Draft Aboriginal Cultural Heritage Bill 2018

This document outlines key changes proposed by the NSW Government to manage and conserve Aboriginal cultural heritage.[1] The NSW Government wants **feedback**. Submissions are due **20 April 2017**.

The NSW Aboriginal Land Council (**NSWALC**) has long called for reforms. The current laws are failing to protect Aboriginal heritage and do not provide any decision making for Aboriginal peoples.[2]

***Please note**: This document has been arranged by Office of Environment and Heritage (**OEH**) workshop 'theme' to assist LALCs attending the Government workshops. This does not mean NSWALC necessarily agrees with Government's claims about improvements in the ACH Bill. This document is a brief guide only and does not address all Government proposals. NSWALC has additional resources available on our website and is developing further resources to for LALCs.*

"Aim A - Broader recognition of ACH Values"

- **New stand-alone Aboriginal Culture and Heritage legislation** - to replace Part 6 of the *National Parks and Wildlife Act 1974* (**NPW Act**)

- **New objects:** the new objects include "*to achieve better outcomes for Aboriginal people and the wider NSW community*", "*recognise that Aboriginal cultural heritage belongs to Aboriginal people*"; "*reflect Aboriginal people's authority over and responsibility for cultural heritage",* and *"conserving and managing ACH", "regulating activities that may cause harm to that heritage"* - Section 3, *Draft Aboriginal Cultural Heritage Bill 2018*

- **New and updated definitions:** Definitions of 'Aboriginal object' and 'Aboriginal ancestral remains' similar to the current laws; New meanings for: 'Aboriginal cultural heritage', 'Aboriginal cultural heritage significance' and 'intangible Aboriginal cultural heritage' - Section 4; Although there are new definitions of Aboriginal Cultural Heritage, the offences of harming Aboriginal Cultural Heritage will only apply to Aboriginal objects, Aboriginal ancestral remains and declared Aboriginal cultural heritage. Places or sites will not be protected unless they are the subject of a declaration.

"Aim B – Decision making by Aboriginal people"

- **New administrative and governance structures** that will allow Aboriginal people to make some decisions:
  - **Aboriginal Cultural Heritage (ACH) Authority** made up of only Aboriginal people - section 8. Will have key functions – section 12.
  - **Local Aboriginal Land Councils** may be delegated '*local coordination and support roles'* - s.13
  - **Local ACH Consultation Panels –** to provide advice on local matters – s.14-17. ACH Authority is proposed to develop policies and guidance around the operation, establishment and membership of the local panels – ie. The Bill does not propose to outline who speaks for Country.

- **The Minister proposed to retain key decision making** including:
  - Appoint ACH Authority members - section 8
  - Approve ACH declarations – section 18
  - Approve ACH maps - section 20
  - Relevant Ministers (Forestry & Crown lands) to consent to certain ACH Conservation agreements – s.29(5)&(6)
  - Minister may vary or terminate ACH agreement if mining or petroleum authority – s.31(7)

---

[1] See 'A proposed new legal framework' (Proposals paper) and Consultation *Draft Aboriginal Cultural Heritage Bill 2018* available at: http://www.environment.nsw.gov.au/ then click on 'New Aboriginal Cultural Heritage laws'

[2] For information about NSWALC's positions please visit www.alc.org.au then click on 'Culture and Heritage'

- Minister may make additional Codes of Practice that provide defences – s.43(2)
- Minister to approve ACH Assessment Pathway Code of Practice - s54 –
- Minister to approve Funding allocation strategy - s64 & 67
- Minister to make interim protection orders - s78- 79
- Minister may remove ACH Authority Board members - Schedule 1

Under the current NPW Act the Minister and the Office of Environment and Heritage (**OEH**) have all decision making and administrative roles.

KEY QUESTIONS:
How should the ACH Authority be formed?
- Eligibility criteria eg. Skills and knowledge
- Gender balance?
- Based on regions / areas?
- Election?
- Nominated from certain groups eg. 4 reps from Land Councils, 4 reps from native title, 4 reps from Aboriginal owners?
- Mix of the above?
- Other?

What do you think about the proposed 'local coordination and support' roles for LALCs?
NSWALC has been advocating that LALCs must have key roles in the new system if properly resourced.

Should the Minister be able to make decisions about ACH?

"Aims C – Better information management"

- **New mapping** to be managed by ACH Authority. Maps to be developed by Local Consultation panels with their support body. Support body may be delegated administration of maps at local level. Proposed to be a restricted access and public portal maps – section 19.
- Under the ACH Bill, there is no requirement for proponents to consult about proposed developments unless known or likely ACH is indicated on the map (discussed further below)

  Under the current NPW Act there is no requirement for proponents to consult about proposed developments unless ACH is indicated on a map or the proponent is otherwise aware of ACH. Under the current NPW Act the Government manages and owns the mapping system.

"Aim D – Improved protection, management and conservation of ACH"

- **Offences and penalties if Aboriginal heritage is harmed** – section 40. Maximum penalty amounts for most serious offences proposed to be $1,650,000 for a corporation & $330,000 for an individual. Extra elements of "*intentionally and recklessly*" have been added to the 'knowing' harm offence which will make it harder to prove.

