

**Submission
No 6**

**INQUIRY INTO ABORIGINAL CULTURAL HERITAGE
(CULTURE IS IDENTITY) BILL 2022**

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Inquiry into Portfolio Committee No 7 (Planning and Environment), Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.

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Thankyou for the opportunity to comment on the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022. I am an academic who has conducted research about cultural heritage in NSW over the last decade or more, in the context of other research about the benefits to Aboriginal people of looking after country.

Background

The current legislative situation in NSW is complex, with the NSW Aboriginal Land Rights Act giving statutory responsibility to Local Aboriginal Land Councils for cultural heritage matters within their administrative boundaries, the Commonwealth Native Title Act giving native title holders and registered claimants certain rights to manage cultural heritage in their claim areas, and Aboriginal Owners in the Joint Managed National Parks responsibility for cultural heritage management as members of the Joint Management Boards, under the National Parks and Wildlife Act 1974 (amended in 1996). Thus changes to Aboriginal Cultural Heritage Legislation in NSW need to take into account the complexities of current legislation. I note that some of this will need amendment if a stand-alone Aboriginal Cultural Heritage Act is adopted, and relevant amendments are attached in the Schedules to the Bill.

Aboriginal people in NSW have for decades sought a stand- alone Aboriginal Cultural Heritage body , and this was part of the original intention of the Keane Report which led to the creation of the Land Rights Act in 1983. Thus the establishment of an Aboriginal Heritage Council as proposed in the Bill is well overdue. Over these years a vast amount of Aboriginal cultural heritage has been legally destroyed in a very weak Aboriginal Cultural heritage regime. The proposed system articulated in the Bill would be a huge improvement.

The Bill's proposals: A huge improvement

I would like to first state that the principles underpinning this Bill present an approach to the recognition, protection and conservation of Aboriginal cultural heritage which would represent a great improvement on the current legislation governing Aboriginal cultural heritage in New South Wales.

I note that the Bill recognises the United Nations Declaration on Indigenous Peoples, and endeavours to reflect UNDRIP's principles which include the right of Indigenous peoples to self determination in relation to a wide range of matters including who represents them and in governing their culture. Thus the fact that the proposed AHC comprises only Aboriginal people who will make decisions on ACH matters is excellent; it has only minimal Ministerial functions. Other very positive features of the Bill are that it has a broad definition of cultural heritage, including cultural landscapes and intangible cultural heritage; its objectives are broad and clarify that the purpose of the Act is to conserve Aboriginal Cultural heritage; and it is broadly respectful of native title holders/registered claimants and other cultural knowledge holders in its design.

Self Determination

I will confine my comments largely to the processes in the Bill for the appointment of the AH Council and local AHC services, as my interest is in the right to self determination, and whether the Bill truly reflects rights of Indigenous people set out in UNDRIP.

Formation of the Aboriginal Heritage Council

Considering Schedule 1 which sets out the process to form the first AHC, I make the following points:

- Ministerial appointment of members is not entirely consistent with UNDRIP, but it may be necessary as a formality to ensure they are recognised under NSW law. However, the processes should maximise the right of Aboriginal people in NSW to choose their own representatives who will make critical decisions about cultural heritage matters. Thus Aboriginal people should nominate to the Minister those people whom they have selected through their own processes. The Minister should not be picking and choosing from a wide range of nominees. This would be quite contradictory to the UNDRIP.
- The Schedule states that persons may be nominated by the NSWALC and by native title bodies, and it leaves them to determine their own process, which is consistent with UNDRIP, but this raises for me a couple of questions

1) who will nominate the Aboriginal Owners? Will they be nominated through the NSWALC or through the Registrar of the Land Rights Act who manages the Register of Aboriginal Owners? Through NSWALC would be more consistent with self-determination in some respects as it is an Aboriginal controlled body.

(2) how will diverse native title bodies across the large state of NSW come to agreement about who they should nominate to represent them? If they do not make this decision about nominees themselves, and the Minister selects from nominees coming from a wide range of registered native title corporations, this will not be consistent with UNDRIP. Is there a role for NTSCorp in facilitating a selection process among registered native title corporations in NSW? This should be a matter for the native title corporations themselves to determine, but I raise it as I want to be sure that the Minister is not the one selecting which native title representatives are on the Council. They must choose among themselves, but should be supported to do this.

- This raises the question about how many nominees each group can make if the membership is to be between 6-11; this means they should nominate up to three members each if they are to be given equal representation and if they, not the Minister, are to determine who will represent them on the Council. They should know in advance how many members they are to nominate, and a gender balance should be struck overall.
- This raises a further question about who made the decision that there should be equal representation of each of these three groups? If this was negotiated and agreed among them, then this is consistent with UNDRIP. If there is not such agreement, proper consultation should occur to agree the balance of representation.
- Point 6 in Schedule 1 deals with the replacement of a member of the AHC, by election. However, it is entirely unclear who the electorate would be for such an election and who would conduct it. To be consistent with the model proposed, the nominee of the person who has resigned or ceased to be a member should be invited to nominate a replacement. (ie if it is a LALC person who has resigned, the NSWALC should nominate the replacement member).

