

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

Organisation: Darkinjung Local Aboriginal Land Council
Date Received: 15 September 2022

Portfolio Committee No 7 – Planning and Environment
Legislative Council
Parliament of NSW

Dear Committee members,

Darkinjung Local Aboriginal Land Council's submission to the Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

About Darkinjung Local Aboriginal Land Council (Darkinjung)

Darkinjung is established and operates under the *Aboriginal Land Rights Act 1983* (NSW). We operate across the Central Coast of NSW, with our borders spanning from Deerubin (the Hawksbury River) in the South, Awaba (Lake Macquarie) in the north, and the Watagan Mountains to the west. These are the lands of the Darkinjung people who had ancestral connections to this country spanning back tens of thousands of years.

Under Section 52 of the *Aboriginal Land Rights Act 1983* (NSW), Darkinjung has a number of functions including:

- Land acquisition, use and management.
- The protection and promotion of Aboriginal culture and heritage for all Aboriginal persons living in the Land Council's boundaries.
- Financial stewardship, which includes the diligent management of current assets as well as creating an economic and financially stable future for the Aboriginal community.

At the back of the Watagan Mountains, in what is known today as the Central Coast and Hunter regions, is Mount Yengo. Mount Yengo located close to the Central Coast is the central point for the creation story of many Aboriginal nations across NSW. Baiyami is the creator spirit who came down from the sky to the land, creating the rivers, mountains and forests. He then lived among the Aboriginal people giving them and helping them embed lore, traditions, kinship, songs and cultures.

Mount Yengo is the place that Baiyami stepped off the earth and returned to the sky.

This is the creation story for many Aboriginal nations, including the Darkinjung, Awabakal, Worimi, Wonnorua, Wiradjuri and the Kamilaroi (Gomeri) peoples which cover a significant part of NSW. This creation story spans back to the dawn of time for Aboriginal people, recognising the traditional connection to Darkinjung country and those Aboriginal people who are now the custodians of ancient beliefs, landscapes, culture, sites and country.

Why is this important to this Bill? It is important for a number of reasons including:

1. The central creation story tied to Darkinjung land on what is now known as the Central Coast is a critical part of the ancient cultural lore and practices, and the ongoing maintenance of this for Aboriginal people across NSW.
2. Noting the significance of the creation story, the Central Coast and Northern Beaches of Sydney are home to some of the most prolific Aboriginal sites on the East Coast of Australia. This includes rock engravings and carvings, bora rings, cave art and sacred trees. Many of these served as ceremonial grounds for over 60,000 years across Aboriginal nations that were connected to the creation story of Baiyami.

3. However, Aboriginal cultural heritage is more than just physical sites. It is also the songlines that we created. Ancient Aboriginal culture is embedded within these songlines that has shaped the environment today. This environment includes the animals and plants that are part of what we call 'country'.

Aboriginal cultural heritage is not just vital to us as Aboriginal people, but to the whole of Australia as one of the oldest living cultures in the world. This is something that is uniquely Australian, with many sites dating back thousands of years beyond internationally renowned heritage sites including Stonehenge (5,000 years old), the Pyramids in Egypt (4,500 years old), and Gobekli Tepe in Turkey (11,000 years old).

These countries go to extraordinary lengths to preserve these icons of international cultural heritage, which provides social, cultural and economic benefits to their broader communities. The proposed Bill would enable the NSW Government, and by default the people of NSW, to respect and celebrate this ancient history while supporting legitimate Aboriginal community-controlled organisations with appropriate cultural authority to maintain custodianship and protection of this for future generations.

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

On 16 September 2020, the Heritage Chairs of Australia and New Zealand welcomed and supported 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.

Developed by and presented to the meeting by the Chairs of Australia's national, state and territory Indigenous heritage bodies, these two documents provide a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia. Both documents are the product of extensive consultation with Indigenous stakeholders and relevant peak advisory bodies.

The Vision and the Standards were subsequently discussed at the Ministerial Indigenous Heritage Roundtable on 21 September 2020. The NSW Government was represented at this Roundtable by the Minister for Aboriginal Affairs and the Minister for the Environment.

The vision statements identified in Dhawura Ngilan include:

1. Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.
- 2) Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.
- 3) Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.
- 4) Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

This Bill provides, in a large part, a response to the overarching vision statements and standards proposed under Dhawura Ngilan by the Heritage Chairs of Australia and New Zealand. It will strengthen current approaches by ensuring that Aboriginal entities with legitimate cultural authority are leading local and statewide responses to the protection, preservation and promotion of Aboriginal cultural heritage.

Senate Inquiry into the Destruction of 46,000 year old caves as the Juukan Gorge in the Pilbara region of Western Australia

On 24 May 2020, Rio Tinto used Western Australian legislation and prior approvals to continue mining works which resulted in the destruction of cave art estimated at being 46,000 years old. The Australian Government commissioned a Senate Inquiry into the destruction of the caves, which expanded to demonstrate similar system failures in other jurisdictions.

