

QUESTION ON NOTICE

PORTFOLIO NO. 7 - PLANNING AND ENVIRONMENT

QUESTION NO. 1

ALIGNMENT WITH THE PLANNING, HERITAGE SYSTEMS

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. AILEEN MacDONALD: You might have to take this on notice. With the comments that you had that the bill has extensive inconsistencies with the proposed processes and unclear policy positions, and you did outline some of them, I was wondering if you can expand on that or is that something that you would take on notice?

SHANE HAMILTON: Probably better to take on notice to be honest.

ANSWER

The Private Members Bill (PMB) proposes an Aboriginal Cultural Heritage (ACH) Council separate to government. This will have adverse effects of the management and protection of ACH. The current system is not functioning well in part due to misalignment with the planning system. To address these issues, any new ACH system must be embedded within government and within the government's planning system.

The areas of particular concern in the PMB are:

- Setting up the management of ACH outside of government will increase regulatory burden, add cost and time as well as uncertainty for developers and potentially limit opportunity for decision-making by Aboriginal people.
- Noting that post-contact, there are a number of sites with shared ACH and non-Aboriginal heritage values, the PMB does not include sufficient provisions for determining, protecting and managing shared heritage sites.
- The ACH Directory being proposed in the PMB has not adequately considered protections on secret and sacred cultural knowledge. Protections of these sensitives must be embedded within new databases that work in unison with the ePlanning system.
- It is unclear how the independent body proposed by the PMB will be resourced. The 2018 draft ACH Bill also proposed an independent body, which was found to be too costly to implement.
- The PMB proposes protecting ACH according to levels of significance used for non-Aboriginal heritage. This is both culturally inappropriate and risks recreating problems with the current heritage system that fails to adequately protect ACH.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

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QUESTION NO. 2

FEDERAL LEGISLATION

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. ROSE JACKSON: Your submission talked about how the bill does not adequately align with the Federal Indigenous cultural heritage reform process, which is described as "currently progressing". I just wondered if you might provide any detail that you had about the misalignment between this bill and that process but also perhaps just give us an update on where that process is up to if you had any information about where the Federal cultural heritage reform process was up to and the New South Wales Government's engagement with that.

SHANE HAMILTON: I probably need to take that on notice so I can give a full answer if that's okay.

ANSWER

The federal reform of Indigenous cultural heritage protection is being jointly led by the Federal Department of Climate Change, Energy, the Environment and Water and the First Nations Heritage Protection Alliance. Aboriginal Affairs NSW have been engaged in this process.

Stage One of the federal reform process included a consultation process with a focus on best practice principles such as those outlined under *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation*, and recommendations from *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* and reviews of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth).

An options paper will be released soon by the Commonwealth Government prior to a second round of wider consultations, which the NSW Government plans to engage in.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

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QUESTION NO. 3

FEDERAL LEGISLATION

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. ROSE JACKSON: That's fine. One more, which you also may have to take on notice: It's drawn from the submission, but you've talked a little bit about some of the inconsistencies with the Government's previous legislative efforts and some of the outcomes of the consultation that you've done that aren't reflected in the bill that we're currently considering.

SHANE HAMILTON: I'm sorry, I don't have specifics on that. I can take that on notice and respond, but I don't have the specifics in front of me on the detail on that.

ANSWER

While standalone Aboriginal Cultural Heritage (ACH) legislation is a priority, reform needs to build on existing legislation such as the *Aboriginal Land Rights Act 1983* (NSW) and the *Native Title Act 1993* (NSW). The Private Member's Bill risks exacerbating conflict between these Acts by prioritising one group over another.

It is important that the authority to speak for Country is determined by Aboriginal people before anything is legislated. ACH legislation needs to build a framework that empowers Aboriginal people to lead the conversation about who has the authority to speak for Country. It is not appropriate for government to have a role in determining Aboriginal cultural authority.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

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QUESTION NO. 4

A WAY FORWARD REPORT

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. ROSE JACKSON: That's fine. One more, which you also may have to take on notice. The submission also suggests that the bill does not adequately align with the findings and recommendations of the Juukan Gorge report that the Joint Select Committee on Northern Australia did, which is obviously a Federal committee inquiry, so I accept that. But I'd be interested in some detail, again, about that misalignment. What were the things that that report, called *A Way Forward*, found that are not aligned or are inconsistent with the bill that we're considering?

SHANE HAMILTON: I'm sorry, I don't have specifics on that. I can take that on notice and respond, but I don't have the specifics in front of me on the detail on that.

ANSWER

The *A Way Forward* report made 23 recommendations, including the need for the principles of the United Nations Declaration of the Rights of Indigenous People (UNDRIP) to be reflected in all legislation that interacts with First Nations lore and culture. Under UNDRIP Article 19, States must have consent as the objective of consultation before the adoption of legislation or administrative policies that affect Indigenous peoples.

There are also recommendations that speak to the importance of co-designing policies and processes with Aboriginal stakeholders to recognise Aboriginal self-determination. The speakers and submissions to this Inquiry have demonstrated that this has not adequately occurred in the development of the Private Members Bill (PMB).

The suggestion to progress the PMB and incorporate amendments later is not consistent with best practice as described in *A Way Forward*, nor does it align with the principles of UNDRIP; specifically, Free, Prior and Informed Consent.