- Clause (e) which excludes a person with certain criminal record, should be removed, unless that record relates to criminal actions involving the damage to or destruction of cultural heritage or financial corruption. Many Aboriginal people have interactions with the criminal justice system due to poverty or fighting for their rights, but remain important knowledge holders. This provision in Schedule 1 is not consistent with UNDRIP as it limits the ability of Indigenous people to be self determining about who they wish to represent them.
- The timeframes for holding a position on the AHC are relatively long given they are eligible for reappointment – some individuals, potentially all, could be members for 10 or more years. While longer appointments allow for stability and development of expertise among the membership, this arrangement also gives only a few people the chance to contribute at this level. Staggered turnover is also a valuable way of bringing new members on without losing all the expertise; thus renewable terms of three years may enable more refreshing of the membership, allowing people from different regions to participate, and turning over only half or a third of the membership at any one time to retain expertise and stability. Perhaps the terms should be defined as 3-5 years, another matter for the AHC itself to determine, before the initial 5 year term is completed.
- The Schedule does not explain how the AHC will be refreshed after the first (five year) term. Would the same process be used? If an election were to be held, how would the electorate be determined? Priority in relation to cultural heritage matters should be given to those who are traditional owners/knowledge holders in NSW, but there is no formal record of who those people are. The current model may continue to be optimal. While the process of determining the second five year term of the AHC (and the length of terms) is a matter that can be left to the AHC to determine once it is established, these should also be the types of issue that should be considered in a review of the first five years of operation.

A final point relates to the relationship between the Aboriginal Heritage Council and local registered native title corporations and Aboriginal Owners. Clause 2 (i) about the Functions and Powers of the AHC refers to the Council working with land councils to educate and promote public awareness of Aboriginal cultural heritage – but it makes no reference to working with native title bodies or Aboriginal Owners to the same ends. Surely all three groups have a role in public education and awareness raising about Aboriginal cultural heritage?

Local Aboriginal Cultural Heritage Services

Part 2 Division 3 deals with the appointment of Local Aboriginal Cultural Heritage Services. I agree that such services should be established, and it should be left to the AHC to determine their number, geographical scope, and composition in each location. It seems important that an early task for the Council is to establish some publicly available criteria for selecting local AHCs.

If these are to be pre-existing organisations, in some areas there may be a native title body, a group of Aboriginal Owners and one or more LALCs. While they may have good relations, on some occasions certain relationships may be poor or conflictual. Furthermore, the Native Title Act may give native title holders a right to manage their cultural heritage which should be respected. Some criteria for designating a body as an AHC and the area for which it has responsibility should be established and made publicly available. This could be one of the first functions of the AHC itself. It may be in some locations that an ACHS needs to reflect the same breadth of membership as the AHC itself, and hence a new local overarching body is required, with one of the existing organisations potentially providing the necessary secretariat services. Thus a distinction between a broad

governing board and the day to day management would be clear. In other locations this would be neither necessary nor workable.

Similarly, Clause 26 (4) is concerned with the suspension or cancellation of an AHC, and the AHC must give grounds for any such action. The Bill does not set out the conditions which would be grounds for such suspension or cancellation and this too is a matter that the AHC should define itself, once established. For example, cancellation or suspension could be necessary where there is criminal corruption, or where the organisation demonstrates that it does not have the capacity to carry out its specified functions as outlined in the Bill at a particular time. The grounds for suspension or cancellation should be made clear and public. The Bill (Clause 26 4 (b)) states that an ACHS threatened with cancellation has an opportunity to be heard but does not set out the process or the arbiter of any conflict or disagreement between the AHJC and a local ACHS. A clear process and an independent arbiter are essential and should be determined by the AHC once formed. The same may be required if the area over which an ACHS has authority is changed against its wishes. Conflict of interest provisions must also be part of such a process and for all local ACHSs.

S 248 of the Bill enables the AHC to make policies and procedures in relation to local ACHSs and these matters should be dealt with by the AHC, including a broad conflict of Interest provision which would apply to all the activities of the AHC and its local ACHSs.

Part 6 Managing Activities that may harm Aboriginal Cultural Heritage

It would be helpful here if there was a definition of Tier 1 and Tier 2 Activities which are referred to throughout.

In Section B, Division 2 (80) the persons to be notified, native title holders are only to be contacted if there is no local ACHS. It should be clear in the Bill that native title holders must be notified of any proposals affecting or impinging on land or waters over which they have native title rights and interests. This is a requirement under the Native Title Act 1993. NSW legislation should be consistent with this so as not to cause confusion. Similarly, in S107, concerning the development of a cultural heritage management plan, registered native title organisations should be informed and consulted by the proponent. (This is clear from s104, but does not flow through into s 107.)

It may be that Section 21 (b) which states that ACHSs must work with other entities under Commonwealth legislation covers this issue, but I think clarity and specificity is essential here.

Similarly it is not clear why in S 17 (1) AHC powers cannot be delegated to a registered native title corporation as well as a local Aboriginal Land Council. As a non-lawyer I realise there may be reasons relating to the fact that this is NSW legislation and the native title system is Commonwealth? However, the AHC includes native title bodies so I would like clarification about this.

Conclusion

Overall, I welcome the Bill and the proposed new system, and my comments are largely concerned with fine-tuning it to ensure that it is as consistent as possible with the UNDRIP, and the right to self-determination and free prior and informed consent of Aboriginal people to matters that affect them. I also want to flag some policies and procedures that I believe it would be important for the AHC to develop, to ensure maximum transparency of process within the diverse Aboriginal community of NSW, reduce the possibility of unnecessary conflict, and ensure there are strong conflict resolution processes in place should conflicts or disagreements emerge. These are standard requirements of governance in any community and should enable the system to work optimally. In

line with the principle of self-determination the AHC should be more than capable of developing them.

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