

# MODERNISATION OF FIRST NATIONS CULTURAL HERITAGE PROTECTION

## Implementation plan

A national engagement process on the Modernisation of First Nations cultural heritage protections. This plan will be delivered in partnership between DAWE and the Alliance



## Implementation Plan

1. On 29 November 2021, the Commonwealth of Australia (represented by the Minister for the Environment, the Hon Sussan Ley MP), and the First Nations Heritage Protection Alliance (**Alliance**), entered into the *Partnership Agreement on the Modernisation of Aboriginal and Torres Strait Islander Cultural Heritage Protection (Partnership Agreement)*.
2. The purpose of the partnership is to:
  - a. Undertake a national consultation process;
  - b. Develop options to be considered by the Minister for the Environment to improve protections for First Nations cultural heritage; and
  - c. Provide advice to the Minister for the Environment on the timing and scope for a meeting with the State and Territory Ministers responsible for First Nations affairs and heritage and members of the Alliance, to discuss ongoing protections for First Nations cultural heritage (**Ministerial Roundtable**).
3. The Partnership Agreement:
  - a. Establishes the Joint Working Group (JWG) to lead the work contemplated by the Partnership Agreement;<sup>1</sup>
  - b. Establishes the Implementation Working Group (IWG) to provide administrative support to the JWG;<sup>2</sup> and
  - c. Requires the development of this Implementation Plan, including consideration of (i) Terms of Reference; (ii) Governance and Reporting; (iii) Scope; (iv) Timeframes; and (v) Resourcing.<sup>3</sup>
4. This Implementation Plan has been endorsed by the JWG to meet the requirements of the Partnership Agreement, setting out the plan for the national consultation process, and documenting the governance arrangements for the JWG and IWG.

## Background to the Partnership Agreement

5. Following the destruction of the Juukan Gorge in Western Australia on 24 May 2020, the Minister for the Environment announced a commitment to develop a national engagement process for modernising the protection of First Nations cultural heritage.

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<sup>1</sup> Clause 12.

<sup>2</sup> Clause 12 v.

<sup>3</sup> Clause 11 v.



6. In September 2020, the Minister for the Environment and the Minister for First Nations Australians, the Hon. Ken Wyatt AM MP, jointly chaired a Ministerial Roundtable, and reiterated this commitment.
7. On 21 April 2021, Minister Ley met with the Alliance to discuss how to lift the standard of First Nations cultural heritage protections and agreement was made that the Department of Agriculture, Water and the Environment (**Department**) and the Alliance would enter into the Partnership Agreement, which was signed on 29 November 2021.
8. Over the course of the development of the Partnership Agreement, a number of relevant reviews and reports were released:
  - a. Samuel, G (2020), *Independent Review of the EPBC Act- Final Report*, Department of Agriculture, Water and the Environment, Canberra (**Samuels Review**);
  - b. Joint Standing Committee on Northern Australia (2020), *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia- Interim Report*, Commonwealth of Australia, Canberra (**Interim Juukan Gorge Report**);
  - c. Joint Standing Committee on Northern Australia (2021), *A Way Forward: Final report into the destruction of Indigenous Heritage sites at the Juukan Gorge*, Commonwealth of Australia, Canberra (**Final Juukan Gorge Report**).
  - d. Heritage Chairs of Australia and New Zealand (2020), *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra (**Dhawura Ngilan Vision and Standards**).
9. These reports will inform the work the partnership as it undertakes the tasks set out in paragraph 2 of this Implementation Plan. Furthermore, the work of the partnership may also inform the Australian Government's response to these reports.

## Terms of Reference

10. The Terms of Reference for the JWG is set out at **Attachment A**.

## Governance and Reporting

11. The work under the Partnership Agreement is to be led by the JWG, supported by the IWG. The governance and reporting obligations of both are set out below.



