relevant authority and knowledge. The legislation refers to such people as Aboriginal or Torres Strait Islander parties and provides a process for identifying them.

Indigenous parties

Aboriginal and Torres Strait Islander parties have certain rights under the legislation. They must be consulted in the course of cultural heritage studies and the development of cultural heritage management plans.

If a native title party exists for an area under the *Native Title Act 1993 (Commonwealth)*, it is an Aboriginal or Torres Strait Islander party for that area. If no native title party exists, a person is an Aboriginal or Torres Strait Islander party for the area if they are:

- Aboriginal or Torres Strait Islander and have particular knowledge about traditions, observances, customs or beliefs associated with the area
 - responsible, under Aboriginal tradition or Torres Strait Islander custom, for the area and objects located in or originating from it
- or

- a member of a family or clan group with responsibility, under Aboriginal tradition or Torres Strait Islander custom, for the area and objects within it.

Cultural heritage bodies

Aboriginal and Torres Strait Islander cultural heritage bodies are responsible for identifying Aboriginal or Torres Strait Islander parties for an area. The Minister for Natural Resources and Water may register a corporation as a cultural heritage body for an area. With the exception of temporary registrations for particular projects, only one cultural heritage body may exist for an area.

A list of cultural heritage bodies is maintained by NRW.

Questions to consider

- Has the definition of Aboriginal and Torres Strait Islander parties ensured that people with the necessary knowledge and authority are identified under the legislation?
- Do cultural heritage bodies assist people who need to comply with the legislation to identify Aboriginal and Torres Strait Islander parties?

Indigenous cultural heritage databases

The purpose of the Aboriginal and Torres Strait Islander cultural heritage databases is to collect a broad range of information about Aboriginal and Torres Strait Islander cultural heritage. Information is placed on the databases by NRW and may be used for research and planning purposes.

The databases are not accessible to the general public, but an Aboriginal or Torres Strait Islander party for an area has a right to information on the database relating to that area. Access to information on the databases may also be granted if it is necessary for research or may help a person to satisfy their cultural heritage duty of care.

Questions to consider

- If you have requested information from the Aboriginal or Torres Strait Islander cultural heritage databases, how efficient and effective was the process for retrieving the information?
- How useful has information from the Aboriginal and Torres Strait Islander cultural heritage databases been in the assessment, management and protection of Aboriginal and Torres Strait Islander cultural heritage?

Indigenous cultural heritage registers

The purpose of the Aboriginal and Torres Strait Islander cultural heritage registers is to capture information collected through the operation of the legislation. It contains details about:

- cultural heritage studies
- cultural heritage management plans
- cultural heritage bodies.

The registers are publicly accessible and have been established as research and planning tools.

Questions to consider

- If you have requested information from the Aboriginal or Torres Strait Islander cultural heritage registers, how efficient and effective was the process for retrieving the information?
- How useful has information from the Aboriginal and Torres Strait Islander cultural heritage registers been in the assessment, management and protection of Indigenous cultural heritage?
- Have the Aboriginal and Torres Strait Islander cultural heritage registers been useful as a planning and research tool?

Cultural heritage studies

Cultural heritage studies are designed as a comprehensive approach to assessing Aboriginal and Torres Strait Islander cultural heritage.

Any person may undertake a cultural heritage study at any time.

Aboriginal and Torres Strait Islander parties must be invited to participate in the development of a cultural heritage study. The legislation requires that the person undertaking the study:

- consult with Aboriginal or Torres Strait Islander parties

- conduct the cultural heritage study in a way that maximises its quality and authority.

In addition to Aboriginal and Torres Strait Islander parties, people with relevant knowledge and skills—such as an Aboriginal or Torres Strait Islander person with particular knowledge, an anthropologist or an archaeologist—may be involved in the process.

NRW is responsible for deciding whether to record a cultural heritage study on the Aboriginal or Torres Strait Islander cultural heritage register. If NRW's decision is disputed, the Minister for Natural Resources and Water makes the final decision about recording a cultural heritage study, taking into account the recommendation of the Land Court.

Questions to consider

- Has the cultural heritage study process helped in the accurate assessment of Aboriginal and Torres Strait Islander cultural heritage?
- How effective is the legislation in ensuring that both proponents and Aboriginal or Torres Strait Islander people can make meaningful contributions to cultural heritage studies?

Cultural heritage management plans

Cultural heritage management plans establish how projects are to be managed to avoid or minimise harm to Aboriginal or Torres Strait Islander cultural heritage.

For many projects requiring an environmental assessment, a cultural heritage management plan must be developed. Actions taken in accordance with an approved cultural heritage management plan satisfy the cultural heritage duty of care.

Aboriginal or Torres Strait Islander parties must be invited to participate in the development of cultural heritage management plans. Plans may be developed by negotiation and can address a variety of matters relevant to the involved parties.

Time limits apply in the development of a cultural heritage management plan and the consultation period is 84 days.

Cultural heritage management plans formulated by agreement are approved as a matter of course. When parties do not agree on a plan, mediation may be pursued. If parties cannot agree, the Minister for Natural Resources and Water makes the final decision about the adequacy of a cultural heritage management plan, taking into account the recommendation of the Land Court.

Cultural heritage management plan guidelines have been established under the *Aboriginal Cultural Heritage Act 2003*.

Questions to consider

- Do you think the cultural heritage management plan guidelines have been helpful in developing cultural heritage management plans under the *Aboriginal Cultural Heritage Act 2003*?
- To what extent do cultural heritage management plans provide a timely and efficient process for the management of activities to minimise or avoid harm to Aboriginal and Torres Strait Islander cultural heritage?

Investigation and enforcement

The legislation establishes investigation and enforcement provisions to protect Aboriginal and Torres Strait Islander cultural heritage. It allows information and evidence to be gathered in relation to suspected offences so that charges may be laid. It provides that authorised officers have certain powers including the ability to enter places, seize evidence and require people to provide assistance, information and documents.

The legislation allows NRW to appoint authorised officers.

Question to consider

- Do you think the investigation and enforcement powers given to authorised officers have been effective in helping to protect Aboriginal and Torres Strait Islander cultural heritage?

Making a submission

Submissions made to the review must include the name and address of the person making the submission.

All submissions will be treated confidentially.

**Submissions must be received by
28 February 2009.**

Submissions may be made online, by post, by fax or by contacting NRW. For further information or to make a submission, contact NRW via:

Phone: (07) 3225 2714

Fax: (07) 3405 6899

Email: ichar@nrw.qld.gov.au

Website: www.nrw.qld.gov.au

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