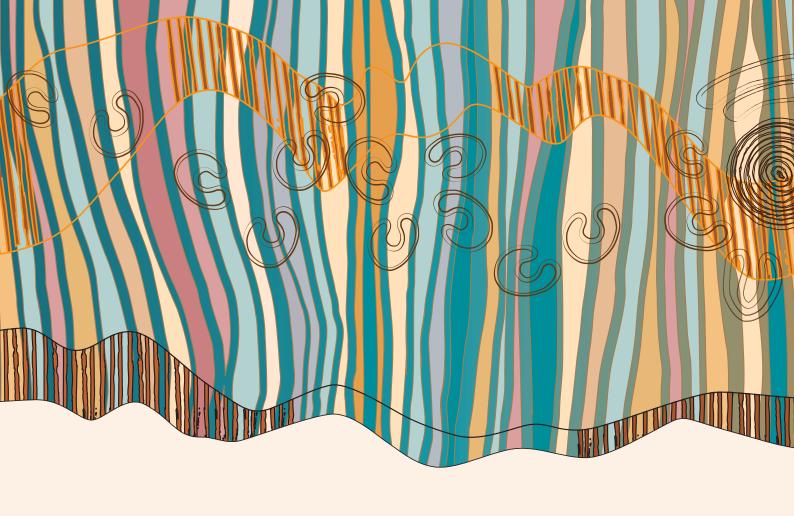
## INQUIRY INTO ABORIGINAL CULTURAL HERITAGE (CULTURE IS IDENTITY) BILL 2022

**Organisation:** Aboriginal Affairs NSW

**Date Received:** 15 September 2022



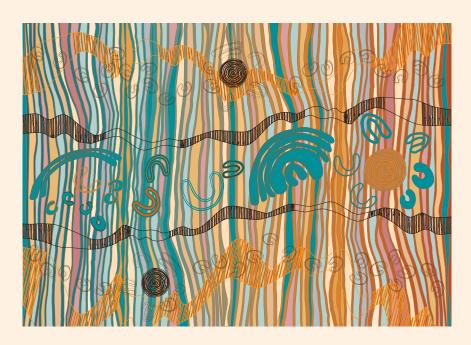
# INQUIRY INTO THE ABORIGINAL CULTURAL HERITAGE (CULTURE IS IDENTITY) BILL 2022



#### ARTWORK BY SARETTA FIELDING

Saretta Art & Design

#### LIVING CULTURE



The artwork layers represent inclusion of all Aboriginal people, celebrating our shared cultural values, alongside the unique diversity of tribal groups and the history, identity and strong culture ties that we pass to future generations.











ELDER

PEOPLE, ELDER

**CIRCLE** 

**PEOPLE** 

**MEETING CIRCLES** 



#### **FOREWORD**

As Minister for Aboriginal Affairs, I acknowledge the Traditional Custodians and Knowledge Holders of the lands and waterways across NSW. I pay respect to all elders, past, and present and recognise their ongoing contribution to protecting Aboriginal Cultural Heritage in NSW. Aboriginal Cultural Heritage is alive and has been passed from generation to generation through ceremony, ritual, dance, and art, since time millennia. Aboriginal Cultural Heritage is embedded in the land, plants, animals, waters, and sky. The intricate song lines across our beautiful state are tangible and intangible and reflect irreplaceable living Aboriginal Cultural Heritage, stories and life.