## JWG Governance

12. Part 4 of the Partnership Agreement sets out the basic governance arrangements of the JWG.

13. The JWG:

- a. Is comprised of a maximum of 6 members, with 3 nominated from each Party, and is co-chaired by one nominee from each Party.
- b. Consists of the following initial members:
  - (i) Dr Melissa McEwen (Commonwealth, Co-chair);
  - (ii) Ms Anne-Marie Roberts (Commonwealth);
  - (iii) Ms Andrea Kelly (Commonwealth);
  - (iv) Ms Rachel Perkins (Alliance, Co-chair);
  - (v) Cr Leeanne Hampton (Alliance); and
  - (vi) Mr Kevin Smith (Alliance).
- c. Will meet on the second Tuesday of each month, or at any other time by agreement of the JWG.
- d. Will make decisions on the basis of consensus, requiring unanimous agreement on an option or course(s) of action.<sup>4</sup>
- e. May, if agreed, invite other organisations and key stakeholders to participate in JWG meetings as contributors or observers.

14. Each JWG member must comply with, and complete and sign the:

- a. Code of Conduct at **Attachment B**;
- b. Conflict of interest declaration at **Attachment C**;
- c. Confidentiality Deed Poll at **Attachment D**.

## Functions of the JWG

15. Part 4, clause 12 iv., of the Partnership Agreement states that the function of the JWG is to develop proposals for the consideration of the parties, designed to achieve the outcomes set out in Part 3 of the Partnership Agreement.

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<sup>4</sup> To avoid doubt, this does not limit the ordinary responsibilities of the Department, including to provide advice to the Australian Government.



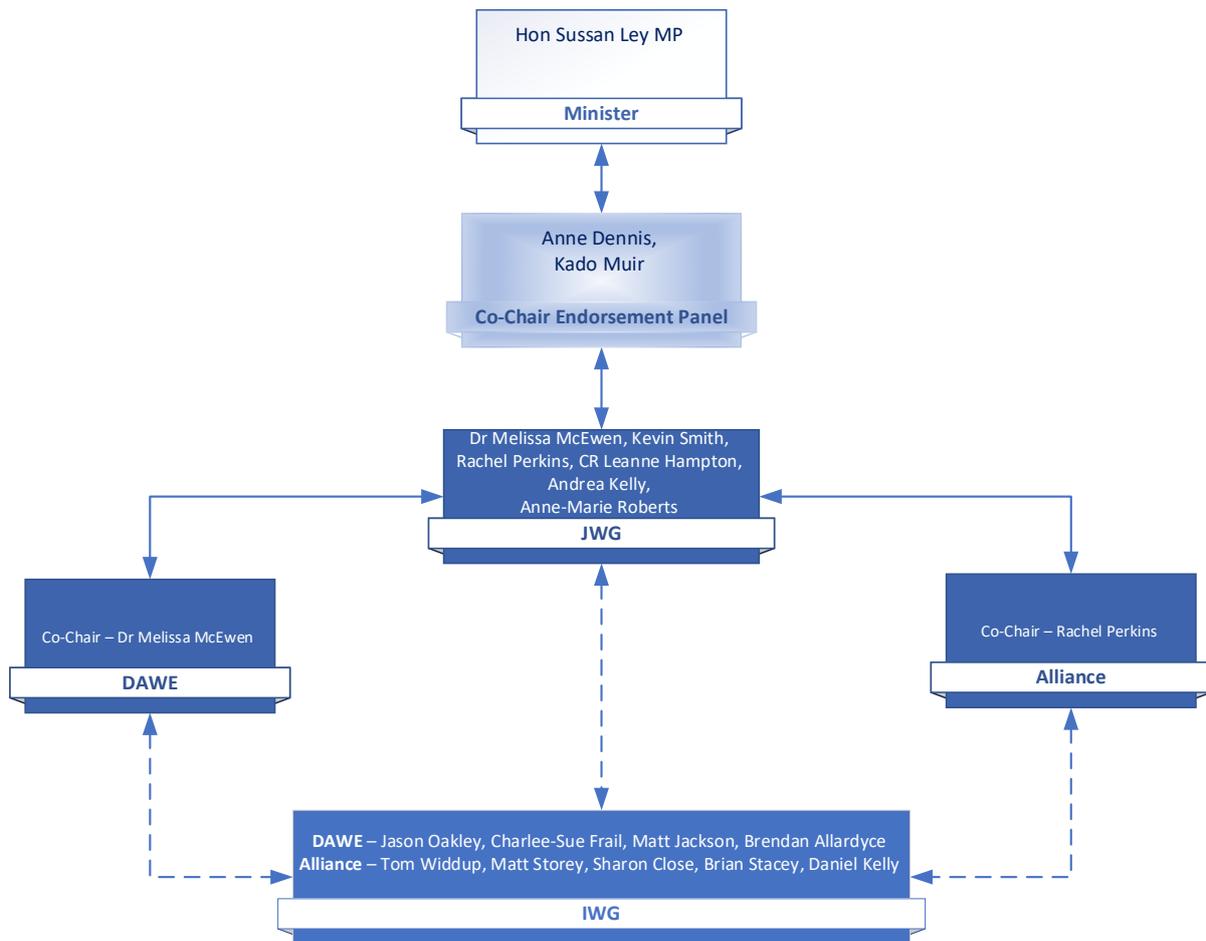
16. In achieving this function the JWG will:
- a. Lead the tasks set out at paragraph 2 of this Implementation Plan;
  - b. Oversee the delivery of the Implementation Plan to be progressed by the IWG;
  - c. Provide those directly involved in the project guidance on high level issues;
  - d. Ensure that strategies to address potential risks to the program's success have been identified and mitigated and that risks are regularly re-assessed;
  - e. Discuss and analyse suggestions gathered from consultations as they progress;
  - f. Review and finalise options for the modernisation of cultural heritage protections and present to the Minister for the Environment and the Alliance.

