



Issues Paper

Cultural Heritage Duty of Care Guidelines Review
20 April 2017

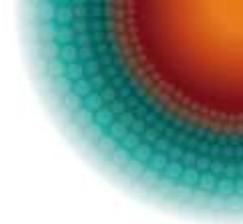


Table of contents

Introduction	1
Purpose of Issues Paper	1
Key principles	2
Findings	3
Categorising activities	4
Assessing Cultural Heritage Risk	7
Dispute Resolution	9
Summary of issues to consider	10
Next Steps	10
Making a submission	10

Introduction

On 3 August 2016, a Discussion Paper and Terms of Reference were released seeking submissions on the current Cultural Heritage Duty of Care Guidelines (Guidelines).

The Department sought submissions from interested parties regarding the performance and operation of the Guidelines with specific focus on the following questions:

- How can the Guidelines be improved to best achieve the purpose of the legislation?
- How can the current categories of activities in the Guidelines be amended to better reflect the need to manage residual Cultural Heritage values in developed or previously disturbed areas?
- How can the Guidelines enable greater synergy between the Cultural Heritage values of an area and the nature of the proposed activity?
- Are there any other elements you think should be included in a revised version of the Guidelines?

Fifty-four written submissions were received during the six-week submission period from the following stakeholder groups:

Aboriginal and Torres Strait Islander parties	13
Private sector land users	8
Consultants	7
Government agencies	7
Local Government	4
Native Title Representative Bodies	4
Lawyers	7
Academia	4

A list of submissions received is included with the Submission analysis document published on the DATSIP website on 23 December 2016 <https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/datsip-report-docg.pdf>.

Of the submissions received, 40 (74%) recommended or supported change to the current Guidelines to improve their use in assessing and managing Aboriginal and Torres Strait Islander cultural heritage.

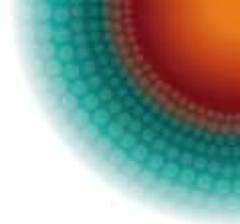
Purpose of Issues Paper

The purpose of this paper is to highlight key themes and issues for developing revised Guidelines to define reasonable and practicable measures to avoid or minimise harm to Aboriginal cultural heritage.

The themes and issues identified in this paper are based on the analysis of submissions which fall within the terms of reference for the review. They form the Department's primary focus in considering the need to amend the Guidelines to achieve their legislative purpose.

This paper is intended as the basis for further consultation with stakeholders over the coming months to develop and refine revised Guidelines for gazettal by the Minister.

The development of Guidelines for the *Torres Strait Islander Cultural Heritage Act 2003* will follow the completion of this review.



Key principles

The Guidelines are underpinned by the key principles of the *Aboriginal Cultural Heritage Act 2003* (the legislation). These principles are set out in section 5 of the legislation and paragraph 1.2 in the preamble to the current Guidelines.

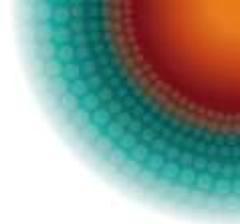
These principles include those outlined in *Ask First – A guide to respecting Indigenous heritage places and values*, released by the Australian Heritage Commission, which strongly emphasise consultation and negotiation with Indigenous stakeholders as the best means of addressing Indigenous heritage issues.

The principles of the legislation also include the need to establish timely and efficient processes for managing activities that may harm Aboriginal cultural heritage. Numerous submissions suggest the current Guidelines do not achieve the necessary balance between the need to consult with Traditional Owners and the need for timely and efficient management processes.

Many submissions were critical of the current Guidelines for promoting an approach to risk assessment which reduces or avoids the need for land users to consult with Aboriginal parties in managing the cultural heritage impacts of their activities.

Conversely, most land users emphasised the importance of the Guidelines for enabling self-assessment processes without the need to consult with Aboriginal parties in certain situations.

This paper seeks to further explore and recalibrate the necessary balance between these divergent views.



