Submission No 27

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

Organisation: The Law Society of New South Wales

Date Received: 7 October 2022

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC/PuLC:SSvk071022

7 October 2022

The Hon Sue Higginson MLC
Chair
Portfolio Committee No 7 – Planning and Environment
Legislative Council
NSW Parliament House
6 Macquarie Street
SYDNEY NSW 2000

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

Dear Chair,

Inquiry into the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022

Thank you for the opportunity to provide comment in respect of the Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (**Bill**). The Law Society's Indigenous Issues and Public Law Committees contributed to this submission. The Law Society has also had the benefit of considering other relevant submissions, including the submissions of NTSCORP Limited and the NSW Aboriginal Land Council.

The Law Society welcomes the Bill as a significant improvement, in many aspects, over the current framework for the protection of Aboriginal cultural heritage (**ACH**) in NSW, which has been criticised for its deep insufficiency. For example, in *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge,* it is noted that

> 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.[1]

The Law Society commends the sponsors of this Bill for their far-reaching and ambitious efforts to reform the protection of ACH in NSW, and note again our support for standalone legislation to protect ACH in NSW.

[1] Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous heritage sites at Juukan Gorge*, October 2021, p 106 (**Juukan Gorge Report**).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Minimum standards

In terms of minimum standards for ACH legislation in NSW, we agree with NTSCORP that ACH legislation in NSW must:

> • be consistent with Australia's International Obligations, including the United Nations Declaration on the Rights of Indigenous Peoples, the International Convention on Civil and Political Rights and the International Convention on Cultural Economic and Social Rights;
> • follow the recommendations and guidance contained in the *Dhawura Ngilan* Report and the Juukan Gorge Report; and
> • reflect the commitments made by the State of NSW under Closing the Gap Agreement by promoting, and not in any way diminishing, the cultures of Aboriginal People in NSW, by increasing Aboriginal People's legal rights in relation to land and water and by building and strengthening Aboriginal structures and decision making.[2]

We note that this view is consistent with the recommendations of the Juukan Gorge Report, which, among other things, recommends that there should be a new framework for ACH protection at the national level, that sets out minimum standards for state and territory heritage protections consistent with relevant international law and the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* (recommendation 3).

It is also worth setting out in full what is recommended at [7.80] by inclusion in the Juukan Gorge Report in minimum standards for ACH legislation:

- a definition of cultural heritage recognising both tangible and intangible heritage
- 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)
- clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist
- decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage
- a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process
- an ability for traditional owners to withhold consent to the destruction of cultural heritage
- a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP
- mechanisms for traditional owners to seek review or appeal of decisions
- adequate compliance, enforcement and transparency mechanisms
- adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners
- the provision of adequate buffer zones around cultural heritage sites
- a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites
- a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.

The Juukan Gorge Report also recommends that the Australian Government endorse and commit to implementing Dhawura Ngilan (recommendation 5). We echo that recommendation at a state level, noting the series of practical steps set out in that document to support the four visions articulated in that document:

[2] Submission of NTSCORP Limited, *Inquiry into Aboriginal Cultural Heritage (Culture is Identity) Bill 2022*, 23 September 2022, at [65].

> 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.[3]

Strengths of the Bill

In this respect, we note that among the strengths of the Bill are that it explicitly includes the UN Declaration on the Rights of Indigenous Peoples, and would cast a wide net in terms of what it seeks to protect, including removing the current exemption for State Significant Infrastructure and Development (**SSID**).[4] The Bill would also, among other things, create a First Nations controlled body as final decision maker on decisions relating to ACH, provide for a broader recognition of what constitutes ACH, including intangible heritage, vastly increase penalties, remove defences for recklessness and recognise that the existing register is not a useful approach for protection ACH.

In our view, these features of the Bill are consistent with the principles set out in international law, the *Juukan Gorge* Report and the *Dhawura Ngilan* document, in particular in relation to the rights of free, prior and informed consent, and self-determination, and how these rights should be operationalised in practice.

Aspects requiring further consideration

The Law Society submits also however, that there are aspects of the Bill that should be considered carefully. In our view, the Bill as currently drafted should be read with a view to identifying potential unintended consequences. It is crucial that the effect of a standalone ACH Bill is fair to all affected parties, as well as proposing clear, efficient and resource-effective processes in respect of managing ACH.

While we do not propose to identify all of the issues that, in our view, would benefit from clearer and tighter drafting, we provide in this submission samples of our concerns for further scrutiny to support our larger point in respect of unintended consequences. We acknowledge that there are inherent difficulties involved in this exercise, including a need to resolve difficult policy issues, such as issues around identity and cultural authority.