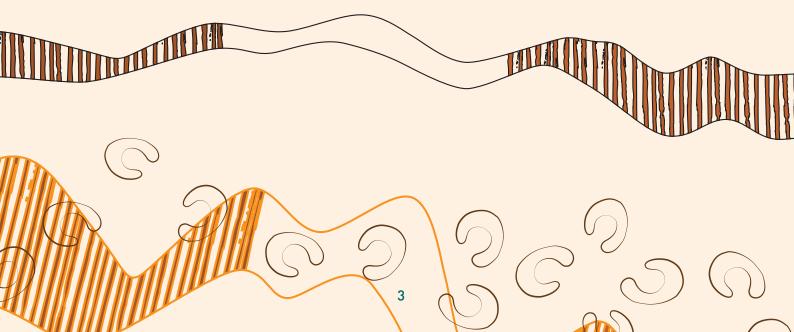
I appreciate the Hon. Fred Nile MLC developing the Private Member's Bill – Aboriginal Cultural Heritage (Culture is Identity) Bill 2022. Improving the recognition and protection of Aboriginal Cultural Heritage is an important issue that warrants careful consideration and new legislation which improves outcomes for Aboriginal communities across the state.

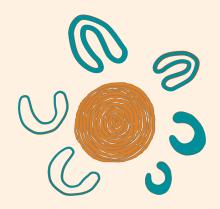
The NSW Government is committed to developing better protection for Aboriginal Cultural Heritage to ensure that Aboriginal cultural practices can continue to be protected, celebrated and shared. I appreciate and acknowledge the importance of recognising Aboriginal culture as a living, dynamic culture and as integral to Aboriginal identity. The NSW Government's approach to developing new legislation is designed around the key principles that Aboriginal communities identified as central to improving the management and protection of Aboriginal Cultural Heritage as a living culture that continues to be celebrated today, and into the future.

I acknowledge that there are a range of complexities and cultural sensitivities that must be navigated to create an improved and enhanced system, and I believe the Government approach is the right balance between the needs of both Aboriginal and non-Aboriginal people.

I am pleased to share this Submission Paper and welcome any findings that may be presented in the Committee's final report to improve the management and protection of Aboriginal cultural heritage in NSW.

The Hon. Ben Franklin MLC
Minister for Aboriginal Affairs NSW





#### INTRODUCTION

Aboriginal peoples' connection to cultural heritage is dynamic and ongoing. Aboriginal culture is the oldest living culture in the world and makes up the rich tapestry of cultural landscapes that span NSW. New standalone Aboriginal Cultural Heritage legislation is needed to reflect the dynamism of culture and help expand the importance and knowledge of Aboriginal cultural heritage beyond archaeological artefacts and objects.

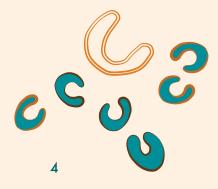
#### **This Submission provides**

- An overview of the approach taken by the NSW Government, in close collaboration with key Aboriginal stakeholders as part of the reform process.
- The key outcomes achieved to date in reforming the current system.
- Analysis of areas of concerns in the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022.
- An outline of the policy directions that will inform the NSW Government's new Aboriginal Cultural Heritage legislation.

The intention of the Submission Paper is to provide an overview of the government's direction for developing a standalone Aboriginal Cultural Heritage Act, which has been developed through discussion with key Aboriginal stakeholder groups.

### THE NSW GOVERNMENT'S COLLABORATIVE APPROACH TO DEVELOPING NEW LEGISLATION

The NSW Government is undertaking extensive work to develop standalone Aboriginal Cultural Heritage (ACH) legislation. It has been a timely process due to the complexities and interdependencies in designing new legislation that aligns with Aboriginal people, non-Aboriginal people, government and industry. Working closely with key Aboriginal stakeholders has been critical in developing an effective community focused reform.



## Aboriginal people supported by local panels Legislative review ACH Model reviewed and amended 2011-12 draft ACH Bill 2015 - 16 **OUTCOME** • State-wide body with decision-making powers supported by local advisory hodies Draft legislative model released 2013 - 14 2017 - 2018

**OUTCOME** 

• Governance model – State-wide body of

A proposed new legal framework: Aboriginal cultural heritage in NSW Discussion Paper released and internal consultation process commenced. Progression to drafting the 2018 ACH Bill:

#### **FEEDBACK**

**KEY MILESTONES TIMELINE:** 

- Based on 313 submissions and nearly 700 people, two-thirds of those identified as Aboriginal.
- Organisations and individuals, 20 Local Aboriginal Land Councils (LALCs), industry, heritage consultants, local government, provided written submissions.
- Sept/Oct 2017 info sessions in 19 locations across NSW.
- March/April 2018, workshops in same 19 plus Tamworth.