Findings

It is the Department's view that three key issues need to be considered in developing new Guidelines:

- **Categorising activities.**
- **Assessing risk of harm to cultural heritage likely to be impacted by an activity.**
- **Dispute resolution processes where parties are unable to reach agreement.**

These issues are further considered in this paper.

A number of other important matters were raised in the submissions but deemed to be either outside the purpose of the Guidelines or outside the role of the Cultural Heritage Unit (CHU) and its current administrative authority.

Matters considered outside the current role and function of the CHU include:

- Standardisation of fees, rates and timeframes for cultural heritage assessment and management processes.
- Extending the regulatory role of the CHU in assessing, endorsing and reviewing cultural heritage assessment activities.
- Mandatory reporting to the CHU of all cultural heritage assessments and surveys.

Given the current legislative framework, the Department will not pursue these suggestions and recommendations.

Matters considered outside the purpose and scope of the Guidelines but relevant to improving the effectiveness of the legislation include:

- Compliance enforcement.
- Education and awareness.
- Government authorised processes that do not include cultural heritage assessment as a condition of approval (e.g. matters that trigger environmental assessment, clearing of native vegetation, permitting of quarrying activities).

The Department will provide stakeholders with information regarding future initiatives in relation to these specific matters following the completion of the Guidelines Review.

Categorising activities

Ninety-five of 99 (95%) comments about the current categories of activities recommended they be modified.

The current Guidelines establish five categories of activities primarily based on the assumption set out in paragraph 2.2:

These guidelines recognise that it is unlikely that Aboriginal cultural heritage will be harmed where:

- the current or proposed activity is on an area previously subject to significant ground disturbance and the activity will impact only on the area subject to the previous disturbance; or
- the impact of the current or proposed activity is unlikely to cause any additional harm to Aboriginal cultural heritage than that which has already occurred.

One of the main criticisms of the current Guidelines by Traditional Owners, heritage consultants and academics was that the above assumption does not apply in all circumstances. These submissions highlighted the potential for cultural heritage to continue to exist in areas previously subject to significant ground disturbance. The following statements capture the sentiment expressed in many submissions:

The current five categories need substantial revision. For those areas where there has been previous surface disturbance or significant ground disturbance and proposed activities do not intend any additional disturbance, there should still be some consideration as to whether a change in the use of the land might impact upon Aboriginal cultural heritage. (Lawyer)

Current categorisations and assessments of harm are fundamentally flawed insofar as assuming prior disturbance has obliterated all Aboriginal cultural heritage, failure to appreciate the potential for the existence of (residual) cultural heritage, and the silence on the fact that cultural heritage not limited to items and objects. Consequently the current regime does not achieve recognition or facilitate protection of cultural heritage. (Traditional Owner)

The current model also assumes that if something is disturbed, that any significance is 'extinguished'. This is contrary to any accepted understanding of cultural heritage significance as espoused by national and state policy and Guidelines. (Consultant)

Submissions argued there should be greater focus on the likely impact of a proposed activity on cultural heritage rather than purely assessing its impact on past ground disturbance. For example:

To meet the aims (and principles) of 'The Act', the definitions of proposed impacts needs to consider potential effects on cultural heritage rather than land surfaces. (Consultant)

Many of the categories established...as the basis for determining impacts of proposed developments, are poorly defined. In particular, all the category definitions are based on the potential impact a development may have on land surface rather than the likely impact on cultural heritage. (Consultant)

Development alone should not determine risk. Rather, the focus should be on the impact of the activity and its potential to harm Aboriginal cultural heritage, rather than whether there is prior development. (Proponent)

Many submissions were critical of the category definitions because they are unclear and overlap in certain circumstances. This is seen to create uncertainty for land users. Traditional Owners also

criticised this lack of certainty as a means by which some land users avoid consultation with Aboriginal parties in situations where activities are likely to harm cultural heritage.