The final report titled *A Way Forward* emphasises that what happened at Juukan Gorge is not unique. It is an extreme example of the destruction of Aboriginal and Torres Strait Islander cultural heritage which continues to happen in Australia. Importantly, the report highlights the need for legislative change at Commonwealth, State and Territory levels to ensure the protection of Aboriginal and Torres Strait Islander heritage.

While recommendations were targeted to the Australian Government's remit, key findings included:

- In NSW, cultural heritage legislation is not effectively integrated with land management and planning approval systems, and Aboriginal people are not effectively represented in the decision-making process. Aboriginal Heritage Impact Permits (AHIPs) must be approved by the Secretary of the Department and Cabinet and are issued under the NPW Act. Applications for work approvals that may harm items listed on the State Heritage Register or subject to interim protection orders under the *Heritage Act 1977* are decided by the Heritage Council of NSW. Development applications of various kinds are decided under the *Environment Planning and Assessment Act 1979* (EPA Act) by the Heritage Council, the local council, the Minister, or the Independent Planning Commission of NSW, depending on the type of development. None of these decision-making bodies are Aboriginal.
- Stakeholders presented negative assessments of NSW cultural heritage protections. Submitters claimed that the protections offered are weak and the heritage framework is inadequate and ineffective. Statistics suggest that destruction of cultural heritage is a common event in the State.
- The Law Council of Australia (LCA) submitted that the NSW cultural heritage framework is considered 'anachronistic and contains serious deficiencies'.
- One of the most fundamental problems is that Aboriginal cultural heritage is considered as flora and fauna, a fact which is seen as highly insulting by Aboriginal peoples. The *National Parks and Wildlife Act 1974* provides no rights of ownership or inclusion in decision making processes for Aboriginal peoples. Aboriginal peoples are unable to determine what is considered significant cultural heritage.
- Destruction of Aboriginal heritage in NSW is occurring at high rates. According to the New South Wales Aboriginal Land Council (NSWALC), during the first half of 2020 approximately four Aboriginal Heritage Impact Permits (AHIPs) were being issued every week by the NSW Government. NSWALC stated that:

'The high rates of destruction of Aboriginal sites, both 'approved' and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of our peoples to maintain living cultures and create wellbeing and healthy communities. Our sites tell important stories and must be protected so Aboriginal peoples can strengthen and maintain our cultures now and in the future'.

- Dr Janet Hunt submitted that 100 to 200 sites and objects are lawfully destroyed every year. Dr Hunt stated that between 2012 and 2017, 704 permits were issued and only one was rejected.²⁵ These statistics suggest there is very little consideration given to Aboriginal cultural heritage in the permits process.
- The NSWALC submitted that the cultural heritage provisions of the NPW Act are not effectively integrated with the development processes in NSW. This results in a reactive system that does not consider Aboriginal heritage until after development assessment processes have occurred or until after Aboriginal heritage is under threat.

The Senate Committee made the following findings:

1. The Australian Parliament should legislate for an overarching Commonwealth legislative framework based on the protection of cultural heritage rather than its destruction, in line with the principles set out below. State and territory legislation should also be required to meet the principles set out in this report.

Darkinjung's response in relation to this submission: This is outside the remit of the NSW Government. However, in the absence of overarching cultural heritage protections at a Commonwealth level, it is incumbent on the NSW Government to ensure that appropriate regimes and legislative instruments are in place for the protection of Aboriginal cultural heritage.

2. The Commonwealth, state and territory governments should endorse a set of standards that set best practice in the management of cultural heritage sites and objects and the development of cultural heritage management plans.

Darkinjung's response in relation to this submission: The NSW Government has the opportunity to embed the standards consistent with those recommended under Dhawura Ngilan and the Priority Reforms under the National Agreement on Closing the Gap. Importantly, this Bill will strengthen legitimate Aboriginal community-control and management of Aboriginal culture and heritage.

3. The economic benefits of protecting and celebrating cultural heritage sites should be promoted.

Darkinjung's response in relation to this submission: The proposed bill will support the economic investment of local Aboriginal communities protecting and preserving Aboriginal culture and heritage. Further, strengthened compensatory and punitive measures embedded within the Bill will provide increased equity in financial penalties for the destruction of both non-Indigenous and Aboriginal heritage. These measures will ensure that funding can then be allocated to restore damaged sites (where possible) or invest in the protection of additional sites by the Aboriginal community.

Issues with the current regime to protect Aboriginal cultural heritage

The current regime is fundamentally flawed and continues to fail Aboriginal people, and the protection of Aboriginal cultural heritage. Key issues include:

- There are inadequate protections over Aboriginal cultural heritage. While the NSW Government maintains the Aboriginal Cultural Heritage Advisory Committee (ACHAC) under the *National Parks and Wildlife Act 1974* (NSW). ACHAC makes recommendations, but those are considered by the Department of Planning, Industry and the Environment before a recommendation is made to the responsible Minister. We understand that more than 1,000 sites have been approved by the NSW Government for destruction.