#### **KEY THEMES FROM CONSULTATION**

- Stand-alone legislation for more strategic protection of ACH.
- Improved assessment process for upfront consideration of ACH, with support for stronger compliance, enforcement, penalties, equal access to appeals giving greater clarity for proponents.
- More contemporary definition of ACH in legislation, including waters, skies and intangible heritage.
- Strong support of Aboriginal decision-making, ownership and control of ACH through a Governance structure of an ACH Council and Local Panels (rather than Minister).
- The improved ACH Information system must be protected as trust is paramount.
- Appropriate resourcing through ACH Fund allocated based on transparent reporting of ACH outcomes.

#### **OUTCOME**

2018

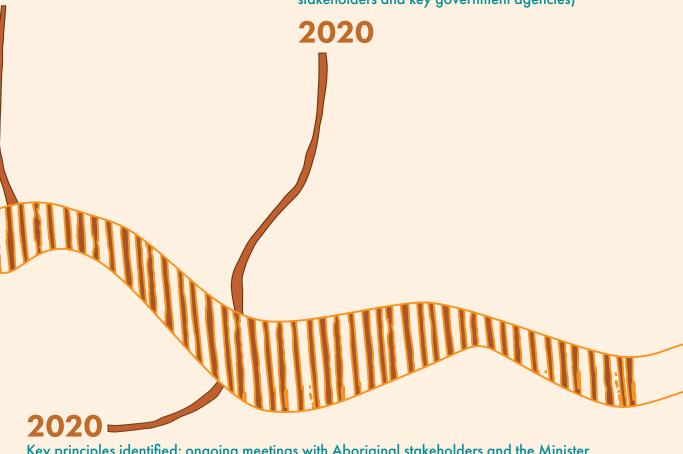
- Stand-alone legislation.
- Pro-active conservation approach moving away from management of harm approach.
- Self-determination and decision making on ACH by Aboriginal people through an ACH Authority and local panels.

#### **Draft ACH Exposure Bill released**

#### **OUTCOME**

- Review of 2018 Bill
- NSW Aboriginal Land Council (NSWALC), Native Title Services Corporation (NTSCorp) and ACHAC co-design an ACH model
- Simplify the system to improve transparency and ease of application of ACH conservation

Targeted Consultations (Aboriginal key stakeholders and key government agencies)



Key principles identified; ongoing meetings with Aboriginal stakeholders and the Minister

#### **FEEDBACK**

- Strengthen self-determination and empower Aboriginal people;
- Be led by Aboriginal people;
- · Inclusive and respectful of cultural and native title rights;
- Build on existing structures of land rights and native title;
- Independent of government;
- Improve ACH protection, promotion & repair, including rights to say no (free, prior, informed consent) including approaches to protection, regulation, intangible, knowledge, languages, cultural access & use, repatriation, water, cultural practices;
- Have no detrimental impacts to land rights, native title or ACH.

#### **OUTCOME**

NSW Aboriginal Land Council (NSWALC), Native Title Services Corp (NTSCorp), Aboriginal Cultural Heritage Advisory Committee (ACHAC) jointly expressed key principles that must be considered in ACH reforms.

