



Environmental Defenders Office

15 September 2022

The Director
NSW Legislative Council's Portfolio Committee No.7
Planning and Environment
Parliament House
Macquarie Street, Sydney NSW 2000

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

Dear Director,

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

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide feedback on the *Aboriginal Cultural Heritage (Culture is Identity) Bill 2022 (ACH Bill)*. EDO is a non-Indigenous community legal centre - we work alongside First Nations around Australia and the Torres Strait Islands in their efforts to protect their Country and cultural heritage from destruction.

In providing this submission, we pay our respects to First Nations¹ across Australia, to their Elders past, present and emerging and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations' cultural heritage through both First and Western laws. We recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since the beginning of colonisation.

EDO lawyers have assisted First Nations across NSW, and Australia, in their efforts to protect their cultural heritage from destruction. The cultural heritage of First Nations has not been adequately recognised, respected or protected in this nation by western law since Europeans arrived and the western laws today are still failing to provide necessary respect and protection to both First Nations and their cultural heritage. This failure is a breach of our international law obligations, including under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which Australia has adopted. While UNDRIP is not legally binding, the rights (and consequential

¹ We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. We have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

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obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties to which Australia is a party and **are binding** on Australia.

The EDO strongly supports stand-alone NSW legislation that deals with the protection of Aboriginal Cultural Heritage. However, for this legislation to be effective it must reflect Australia's international legal obligations and be prepared in genuine consultation with First Nations from across NSW. Further, First Nations must be involved in developing this consultation process to ensure that it is conducted in a culturally safe and appropriate manner and the views of all NSW First Nations are heard and not only those who have the means to attend two hearings in the Sydney CBD.

The current inquiry process provides insufficient time for genuine consultation with NSW First Nations. Further, the decision to only have two hearings in Sydney will deprive many First Nations from having the opportunity to participate in the inquiry. We note that the inquiry process itself is a colonial construct and not conducive to ensuring genuine input from NSW First Nations.

Accordingly, we **recommend** NSW First Nations must be provided with a genuine opportunity to review the ACH Bill. Further, the form of this review process should be developed by First Nations and be adequately resourced to ensure it is carried out in a culturally safe and appropriate manner, which ensures input from all NSW First Nations.

EDO has and continues to work with First Nations clients who have interacted with western laws, including western cultural heritage laws in many ways, from litigation, engaging in western law reform processes, through to broader First Nations-led environmental governance of on Country projects.

In EDO's respect for First Nations self-determination, EDO has provided high level key recommendations for reform to help strengthen western legal systems across Australia to provide respectful and effective protection of First Nations' Countries and cultural heritage, and to push for empowerment of First Nations to protect their own cultural heritage and which complies with Australia's obligations under international law.

In the context of this inquiry process, we make the following **high level key recommendations**. The ACH Bill must:

- a. be consistent with Australia's international obligations, including UNDRIP.
- b. ensure that First Nations are the primary decision-makers about their heritage. First Nations decision-making processes must be respected, supported and properly resourced.
- c. provide statutory entrenchment of decision making about heritage by First Nations in relation to both significance of heritage and protection of heritage.
- d. ensure definitions, including what is heritage, are guided by First Nations laws and decided by First Nations Peoples and Communities.

- e. mandate 'respect' for First Nations cultural values and where the destruction of a site will have detrimental effect on culture or cultural identity, the site must be protected to be in-line with Australia's obligations under international law.
- f. provide that First Nations must give their free, prior and informed consent in relation to decisions that impact protection of their heritage. Determining how to operationalise free, prior and informed consent must be led by First Nations.
- g. ensure that First Nations have the legal right to enforce laws to protect their heritage and to seek redress for illegal damage to their heritage.
- h. provide for merits appeal rights for First Nations in relation to decisions that impact their heritage.
- i. ensure that First Nations should determine the most culturally appropriate methods of determining who has the right and power to speak for cultural heritage of an area.

Stand-alone cultural heritage legislation is long overdue in NSW. New laws need to be discussed, designed and developed by First Nations for First Nations. EDO stands alongside our First Nations clients and communities in this important process and in their ongoing efforts to protect their Countries and cultural heritage from destruction. For further information or to discuss this submission, please contact Natalie Vella at natalie.vella@edo.org.au.

Yours sincerely,

Environmental Defenders Office



Natalie Vella
Special Counsel