### Reporting

17. The JWG will seek to meet with the Minister for the Environment (virtually or in person), and will provide a written update on its progress, on no less than four occasions in each 12-month period but may do so more frequently.
18. The JWG will, in accordance with this Implementation Plan, provide a report to the Minister for the Environment on options for the modernisation of cultural heritage protections and present to the Minister for the Environment and the Alliance (**Options Report**).
19. The Options Report will be finalised in accordance with the flow chart at Figure 1, which requires that it be:
- a. Approved by the JWG;
  - b. Endorsed by the Alliance, through the Alliance Co-chairs; and
  - c. Provided to the Minister of the Environment for her consideration.



Figure 1: Approval of the Options Report



## Dispute Resolution

20. In the event that the JWG is unable to reach a decision on the basis of consensus, or falls into irreconcilable dispute on any issue, the following process will apply:

- a. A Co-chair may provide the other Co-chair written notice informing them that a dispute has arisen which has not been able to be resolved through ordinary JWG processes (**Dispute Notice**).
- b. The Dispute Notice will set out all relevant details of the dispute.
- c. Within seven days of the date of the Dispute Notice the Co-Chairs will meet and attempt to resolve the dispute.
- d. In the event that the dispute is not resolved within 14 days of the Co-Chairs meeting, either Co-Chair may refer the dispute to the Minister of the Environment and the Co-Chairs of the Alliance.



- e. Within 28 days of a Co-chair referring a dispute, the Minister of the Environment and the Co-Chairs of the Alliance will set a meeting date, or make some other suitable arrangement, to meet to attempt to resolve the dispute.

#### IWG Governance

21. Part 4, clause 12 v. of the Partnership Agreement establishes the IWG to provide administrative support for the JWG.

22. The JWG agrees that the IWG:

- a. Is comprised of a maximum of 12 members, with 6 nominees from each Party. The IWG will be co-chaired by one nominee from each Party.
- b. Consists of the following initial members:
  - (i) Mr. Jason Oakley (Commonwealth, Co-chair);
  - (ii) Ms Kat Miller (Commonwealth)
  - (iii) Ms. Charlee-Sue Frail (Commonwealth);
  - (iv) Mr. Matt Jackson (Commonwealth);
  - (v) Mr Brendan Allardyce (Commonwealth):
  - (vi) Mr. Daniel Kelly (Alliance, Co-chair);
  - (vii) Mr. Tom Widdup (Alliance);
  - (viii) Ms. Sharon Close (Alliance): and
  - (ix) Mr. Matthew Storey (Alliance).
- c. Will report to the JWG at least monthly.
- d. Will meet on every second Thursday, prior to, and then following JWG meetings, or at any other time as directed by the JWG or agreed by the IWG.
- e. Will make decisions on the basis of consensus, requiring unanimous agreement on an option or course(s) of action.