- Penalties under current regimes are not appropriate for the destruction of significant Aboriginal sites that date back thousands of years are disproportionately low compared to heritage listed structures that may be between 100 and 250 years old. For example, in 2015 the NSW Land and Environment Court issues a property developer a \$250,000 fine for the destruction of a heritage listed building. Another developer/construction company was fined \$55,000 and \$25,000 in legal costs for the destruction of heritage listed items in a historic Sydney building. This is compared to Ausgrid being fined in 2013 \$4,690 for the destruction of a significant rock engraving at Cromer.
 - Fines do not apply when the applicant has been authorised for their destruction. As per the first point, we are not aware of any requests to destroy Aboriginal cultural heritage that have been denied with a reported 1,000 approved.
- While the NSW Government has established ACHAC, this is an advisory body that does not have authority over the decisions made by Government in relation to Aboriginal cultural heritage. As such, this operates contrary to the overarching priority reforms agreed by the NSW Government under the National Agreement on Closing the Gap including:
 - Shared decision-making which ensures that Aboriginal people are empowered to share decision making authority with governments to accelerate policy and place-based progress on Closing the Gap through formal partnership arrangements.
 - Building the community-controlled sector by ensuring that there is a strong and sustainable Aboriginal community-controlled sector delivering high quality services to meet the needs of Aboriginal people across the country.
 - Improving mainstream institutions by ensuring that Government, and their organisations and institutions, are accountable for Closing the Gap and are culturally safe and responsive to the needs of Aboriginal people including through the services they fund.
- The lack of protection and preservation of Aboriginal cultural heritage undermines the Government's ability to deliver against Outcome 16 of the National Agreement on Closing the Gap who's overarching outcome is to ensure that Aboriginal cultures and languages are strong, supported and flourishing. While the specific deliverables are targeted to language, protecting and preserving ancient cultural heritage is a critical component of culture in itself.
 - Given that much of Aboriginal cultural knowledge was based on language and sites, the ongoing destruction of significant sites across NSW risks the Government's ability to address this outcome in a holistic context.
 - Further, under the National Agreement the NSW Government and all signatories have committed to prioritising Aboriginal cultures including by implementing activities in a way that takes full account of, promotes and does not diminish in any way the cultures of Aboriginal people.
- No funding is currently available for the protection and preservation of ancient sites. However, the NSW Government allows for Registered Aboriginal Parties (RAPs) to be engaged to undertake cultural heritage work as part of the planning process.
 - The issues with this is that there is no verification that the RAP has the legislated cultural authority to exercise these practices in the area in question. Further, some providers claim to be Aboriginal but may not meet the legal definition of Aboriginality applied under the *Aboriginal Land Rights Act 1983 (NSW)* or Federal Court legal determinations.

- (cntd) People falsely claiming to be Aboriginal or have appropriate cultural authority for an area to receive a benefit may be guilty of fraud as they are receiving a benefit by deceit. This also places the management of cultural heritage sites and knowledge at risk for future generations which may undermine Aboriginal cultural heritage, stories and lore.
- The proposed Bill restricts the provision of cultural heritage works to those entities that are established and have appropriate determinations under legislative mechanisms that provide for cultural authority. This includes:
 - Entities that have gone through the legal process and have received a determination as a Traditional Owner (demonstrating historic and ongoing cultural connection) in accordance with the *Native Title Act 1993*.
 - Registered Aboriginal Owners who have gone through the research and registration process through the Office of the Registrar of Land Rights operating under the *Aboriginal Land Rights Act 1983 (NSW)*.
 - Local Aboriginal Land Councils who hold authority for the protection, preservation and promotion of Aboriginal cultural heritage within their boundaries under Section 52 of the *Aboriginal Land Rights Act 1983 (NSW)*.
- If passed into legislation, this Bill will restrict the ability to protect and preserve cultural heritage to those entities with appropriate cultural authority as established under legal processes. This will redirect funding to those organisations that will then be able to use this funding to support labour costs for the ongoing management and preservation of sites through legitimate Aboriginal community-controlled organisations. This is consistent with the Priority Reforms under the National Agreement on Closing the Gap.
 - The proposed legislation will enable legitimate Aboriginal entities with appropriate cultural authority the ability to generate sufficient revenue which can be used to employ staff and purchase resources, to be used to ensure the protection, preservation and promotion of Aboriginal cultural heritage within the local area.

As a visual representation of why this is needed, please see the image attached to this submission which was identified at a historic cave art site at Woy Woy in NSW. While not funded to do so, Darkinjung has addressed other site desecration issues including fires being lit on ancient rock engravings and the protection of additional sites. This includes those located on private property or NSW Government owned land which are at risk of destruction without appropriate legislative protections.

In conclusion, Darkinjung supports the proposed Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 and implores the Parliament of NSW to move swiftly on this to protect our ancient heritage and sites for Aboriginal people and all Australians to be proud of. This will allow us to care for country as the custodians of Darkinjung country.

Yours sincerely

Brendan Moyle
Chief Executive Officer



Central Coast in Pictures

· 4 d · 🌐

Yesterday we hiked deep into the bush above Woy Woy to find a cave that contains indigenous art. Unfortunately vandals have already found it and graffitied the artwork. There is a very nice charcoal drawing of a kangaroo and many ochre hand stencils.

[#woywoy](#) [#caveart](#)