1. Membership of the ACH Council. We note the Bill has taken the approach of declining to prescribe how members of the proposed ACH Council will be appointed (after the initial appointments are made by the Minister as set out in Schedule 1). However, the Bill also does not provide for a maximum appointment term for these initial Ministerial appointees. Further, we note that a "holder of native title rights under the Native Title Act" may nominate potential members for appointment to the ACH Council (Schedule 1, clause 2(1)(b)). Elsewhere in the Bill, "native title holder" is the term used, and neither term is defined. "Native title holder" is the term used in the *Native Title Act 1993* (Cth) (**NTA**). Given that the concept of "native title holder" is a critical touchstone in respect of Ministerial

[3] Heritage Chairs of Australia and New Zealand, September 2020, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*, Canberra.
[4] Section 4.41 of *Environmental Planning and Assessment Act 1979* (NSW) provides an AHIP under section 90 of the *National Parks and Wildlife Act 1974* (NSW) is not required for consent in respect of SSID. In the event that the Bill is passed, we assume that s 4.41 would be amended accordingly.

appointments, in our view, this Bill should use consistent language with the NTA. In the absence of a native title determination, it is not clear whether native title exists, and who the native title holders are. Once there is a determination, there is usually a prescribed body corporate (**PBC**) that acts as either trustee or agent for the native title holders. Consideration should be given to whether PBCs should nominate representatives rather than any native title holder.

We note also that the Minister must ensure that an equal number of nominees are appointed to the ACH Council from or representing Aboriginal land councils, native title holders, and Aboriginal owners (Sch 1, Pt 2, Cl 2(4)). However, there can be considerable overlap between these three categories.

2. Definitions – operability and enforceability. By way of further example, we note that critical concepts such as "Aboriginal cultural heritage", "knowledge holders", "custodians", "cultural landscapes" and "original Aboriginal inhabitants" are not clearly defined. We note that the Bill attaches criminal sanctions and serious penalties in certain circumstances, and, from a rule of law as well as an enforcement perspective, it is critical to ensuring that key concepts are clearly defined.

   There is a balance to be struck in respect of ensuring that definitions are broad enough to capture relevant ACH, but also certain enough as to be operable and enforceable. The definition of "Aboriginal cultural heritage" at cl 6 includes "tangible and intangible elements that are important to the Aboriginal people of the State, and are recognised through social, spiritual and history values, as recognised by Aboriginal people…" When considering the question of harm or risk of harm, from an evidentiary perspective, it will be a considerable burden to show that the ACH harmed was important to all Aboriginal people of NSW, and it will also be very complex to show what the social, spiritual and historical values are. It is arguable that this standard of proof is higher than what is currently required in the *National Parks and Wildlife Act 1974* (NSW).

3. Registry of Aboriginal Owners. The Bill would require the ACH to establish and maintain a directory, called the ACH Directory, as well as a Registry of Aboriginal Owners. In our view, this would impose extremely onerous and resource intensive obligations. In particular, we have significant concerns in respect of the obligation to establish and keep a Registry of Aboriginal Owners. This register "should include the name of every Aboriginal person who has a cultural association with land in NSW", the location of the land in question and the nature of the cultural association the Aboriginal person has with the land (Part 9, Div 3, cl 186(1)). The name of the Aboriginal person must not be entered in the Register unless they are directly descended from the "original Aboriginal inhabitants of the cultural area in which the land is situated, and has a cultural association with the land that derives from the "traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land" and has consented to the entry of their name into the Register (Part 9, Div 3, cl 186(2)).

   In our view, this represents a practically impossible task, even if only from the perspective of administration and resourcing. Furthermore, proving biological descent is also likely to be fraught from an evidentiary perspective. We note that many Indigenous people are associated with many areas of NSW through, for example, historical and more recent movement, inter-marriage with different language groups and descent from a number of different language groups. Importantly, we suggest that this requirement is likely to have a direct and potentially adverse bearing on relationships between Aboriginal people, as well as between Aboriginal and non-Aboriginal people, and has a high likelihood of intensifying traumas in respect of the difficult issues around identity, cultural authority and the impacts of colonisation. The Register of Aboriginal Owners requirement may create a system

analogous to that created under the Canadian *Indian Act*[5] which has been criticised as being highly invasive and paternalistic[6] in creating benefits and rights based on one being a "status" and "non-status" First Nations person. In our view it would be undesirable to replicate this framework in NSW.

Thank you again for the opportunity to provide comments. Questions may be directed to Vicky Kuek, Principal Policy Lawyer,

Yours sincerely,

Sonja Stewart
Chief Executive Officer

[5] *Indian Act* R.S.C., 1985 c. I-5
[6] See for example https://indigenousfoundations.arts.ubc.ca/the_indian_act/.