

KIMBERLEY LAND COUNCIL

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19th November 2021

Mr Francisco Cali-Tzay

UN Special Rapporteur on the Rights of Indigenous Peoples

Email: indigenous@ohchr.org; FranciscoCaliRealtorEspecial@gmail.com

Dear Mr Cali-Tzay,

Urgent Request for UNCERD Review – Aboriginal Cultural Heritage Bill (Western Australia), 2021 (Bill)

The Kimberley Land Council is writing to request your urgent attention to intervene in the passing of the Aboriginal Cultural Heritage Bill 2021 (WA). The Bill exposes Aboriginal cultural heritage to continued damage and destruction, in violation of international human rights.

Established in 1978 by Kimberley Aboriginal people, the Kimberley Land Council has grown from a grass roots movement to protect land, law and culture to one of Australia's leading native title representative bodies and advocacy organisations at the forefront of issues affecting Aboriginal people.

On November 17th, 2021 the Western Australian Government tabled the Aboriginal Cultural Heritage Bill to parliament, despite the Bill receiving widespread condemnation from Aboriginal leaders and heritage experts from across the country. Ordinarily parliamentary processes require the bill to be laid before the lower house for three weeks, however the government forced through a vote on the bill in less than 24 hours. The Bill is set to pass under expedited procedures enabled by the COVID crisis.

The Kimberley Land Council is deeply concerned with the Bill, and believe it will be a cultural catastrophe that will result in the destruction of irreplaceable cultural heritage. Fundamentally, the Bill will not protect Aboriginal cultural heritage and will continue a pattern of systematic structural racial discrimination against Aboriginal people.

The final decision on whether Aboriginal cultural sites in Western Australia can be destroyed for projects like mines will rest with a State Government Minister under proposed legislation, with no rights of review for Traditional Owners. This is highly problematic as the State Government is too close to industry and too dependent on royalties to be objective and transparent when it comes to matters concerning Aboriginal heritage.

The current law managing impacts on Aboriginal cultural heritage has permitted the lawful destruction of more than 1,000 sites. Between 2017-2021 the mining industry made 144 requests to the Western Australian Government to 'impact' heritage sites, with only one of these requests being rejected. One of the 143 requests granted resulted in the destruction of the 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia by Rio Tinto.

The Bill will not prevent further tragedies like Juukan Gorge. The Bill is inconsistent with recommendations made by the Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia, A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge (October 2021). The Final Report said Australia must do more to protect Aboriginal cultural heritage by overhauling 'grossly inadequate laws and giving traditional owners the right to withhold consent to the destruction of cultural heritage on their country.'

Traditional Owners have not had their most fundamental concerns about the Aboriginal Cultural Heritage Bill addressed over the past three years, during the government's flawed consultation process. Over 90% of the submissions from Aboriginal parties called for the Bill to be scrapped or re-written. Aboriginal people's concerns have been ignored by the Western Australian Government.

We are aware that a request for Urgent Action to the Committee on the Elimination of Racial Discrimination made on 10 September 2021 by Aboriginal people from Western Australia and is currently before the Committee. We support their calls for an urgent investigation.

Some significant concerns with the Bill's inconsistency with UNDRIP are outlined below:

- The Bill's design and consultation process, including a failure to involve Indigenous peoples in Western Australia in a co-design process consistent with Article 3 and Article 32 of UNDRIP
- Lack of principles of free, prior and informed consent in the agreement making process, leaving ultimate decision-making to the responsible Minister where there is no agreement between Indigenous groups and proponents and is inconsistent with Article 32 of UNDRIP
- Lack of safeguards within the Bill to ensure that significant cultural heritage will not be subject to destruction, instead this is left to be determined by the responsible Minister in circumstances already described, which is inconsistent with Indigenous peoples' right to maintain, control, protect and develop their cultural heritage consistent with Article 31 of UNDRIP. The Minister's decision includes consideration of an 'interests of the state' test, which threatens to prioritise economic drivers before protection of significant cultural heritage and, thus, risks racially discriminating decision-making.
- No review rights for Aboriginal peoples where a decision is made to destroy their cultural heritage and is inconsistent with obligations to provide effective mechanisms for just and fair redress, which is inconsistent with Article 32 of UNDRIP.

In this critical context, we are seeking an urgent intervention from the UNCERD committee to investigate the Aboriginal Cultural Heritage Bill 2021 (WA) before more irreplaceable cultural heritage is destroyed under a law that continues the systematic structural racial discrimination against Aboriginal people.

We request that the Bill be immediately withdrawn. A process should be put in place that ensures the free, prior and informed consent of Aboriginal people that may be affected is secured and that legislation is drafted that affirms and protects the rights of Aboriginal people in line with the U.N. Declaration of the Rights of Indigenous Peoples.

Yours sincerely,



Anthony Watson
Chairman
Kimberley Land Council