

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

Organisation: The National Trust of Australia (New South Wales)

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Ms Susan Higginson, MLC
Portfolio Committee No 7
Chair - Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

By email: portfoliocommittee7@parliament.nsw.gov.au

Dear Ms Higginson,

Re: National Trust submission for the Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

Thank you for the opportunity to provide comment into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (the Bill). We understand that this non-government Bill was introduced to Parliament earlier this year and has now been referred to this Inquiry.

The National Trust is that state's oldest and most respected heritage organisation, supported by 18,000 members state-wide. Founded in 1945, the National Trust's vision is to bring the heritage of New South Wales to life for future generations. As a united organisation of loyal members, dedicated volunteers, staff, Branches and Committees, we advocate for the protection of New South Wales' built, natural and cultural heritage to ensure its preservation for future generations.

The introduction of the non-government Bill is a welcome opportunity to ensure that the development of any Aboriginal Cultural Heritage legislation is:

- Based on extensive and inclusive consultation with Aboriginal people and communities;
- Prioritises the voice and input of Aboriginal individuals and communities;
- Uses the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as its basis; and
- Incorporates the recommendations from the "Never Again" and "A Way Forward" reports from the Inquiry into the destruction of Jukaan Gorge.

Aboriginal Cultural Heritage Reforms

NSW is the only state in Australia that does not have stand-alone Aboriginal cultural heritage legislation, despite a bipartisan commitment in 2010 to review our state's Aboriginal protection laws. The current Aboriginal cultural heritage laws in NSW (contained within the *National Parks and Wildlife Act, 1974*) are recognised as failing to protect Aboriginal cultural heritage and being archaic for not providing a role for Aboriginal people in the self-determination of their heritage.

These Aboriginal heritage laws are underwhelming and flawed; worse still, their meagre protections can be 'turned off' for any development classified by the government as "State Significant" - an issue shared with the *NSW Heritage Act, 1977* - with State Significant Development and Infrastructure overriding existing environmental and heritage laws and operating outside their remit.

In 2022, twelve years after the bipartisan commitment to Aboriginal Cultural Heritage Reform, a new Aboriginal Cultural Heritage Bill is yet to be tabled by the government and the destruction of Aboriginal sites continues. Data released in the NSW Senates Committee (25 February 2021) shows that in the last 5 years, every single Aboriginal Heritage Impact Permit (AHIP - an application for a permit to destroy Aboriginal heritage) in NSW was approved. In the last year alone, there were 84 approved permits to destroy Aboriginal



sites. The permits may come with “mitigation methods” to “minimise harm,” however the cumulative impact on the state’s collective indigenous heritage continues to grow.

The failure of legislation to effectively protect Aboriginal heritage has driven a reform process to provide better protection for Indigenous heritage, however the reform process, started in 2011, has been excruciatingly slow with little progress since the last draft Bill was released for consultation in 2018.

We acknowledge that the NSW Department of Aboriginal Affairs have been working toward a draft Bill, and thank their representatives for their recent briefing to the National Trust on their progress to date. However, we share the frustrations of many people, not least our Aboriginal communities, in the slow overall progress.

UNDRIP

The Chair of the Australian Parliament’s Joint Standing Committee on Northern Australia, in the “A Way Forward” report on the destruction of Indigenous heritage sites at Juukan Gorge, urged that lawmakers ‘consider the relevance of UNDRIP to the social, cultural and economic realities of Aboriginal and Torres Strait Islander peoples’.¹

That Report identified ‘serious deficiencies’ across cultural heritage legislative framework in all jurisdictions. It found ‘none of these frameworks adequately encompass the complexity of Indigenous heritage which is living and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscape and waters’.²

The rights prescribed in the 2007 United Nations Declaration on the Rights of Indigenous People (UNDRIP), including the right to Free Prior and Informed Consent by Aboriginal people to decisions that affect their heritage, must be incorporated not just into the Bill, but into its development and implementation. We hold concern that, however well-intentioned this Bill is, the necessary level of broad, open and meaningful consultation with the widest range possible of Aboriginal individuals and communities has not been undertaken in the development of this Bill.

More recently the document *Dharuwa Ngilan*, a vision and guidelines for Aboriginal and Torres Strait Islander heritage protection in Australia, was developed by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ 2020). This Vision sets out important ‘Best Practice Standards in Indigenous Cultural Heritage Management and Legislation’ that the NSW Aboriginal heritage protection legislation should meet.

The Bill

The National Trust was grateful for the time taken by the office of Rev the Hon Fred Nile to brief the Trust on the intention and objects of the Act, and its proposed operation. We are also pleased that there are active moves within government to prioritise standalone Aboriginal Cultural Heritage legislation. We understand that the Bill is designed to better protect and support Aboriginal Cultural Heritage in NSW and since its introduction, has provided a meaningful starting point to prioritise Aboriginal Cultural Heritage reform.

The overall proposal to enact stand-alone legislation to protect Aboriginal culture and heritage is a positive and long-overdue, however we are concerned that some key elements from Aboriginal stakeholder feedback into the earlier 2018 draft Bill do not appear to be incorporated into this Bill. It is our strong view that any new legislation needs to respond positively to the concerns of the Aboriginal community and meet current best practice with respect to recognising and conserving cultural heritage and in relation to recognising the rights of Indigenous people.

¹ Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (Final Report, October 2021), xii.

² *Ibid*, 2 [1.6].



We also feel that whilst much of the Bill is a worthy and good starting point, the mechanics of how this Bill would operate once enacted has not been properly considered. It is pointless to procure the passing of an Act with worthy Objectives that isn't drafted to allow easy, effective and robust implementation.

Finally, resourcing for the implementation and operation of the Bill will be just as, if not more, important than the Bill itself. The recent Inquiry into the *NSW Heritage Act, 1977* highlighted how critical resourcing is in order for the Objectives of an Act to be met and in order that it can be effectively operated.

Recommendations

We commend the introduction of this non-government Bill and sincerely hope that it leads to strong, standalone legislation. We recommend the following for the development of **any** Aboriginal Cultural Heritage legislation, be it this non-government Bill or a future Bill tabled by government:

- The NSW Government must urgently prioritise Aboriginal Cultural Heritage Reform and support and prioritise its development.
- Should this non-government Bill not proceed, the NSW government must publicly commit to date for the introduction of their own Aboriginal Cultural Heritage Bill.
- The Bill, its development and its implementation must prioritise and be based on feedback from Aboriginal people and Torres Strait Islander peoples;
- The Bill, its development and its implementation must be informed by human rights principles, particularly, and as recommended by the Australian Parliament's Joint Committee on Northern Australia, any new legislation must be consistent with UNDRIP and the *Dhawuru Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*.
- The Bill must be supported by adequate resources to both Aboriginal and Torres Strait Islander organisations and peoples to protect their cultural heritage, and to the Department that will operate and implement the legislation.
- That any Aboriginal Cultural Heritage legislation includes in its remit a wide definition of "heritage" encompassing Country, beliefs, the meaning of places, intangible values, storylines and

In summary, we once again bring attention to the destruction of Jukaan Gorge – which was approved and entirely legal under WA's legislation. Any Aboriginal Cultural Heritage legislation for NSW must not make the same mistakes – it must be strong, it must remove the opportunities for it to be turned off, and, rather than offering detailed ways one can "mitigate" away impacts on Aboriginal Cultural Heritage, it must focus on protecting Aboriginal sites and landscapes in situ, it must contain mandatory cumulative impact assessment requirements, and it must prevent further destruction and loss of Aboriginal cultural heritage.

Yours sincerely,

Jane Alexander
Advocacy Manager