The duty of care categories conflate the issues of previous impacts (previous disturbance) and activity (proposed disturbance) in an attempt to capture a wide range of activity scenarios. This has resulted in a certain amount of uncertainty in the correct application of categories to projects and project areas. (Consultant)

In light of these submissions, new categories are proposed based on the interplay between past land use and the nature of the proposed activity. These categories introduce the concept of defining an activity as either 'consistent' or 'inconsistent' with previous land use in determining an appropriate approach to assessing the risk of harm to cultural heritage.

Activities consistent with past land use are those activities which do not differ substantially from current land use or alter the current intensity of land use in an area.

In contrast, activities that are inconsistent with past land use are those activities which materially change the use of the land or by their nature are of a greater scale and intensity of land use.

As these are new terms, their meaning and application will require further consideration through consultation with stakeholders.

Proposed categories for further consideration by stakeholders are as follows:

Category 1: Activities causing no physical impact

Activities causing no surface disturbance, vegetation removal or other physical impacts.

These activities may proceed without further assessment subject to the same caveats noted in the current Guidelines. For example, it is important to be aware that merely being present in a culturally significant place may cause offence to Aboriginal people, and where this is known, due respect should be paid to these cultural sensitivities by notifying the relevant Aboriginal party of the intended activity. In addition, it is respectful to notify Aboriginal parties about any research activities occurring in relation to their traditional land and waters even where the specific activities will not cause any physical impact.

Category 2: Activities consistent with previous land use activities

Activities involving any type of ground disturbance, removal of vegetation, or other physical impacts which are consistent with previous land use activities.

This would include the examples of activities outlined in the current Guidelines at paragraph 4.6. These activities may proceed without further assessment subject to the same caveats noted in the current Guidelines, namely:

4.7 If at any time during the activity it is necessary to excavate, relocate, remove or harm a Cultural Heritage Find the activity should cease immediately. You must notify the Aboriginal Party for the area and seek their advice and agreement as to how best this may be managed to avoid or minimise harm to the Aboriginal cultural heritage.

4.10 An activity under category 2 that will excavate, relocate, remove or harm Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database should not proceed without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the Act.

Category 3: Activities inconsistent with previous land use activities

Activities involving any type of ground disturbance, removal of vegetation, or other physical impacts which are inconsistent with previous land use activities. This would include, for example, residential development in areas previously subject to pastoral activities, increasing the footprint of established infrastructure, or the intensified agricultural use of grazing land. These activities should not proceed without further cultural heritage assessment to determine the likelihood of harm to Aboriginal cultural heritage.

Category 4: Activities in previously undisturbed areas

Activities involving any type of ground disturbance, removal of vegetation, or other physical impacts in an area not previously subject to these activities should not proceed without further cultural heritage assessment to determine the likelihood of harm to Aboriginal cultural heritage.

Key issues for assessing likely impacts of harm to Aboriginal cultural heritage are outlined in the next section.

Issues to consider

- *What are the practical implications of defining activities in the manner proposed above?*
- *Is it necessary to define 'consistent' and 'inconsistent' activities by developing a list of example activities for inclusion in the Guidelines?*

Assessing Cultural Heritage Risk

While consideration of previous land use is one element in the assessment of an activity's potential impacts on cultural heritage, understanding the nature of any cultural heritage likely to be impacted by the activity is crucial in complying with the cultural heritage duty of care. An appropriate assessment of risk therefore requires two separate but related enquiries:

- Is the activity consistent with previous land use activities (as discussed above); and
- What is the likely impact on cultural heritage arising from the proposed activity?

Based on the principles of the legislation and the current Guidelines, the views of the Aboriginal party for an area are key in assessing and managing any activity which is likely to harm Aboriginal cultural heritage.

Submissions highlighted the limited knowledge of many land users regarding the identification of Aboriginal cultural heritage and their subsequent inability to identify potential impacts on that cultural heritage.