- **Declared ACH to replace the current 'Aboriginal Places' provisions** – Minister proposed to make declarations on recommendation of ACH Authority - section 18

- **New Intangible ACH agreements** and new offence for using registered intangible cultural heritage for commercial purposes without agreement – section 38. Current NPW Act does not include this.

- **Ownership of certain Aboriginal objects currently owned by NSW Government to be transferred to ACH Authority** – section 24

- **New repatriation provisions** setting out processes for Aboriginal cultural heritage to be returned including consultation with the local ACH Panel – section 25. The current NPW Act has some provisions for 'disposing' of Aboriginal objects which may include returning to Aboriginal owners.

- **Changes to voluntary conservation agreements** – sections 28 – 35 – agreements may be made between land owners and the ACH Authority.

- **ACH Fund** – sections 63 – 70 – new provisions to guide the prioritisation of funding on Aboriginal cultural heritage conservation in NSW.

"Aim E – Greater confidence in the regulatory system"

- **'Due diligence' process to the replaced with new 'Assessment Pathway'**. Key stages in Bill including proponents to check map of 'known and likely' Aboriginal heritage to trigger further assessment and consultation. If there is no heritage on the map then proponents can proceed without consultation – Sections 55-58. Details to be set out in a Code of Practice developed by ACH Authority and approved by Minister – section 54.

- **Aboriginal Cultural Heritage Management Plans (ACHMPs) to replace Aboriginal Heritage Impact Permits (AHIPs)**. ACHMP to be negotiated between proponent and local panel, and approved (or refused) by ACH Authority – sections 46 – 53. Very short timeframes to negotiate ACHMPs proposed (to be outlined in Regulation)

- **Proponents to seek Aboriginal heritage approvals prior to seeking development consent**, with some exceptions including for state significant development and complying development – sections 60-62. The interaction with planning laws is complex and requires further clarification.

- **Appeals and reviews** – judicial reviews available and some merits appeals available for proponents. Merits review of decisions about ACHMPs is only available to proponents, not Aboriginal people.

- ACH Authority to undertake **compliance and enforcement**, including new investigation powers and ability to issue stop work orders. Scope for LALCs to be delegated functions eg. 'authorized officers'.

NOTE:

Proposals paper vs. Draft Bill: Some proposals outlined in the Proposals paper have not been captured in the draft Bill. For example, the Proposals paper states that the Draft Bill will include a definition of 'desecration' however this is not included.

Regulation, Policies and Guidelines: Some key elements of the new system are intended to be outlined in Regulations, Policies or Guidelines. The Regulations will be developed by the Government. The Policies and Guidelines documents will be developed by the ACH Authority and will in some cases require approval by the Minister. It is proposed that there will be consultation with Aboriginal people. See page 2 of the Proposals Paper. These instruments have not yet been developed, however the Proposals paper flags some elements proposed to be included in Regulations – for example, timeframes for negotiation and determination, review of the low impact list. These documents will have a significant role to play in the operation of the new laws in practice.

Transitional arrangements: If the Bill passes Parliament the Government expect the new system will take 4-5 years to fully implement - work is needed to establish the ACH Authority, develop policies and guidelines, build capacity, form consultation panels, develop maps etc. See pages 4, 50 and 51 of the Proposals Paper.

Resourcing: The NSW Government has acknowledged that resourcing of the new system is required to ensure it effectively operates, and that work is underway on this. See page 50 of the Proposals Paper. Resourcing of the new system will be critical to ensure that the system is successful. NSWALC is continuing to seek further information about this.

Summary of key proposals: Current laws vs. Draft Bill[3]

Issue and section/s of Draft Bill	Current *National Parks and Wildlife Act 1974* (NSW)	*Draft Aboriginal Cultural Heritage Bill 2018*	
		Potential improvements	***Issues / further consideration***
Aim A - Broader recognition of ACH Values			
Objects – section 3	• Do not recognise Aboriginal peoples. • Limited to *"the conservation of objects, places or features"*	• *"recognise that Aboriginal cultural heritage belongs to Aboriginal people".* • *"reflect Aboriginal people's authority over and responsibility for cultural heritage"* • *"recognize Aboriginal cultural heritage as living culture that is intrinsic to the well-being of Aboriginal people"* • *"promote understanding and respect for Aboriginal cultural heritage"*	• Provides for *'conserving and managing ACH'*, not protection. • Land Rights not referenced. • Other elements of United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) not referenced eg. Articles 11 & 12 right to practice and protect culture, right to redress.
Definitions – section 4	*Aboriginal objects* *Aboriginal Places* (declared by Minister) *Significance* is referenced in NPW Act	• Definitions of 'Aboriginal object' and 'Aboriginal ancestral remains' similar to the current laws • New meanings for: 'Aboriginal cultural heritage', 'Aboriginal cultural heritage significance' and 'intangible Aboriginal cultural heritage'	• NSWALC has previously raised concerns regarding the use of *'significance'* • