3rd April 2025

Attention: Legislative Scrutiny Committee
Re: Sacred Sites Act

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I recommend the Bill requires more extensive consideration and consultation. I encourage the Committee to report that the Assembly should not pass the Bill.

I focus my comments on new Sections 24 A and B. These new sections make provisions for Transferable Certificates and Recorded Parties.

The Explanatory Statement tells us, of s.24A, that:

> *These transfers are administrative in nature only.*

We are similarly assured, of s.24B, that:

> *This clause reduces regulatory burden and red tape*

The discussion of the impact of these changes in the Statement does not entertain any impact on existing legal protection of Indigenous heritage values. As for describing the interaction of the Act with Commonwealth law, we are offered the bold but evidence free assertion that:

> *This new provision is consistent with the requirements of the Aboriginal Land Rights Act*

In fact these two new sections represent a significant curtailment of existing protections, and risk conflict with ALRA that invites judicial review.

As the Statement illustrates, these significant impacts have not been given the attention they warrant. Further, the public exposure period of this Bill is woefully inadequate. A short turn-over might be more appropriate for a Bill which truly only "modernises the language" while "ensuring continuity and efficiency". But this Bill goes far beyond that, and as such has not benefited from appropriate opportunity for community participation. As this committee has heard recently, more time and resources are required to allow appropriate engagement of those Territorians most impacted by this Bill.

The Bill does not have sufficient regard to Aboriginal and Torres Strait Islander tradition[1] as measured by this failure. This is a significant impact on protections of Indigenous tradition, and has been given inadequate regard, to the extent of being actively mischaracterised as mere "process efficiencies".

The Bill should not pass with these two new Sections 24A and 24B, without due consideration of the impact on existing protections and the likelihood of conflict with ALRA.

These considerations are explored further in the attached notes.
I remain interested in contributing to better decision making on this and related matters,

Justin Tutty

1 as per 3(b)(iii)(J) of the Committee's terms of reference

Existing protections

The Act currently defines a discretionary, culturally respectful regime where Traditional Owners are empowered to control disclosure, define impact and tailor consent to specific proponents.

Under the current Act, Certificates are not generic clearances. They are based on a unique, relational assessment of all available context, including: the land, current conditions, the proposed activity, the proponent and the custodian's comfort with disclosure and potential impacts.

Traditional Owner consent is personal, situational, and culturally contingent. But the s.24A and s.24B amendments treat procedural consent as ongoing or transferable consent, regardless of cultural context. These new provisions ignore the fact that conditions may have been tailored to specific times, actors and projects.

Under existing arrangements Traditional Owners can protect sensitive cultural knowledge by not disclosing full details. Aboriginal custodians retain discretion in how much knowledge is shared; what conditions are placed on a certificate; and whether a specific party is trusted to undertake the work. The Authority uses its consultation process to make a context-sensitive assessment, considering:

- the nature of the work proposed
- the identity and trustworthiness of the proponent
- the cumulative impact of development
- the degree of disclosure Traditional Owners are comfortable with

These features mean each application is unique, and Traditional Owners retain discretion over what is revealed and how protections are shaped.

Internal consistency of ASSA

The new provisions are mechanistic and mandatory, while existing clauses are discretionary and relational, creating internal conflict between the two approaches.

The Aboriginal Areas Protection Authority must have regard to the wishes of custodians relating to the extent to which sacred sites should be protected. Section 22(1)(d) requires Authority Certificate conditions to be in accord with the custodian's wishes. Section 42 – *Wishes of Aboriginals to be taken into account* – requires the authority to:

> take into account the wishes of Aboriginals relating to the extent to which the sacred site should be protected

Importantly, these requirements encompass interpreting those wishes in context, rather than recording them for future re-interpretation.

These sections clearly expect that AAPA must actively consider the wishes of Traditional Owners for each application. These are not set-and-forget provisions, rather they reflect the discretionary nature of cultural knowledge-sharing and the importance of re-consent as circumstances evolve. Each application is evaluated on its own merits, based on *current* custodian perspectives.

The mandatory nature of the new sections, which each require:

> the Authority must issue a new Authority Certificate

undermines or conflicts with the discretionary, consultation-based expectations of s.42 and others. In doing so, these new provisions significantly alter the function of Certificates under the Act.

Consistency with ALRA

The Aboriginal Land Rights Act (NT) has a clear purpose of safeguarding cultural heritage, including sacred sites. In Section 69 – *Protection of Sacred Sites* it invites NT law to operate alongside - but this should remain consistent with the Act. Section 73(1) requires:

> any such law has effect to the extent only that it is capable of operating concurrently with the laws of the Commonwealth, and, in particular, with this Act

The new s.24A and s.24B provisions sidestep the current practice of renewed consultation with Traditional Owners for new parties or project phases. This weakens cultural oversight and consent - particularly concerning where projects evolve over time, or as cumulative impacts emerge. These new provisions introduce real risks that could undermine the cultural discretion and situational judgement that Traditional Owners currently exercise under the Act.

Section 24A allows a certificate holder to transfer their existing Authority Certificate to another party without further consultation with custodians, as long as the work and land use are the same. This ignores any consideration of whether the previous conditions included proponent- or project-specific considerations. For example, a Traditional Owner group might approve a certificate based on trust in a local business but might not immediately want an international mining corporation to operate under the same certificate.

With the new provisions, there would be no opportunity for Traditional Owners to reassess impacts if the context changes. Even if the technical description of the work remains the same, the practical effect could be different depending on changed site conditions, scale, seasonality, or methods. The original protections are “locked in”, and cannot evolve because this provision discourages development of a new application.

The new provisions erode Traditional Owner discretion by removing key points of re-engagement with the Authority. Rendering certificates extendable and transferable presents a new “one clearance fits all” approach, which is contrary to the fundamentally relational and contextual nature of existing sacred site protections. This weaker approach potentially conflicts with the cultural protocols that allow for partial disclosure as a form of protection.

Cultural protections are dynamic and relational - not static permissions. To respect this present reality, transfer mechanisms need to require re-affirmation by Traditional Owners, even for seemingly identical projects. AAPA’s discretion should be facilitated by new consultation triggers, not reduced to administrative checks.

The Statement tells us that:

> This new provision is consistent with the requirements of the *Aboriginal Land Rights Act (Northern Territory*) *1976* as it does not seek to change any of the protections initially imposed which would

> have considered the wishes of the relevant custodians regarding the extent to which sacred sites are protected in respect of the same work and use.

This assertion exposes the false assumptions that a new application would warrant the same protections; and that the initial context remains relevant for the transfer. The initial protections may have been appropriate for the context at the time when wishes were considered, but no longer so for the context when the transfer is sought. In this way, initial considerations may no longer be valid or relevant.

Section 24A allows no mechanism to re-assess whether the original custodians approved the new party, would maintain their position under new circumstances, or ever considered or intended their consent would apply to any future party. There is no facility for consulting custodians again, re-assessing whether their consent still applies, or otherwise considering new contextual factors. In an extreme example, original Traditional Owners consulted with may have passed away, and yet the Authority has no discretion to recognise benefit in reconsidering the new context.

The Statement claims this is a mere administrative change, because the original certificate:

> would have considered wishes of Aboriginal people ... [and] there will be no changes to the original protections.

However, this misunderstands how cultural knowledge and consent are governed. Custodians may offer limited or partial information to protect sacred knowledge. Context determines consent - it's not only about the program of works, but *who* is doing it, *when*, and *how*. This context may be considered for the original certificate, but those considerations may no longer be relevant to the new context of the transfer.

The Statement does not address the consistency of s.24B with respect to ALRA. Clearly, similar concerns apply: conditions considered relevant and appropriate for one operator might not meet the wishes and ambitions of Traditional Owners in the context of a new party. ALRA embodies ongoing respect for Aboriginal wishes, including around who carries out the work. This new section could present the unintended effect of inviting less accommodating conditions, based on concerns regarding unknown additional parties being added to the clearance at a later date.

The clear inconsistencies of these new sections with ALRA invite judicial review, including with reference to s.109 of the Constitution. Ultimately this could lead to outcomes that are far worse for those who fear regulatory duplication, burden and delay.