Additionally, there are no Guidelines provided for proponents, untrained and unskilled in cultural heritage management, to assess whether a proposed land use might adversely affect cultural heritage...In general, there remains inadequate guidance on when and how cultural heritage assessments are required. (Consultant)

Assessing whether an area contains cultural heritage, irrespective of the nature and extent of previous disturbance, is a matter best determined by Aboriginal Parties and appropriately qualified experts...[I]nadequate assessments are currently being conducted by many land users, their employees, contractors and consultants. Reliance upon unsound assessments has led to the Guidelines being used by land users to frustrate or circumvent the objectives of the ACHA. (Lawyer)

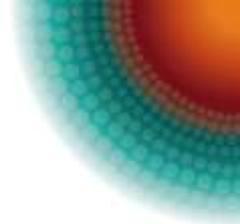
Submissions also raised the lack of transparency in the decision-making processes of land users when undertaking a duty of care assessment without consultation with the Aboriginal party.

In the current circumstances, it is conceivable that a proponent / land user can arrive at a decision as to the category and the consequent outcome without needing to formally document both the category under which they consider they are operating, how they arrived at this determination nor explain previous land use history or exactly how and in what circumstances the proposed activity might affect Aboriginal cultural heritage. This creates a level of uncertainty for Aboriginal parties in particular, who might wish to challenge how a proponent arrived at a decision that could exclude the Aboriginal parties from an exercise to evaluate a proposed action and the cultural heritage consequences. It also creates a problem for a regulatory agency that is seeking to establish whether a proposed or implemented course of action is appropriately proportionate to the likely risks to Aboriginal cultural heritage, something central to deciding whether further action on their part is necessary to give effect to the purpose of the Aboriginal Cultural Heritage Act (ACHA). (Consultant)

It is proposed that revised Guidelines will require land users to document their approach to complying with the duty of care in any case where further assessment is not considered necessary.

In those instances where further assessment is required, as proposed in accordance with Categories 3 and 4 above, assessment should involve consultation with the relevant Aboriginal parties for the area.

In accordance with the current Guidelines, where a cultural heritage survey is required, the Aboriginal party for the area must be given the opportunity to be involved in undertaking the survey. Their advice must be sought as to how best to manage any impacts of the activity which may harm cultural heritage identified by the survey.



Aboriginal parties have a responsibility to provide advice in a timely and efficient manner proportionate to the nature and scale of the proposed activity. It is not unreasonable for an Aboriginal party to utilise the services of appropriately qualified heritage professionals in discharging their responsibilities to assess and manage cultural heritage.

The nature and significance of any cultural heritage in the area is primarily a matter for the Aboriginal party. However, should the party fail to engage, respond or accept an invitation to assess the risk of harm to cultural heritage, advice from appropriately qualified persons such as anthropologists, archaeologists and historians must be sought to assist with the assessment.

If the assessment determines the activity is likely to impact on Aboriginal cultural heritage, you must notify the Aboriginal party for the area and seek their advice and agreement on appropriate management strategies. If the Aboriginal party fails to respond to this notification within a reasonable timeframe, the land user may proceed with the activity based on advice from an appropriately qualified cultural heritage professional. All attempts to engage with the Aboriginal party should be documented.

The process outlined above enabling a land user to proceed with their activity only applies where they have been unable to consult with the Aboriginal party despite their best efforts. In situations where parties have consulted but are unable to agree on appropriate management strategies, possible dispute resolution processes are considered in the following section.

Issues to consider

- *Is it 'reasonable and practicable' to require consultation with the Aboriginal party in all circumstances where an activity is inconsistent with previous land use?*
- *What is a 'reasonable timeframe' for response to a notification seeking advice from an Aboriginal party?*
- *How is an 'appropriately qualified cultural heritage professional' to be defined?*
- *Should the Department develop a template for land users for documenting their assessment of risk?*

Dispute Resolution

Numerous submissions focused on the uncertainty created when agreement cannot be reached about suitable management processes. It is recognised that disagreements arise in a range of circumstances even where parties are acting in good faith.

The current Guidelines state (at paragraphs 4.9, 5.10, 5.19, 7.5)

Where agreement cannot be reached with the Aboriginal Party for the area, you continue to have a duty of care obligation under section 23 of the Act and must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan under Part 7 of the Act.