Facilitated discussion between AANSW, NTSCORP, NSWALC, ACHAC; submissions from key Aboriginal stakeholders to the Minister on ACH reforms

#### **OUTCOME**

 Updated policy position workshopped with key Aboriginal stakeholders to reflect the previous consultation feedback and make the legislation less costly and less complex

Amendments to draft 2018 Bill 2021

2021 - 2022

Ongoing, monthly inter-agency discussions to finalise a whole of Government approach – principles and mechanisms developed for better alignment with existing systems

#### **OUTCOME**

 Inter-agency consultation with DPE Planning Policy, DPE Legal, DPE Deputy Secretaries through the ACH Steering Committee and officer level meetings 2022

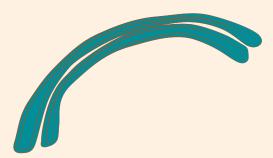
Finalising amended policy position with NSWALC and NTSCORP

#### OUTCOME

 Majority of policy position supported in principle Comments on the
Aboriginal Cultural Heritage
(Culture is Identity) Bill 2022

The Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (the Bill) has numerous reasons for concern, including:

- The Bill has extensive inconsistencies with the proposed processes and unclear policy positions.
- The Bill is not adequately aligned to the legislative context of ACH as the Bill does not realistically factor in key considerations including:
  - The Federal Indigenous cultural heritage reform process, which is currently progressing through a partnership between the Federal Department of Climate Change, Energy, the Environment and Water (DCCEEW) and the First Nations Heritage Protection Alliance.
  - The findings and recommendations of the Joint Standing Committee on Northern Australia's report, A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge.
- Key legislation such as the Native Title Act 1993 (Cwth) and the Aboriginal Land Rights Act 1983 (INSW).



- The Bill was developed with a very narrow stakeholder group and appears not to be informed by culturally appropriate Aboriginal community consultation.
- The Bill flags a number of issues that the NSW Government is currently considering, including:
  - Governance arrangements, including governing Council structure and Local Panel arrangements.
  - Culturally sensitive considerations, including ancestral remains and protected areas.
  - Administrative functions and alignment with other Government legislation.



#### THE NSW GOVERNMENT'S PROPOSED

#### LEGISLATIVE DIRECTION

The NSW Government's approach to developing standalone Aboriginal Cultural Heritage legislation is responding to the **five key aims** that Aboriginal communities across NSW have identified as being critical to improving Aboriginal cultural heritage management and protection.



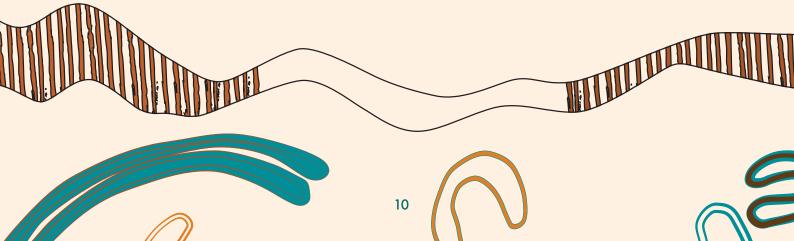
The foundational aim of the Aboriginal Cultural Heritage reforms is to better recognise Aboriginal Cultural Heritage values across NSW. The protection, preservation, celebration, and prosperity of Aboriginal Cultural Heritage are key principles being investigated by the NSW Government.



The ACH reforms recognise that Aboriginal people are best placed to protect and decide on Aboriginal Cultural Heritage matters and the new legislation aims to enable this. This guiding principle is reflected by the NSW Government working closely with Aboriginal stakeholders in the reform process.



Cultural knowledge is fundamental to the protection, celebration, and growth of cultural practice on Country and the rights of Knowledge Holders must be recognised. Community feedback from the 2018 consultation process highlighted the importance of recognising the intellectual property rights of Knowledge Holders. Cultural knowledge must guide how we approach protecting and managing Aboriginal Cultural Heritage. This aligns with best practice standards in *Dhawura Ngilan* (2020).





To ensure the reforms are acceptable to both community and the Government, it is important that Aboriginal Cultural Heritage systems align with the planning and heritage systems. This means working collaboratively to balance improved protections for Aboriginal Cultural Heritage without creating a break of development. Streamlined and clear processes are fundamental to the reform process.



The NSW Government is working with Aboriginal stakeholders to understand how we can create a regulatory system that aligns with the NSW Planning system in an efficient and effective manner whilst building confidence amongst Aboriginal communities through improved monitoring and reporting and the enforcement of compliance protocols and offences.