I acknowledge that the government has taken some time in developing an updated Aboriginal Cultural Heritage Bill. This reflects the government's understanding of the need to work closely with Aboriginal stakeholders throughout the process, which the NSW Government is committed to continuing.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

QUESTION ON NOTICE

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QUESTION NO. 5

OBJECT OF ACT

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. PENNY SHARPE: Yes, but I suppose my question is specifically, within any bill, do we need to state clearly that the objective of the bill is to stop destruction or harm?

SHANE HAMILTON: I'd have to take that on notice but, yes, I think the principles of what you're talking about are exactly what we should have. In terms of pointing to an example, yes, I would have to provide that information.

ANSWER

The ultimate goal of any successful Aboriginal Cultural Heritage (ACH) legislation should be enabling the practice and celebration of Aboriginal culture. Effective protection and management of ACH is fundamental to achieving this.

Whilst no Australian jurisdiction includes as the Object of the Act the prevention of harm or destruction, the Aboriginal Heritage Act 2006 (Victoria) includes two objects which (g) prioritise the timely and efficient assessment of activities which may harm Aboriginal cultural heritage (ACH) and (j) the need for appropriate penalties to prevent harm to ACH.

Best practice guidelines as set out in *Dhawura Ngilan* and *A Way Forward* speak to the fundamental role that early consultation has in providing a culturally appropriate avenue for the prevention of harm of ACH early in the planning process. Importantly, no other jurisdiction has been able to provide Aboriginal communities with veto rights on state significant infrastructure and state significant development. Early consultation would provide appropriate measures to manage and mitigate the risk of harm.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

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QUESTION NO. 6

PRESUMPTION OF HARM

On Tuesday the 4th of October 2022 the following question was asked by the Committee:

The Hon. PENNY SHARPE: The presumption is that you don't harm it, and then there's the cascading decision in consultation with Aboriginal people about the way in which that may occur and under what circumstances. It sort of sets up that process, but can you point to anywhere across Australia that has good presumption laws?

SHANE HAMILTON: I'd have to take that on notice but, yes, I think the principles of what you're talking about are exactly what we should have. In terms of pointing to an example, yes, I would have to provide that information.

ANSWER

The *A Way Forward* report highlights that all 'States have failed' (p. 186) when it comes to protecting Aboriginal cultural heritage (ACH). Currently, the onus is on Aboriginal communities to prove that a proponent knowingly harmed ACH rather than on the proponent to prove that they took all necessary measures to prevent harm to ACH.

Harm to ACH can be managed through early consultation, the development of ACH management plans and due diligence practices. Greater emphasis must also be placed on developing clearer legislation around compliance, enforcement and stricter penalties that adequately compensate Aboriginal communities for loss and deter proponents from illegally harming ACH.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW

SUPPLEMENTARY INFORMATION

PORTFOLIO NO. 7 - PLANNING AND ENVIRONMENT

The Hon. PENNY SHARPE: That's okay. Thank you for your evidence. You've indicated the risks of just proceeding with the bill in its current form without an adequate process to particularly look at amendments, because we've had some really good evidence through this inquiry, with good suggestions. What do you see as the major risks of just letting it go and hoping we can fix it later?

SHANE HAMILTON: We talked a bit about the planning system, protected areas. I think there are just a number of areas that would need to be worked through and widely consulted on before you would consider the bill in any format, and I touched on a couple of these today. As I said before, I'm happy to provide supplementary information.

RESPONSE:

Amendments to the Private Member's Bill (PMB)

The *Dhawura Ngilan* vision sets the best practice standards in Indigenous cultural heritage management and protection and speaks to the fundamental requirement of Aboriginal consultation and Custodianship of Aboriginal cultural heritage (ACH). This includes the development of legislation.

A number of issues and concerns with the PMB have been highlighted throughout the parliamentary inquiry process. Proceeding, without working through solutions to these issues will not provide community with the desired outcomes, has the potential to increase lateral violence and is out of step with best practice.

The *A Way Forward* report recommends that minimum standards for the development of ACH legislation be developed and include 'a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)'.

The PMB's proposed ACH Directory fails to adequately consider the importance of truth telling, the protection of cultural knowledge or the complexity of developing a system which serves Aboriginal communities and proponents. The NSW Government is working with Aboriginal community groups to better understand the cultural needs of community as a central element in designing improved data management and systems, which conforms to best practice.

Local ACH Services

The PMB proposes a system that replicates the current Registered Aboriginal Party system and does not adequately consider the risks associated with this system and fraudulent claims. The Bill outlines that local ACH services may charge fees to external parties but cannot charge the Department or Council for any services. To operate effectively, local ACH services would need to work closely with both government and the Council. It is unclear how the PMB would govern these processes or how the Local ACH Services would be paid for this work.

Resourcing

The PMB is silent on the resourcing of the independent corporation and there has not been sufficient information presented on how this approach would be economically viable. Additionally, it is unclear how/if the interested Aboriginal parties that must be consulted with are in any way compensated for their service.

State significant infrastructure (SSI) and state significant development (SSD)

The PMB declares that SSI and SSD can be vetoed by the ACH Council. This aspect of the Bill is not implementable in its current form. It will give an independent body veto rights over major projects and is inconsistent with federal and all current state legislation. However, early, thorough, and respectful engagement with Aboriginal communities has the potential to mitigate harm and aligns with existing systems.

Compliance

The PMB gives the police responsibility for enforcement. Historically, the relationship between Aboriginal communities and police has not been one built on trust. Police are unlikely to have the cultural expertise required for this role. This may prove to be problematic in implementation.

Shane Hamilton

Deputy Secretary, Aboriginal Affairs NSW