Submissions considered this approach to be impractical and does not provide certainty to land users and Traditional Owners when agreement cannot be reached. There is a widespread view that a clear process is necessary in circumstances where consultation is required under the Guidelines but parties fail to agree on the management of activities that may impact cultural heritage.

Develop and incorporate Dispute Resolution Guidelines, including the use of independent experts (Indigenous, archaeological and anthropological) or expert panels to determine disputes. (Consultant)

If agreement cannot be reached, then an external mediator or expert or consultant be appointed by DATSIP to make recommendations. The current idea that it's either an agreement or 'proceed without' the Aboriginal Party does not meet the principle of the Act, while a CHMP is not always reasonable or practicable. (Consultant)

[There needs] to be a conflict resolution measure provided within the Duty of Care Guidelines to maintain consistency across all residual heritage studies...Mediation guided by DATSIP a detailed study by an independent cultural heritage specialist to confirm or deny the existence of residual heritage values would be a possible dispute resolution measure. This process could be governed by DATSIP as part of the mediation. If mediation fails, a ruling by the Land Court could act as the final appeal mechanism. (Government Agency)

There is little discussion, however, in the Guidelines about alternatives where an agreement cannot be reached. Whilst reference is made to a CHMP under Part 7 of the Act only, this is often not practicable in the context of minor works or low cost works...Another avenue apart from the Part 7 could be made available (subject to resourcing maybe) such as mediation provided by the Cultural Heritage Unit (potentially a paid service) or a form of injunctive relief. (Proponent)

The Department recognises the need for greater certainty for all parties when agreement cannot be reached. Several dispute resolution options have been canvassed in the submissions. These include:

- Dispute resolution models based on the engagement of an independent expert external to Government
- Dispute resolution models based on the development of a mediation service internal to Government
- Expansion of the Land Court of Queensland's Cultural Heritage Division's role to incorporate mediation services beyond its current legislative role under Part 6 and Part 7 of the legislation.

Given the practical implications and resources necessary to implement any of the above dispute resolution models, the Department will explore these options in the coming months as part of its ongoing consultation with stakeholders and relevant government agencies.

It is recognised that establishing a viable dispute resolution process is critical to obtaining the support of land users for revised Guidelines.

Issues to consider

- *Who should be responsible for assisting parties resolve disputes?*

Summary of issues to consider

- *What are the practical implications of defining activities in the manner proposed above?*
- *Is it necessary to define 'consistent' and 'inconsistent' activities by developing a list of example activities for inclusion in the Guidelines?*
- *Is it 'reasonable and practicable' to require consultation with the Aboriginal party in all circumstances where an activity is inconsistent with previous land use?*
- *What is a 'reasonable timeframe' for response to a notification seeking advice from an Aboriginal party?*
- *How is an 'appropriately qualified cultural heritage professional' to be defined?*
- *Should the Department develop a template for land users for documenting their assessment of risk?*
- *Who should be responsible for assisting parties resolve disputes?*

Next Steps

Following the release of this paper, the Department will schedule workshops in Brisbane and Cairns during May 2017. All stakeholders who provided submissions will be contacted by the Department with details of these workshops.

Further written submissions are sought focusing on the **issues to consider** as set out in this paper.

It is intended to release draft revised Guidelines by **28 July 2017** for final comment prior to gazettal.

Making a submission

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

Submissions will be treated confidentially.

Submissions must be received by **1 June 2017**.

Submissions may be made by email or by post to the following addresses:

Email: cultural.heritage@datsip.qld.gov.au

Post: Cultural Heritage Duty of Care Guidelines Review

Cultural Heritage Unit
Department of Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST QLD 4002

For further information or to discuss the submission process, contact the Cultural Heritage Unit, DATSIP

Phone: 1300 378 401

Website: <https://www.datsip.qld.gov.au/people-communities/aboriginal-and-torres-strait-islander-cultural-heritage>