#### Functions of the IWG

23. The JWG agrees the functions of the IWG will be to:

- a. Deliver this Implementation Plan;
- b. Develop all documentation relevant to the Implementation Plan, including communication strategy, desktop research, discussion papers and briefings;
- c. Develop documentation, including preparing and distributing meeting notices and agendas within agreed timeframes



- d. recording and distributing a summary of each meeting as soon as practical after each meeting, and
- e. Undertake joint engagement with the parties identified;
- f. Draft options for the modernisation of cultural heritage protections based on the national engagement process and existing reports, inquiries, submissions, for consideration by the JWG.
- g. Any other function or task, as directed by the JWG.

### Dispute Resolution

24. In the event that the IWG is unable to reach a decision on the basis of consensus, or falls into irreconcilable dispute on any issue, the matter will be referred to the JWG.

### Scope

25. The JWG has a wide scope, and is able to consider any options it considers appropriate for the modernisation of Aboriginal and Torres Strait Islander cultural heritage, and to ensure protections align with community expectations and international legal norms, including consideration of:
  - a. legislative reform, including the amendment of existing or enactment of new Commonwealth legislation;
  - b. policy transformation;
  - c. administrative improvement;
  - d. identification of resourcing or structural deficiencies;
  - e. review and restructure of processes, procedures and protocols; and
  - f. design and development of new standards and communication products.

### Consultation Process / Timeline / Schedule of Engagements

26. The national consultation process will take place in two stages, as set out in the timeline below. The two stages are:

#### Stage 1

- a. Stage 1 consultations will focus on industry stakeholders, relevant State Government departments, and regional or peak First Nations representative bodies.



- b. First Nations representative bodies will be encouraged to invite select First Nations people from their region with a special interest or expertise in cultural heritage, or those directly impacted by cultural heritage destruction.
- c. The purpose of Stage 1 consultations is to:
  - (i) Discuss existing Commonwealth legislation, particularly the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (**ATSIHP Act**), the Native Title Act 1993 (Cth) (NTA) and Environment Protection and Biodiversity Conservation Act 1999 (Cth) (**EPBC Act**).
  - (ii) Consider options for a Commonwealth response to Dhawura Ngilan Vision and Standards;
  - (iii) Seek views on the recommended national environmental standard for First Nations engagement and participation in decision-making as recommended by the Samuel Review;
  - (iv) Discuss State and Territory cultural heritage legislation, in particular how such legislation may interact with Commonwealth legislation, including current reviews that are underway or planned;
  - (v) Discuss findings and recommendations from the interim and final report on the Joint Parliamentary Committee on Juukan Gorge; and
  - (vi) Discuss and identify Commonwealth policy, protocols and process improvements in relation to cultural heritage protections.
- d. Consultations will occur in person or online, and following consultations the IWG will prepare, and the JWG will approve, a discussion paper summarising the findings and potential options (**Directions Report**).
- e. The Directions Report will identify and summarise stakeholder perceptions on the gaps, concerns, challenges, and vision for cultural heritage protections at the Commonwealth and State level (including the ATSIHP Act, the NTA and the EPBC Act).
- f. A consultant will be engaged, and in liaison with the IWG, will develop the Directions Report into a policy options paper (**Policy Options Paper**).

## Stage 2

- a. The JWG will approve the Policy Options Paper, following which it will be made available for national consultation.



- b. Stage 2 consultations will focus on First Nations people and groups around Australia and be open to all interested community members.
  - c. The purpose of Stage 2 consultations is discuss the suitability of the Policy Options Paper.
  - d. Consultations will occur in person or online. While there will be opportunity to make written submissions during Stage 2, in person consultation is to be encouraged.
27. Following the completion of the national consultation process the IWG will prepare a draft **Options Report**, to be finalised in accordance with paragraph 19 of the Implementation Plan.
28. Upon being provided the Options Report, following consultation with the Minister for Indigenous Australians, the Minister for the Environment will deliberate and make decisions:
- a. in partnership, and through a shared decision-making process with the Alliance; and
  - b. otherwise, in accordance with her legislative authority in the environmental portfolio and her delegated responsibility for the Department. The JWG is delegated under the Partnership Agreement, which has a term of 12 months, commencing from the 29 November 2021, unless all Parties agree to an extension of this work. The agreed timeline and schedule of engagement is as follows:

**Stage One and Two Engagement: Refer Appendix A MICHP Project Plan (Attached)**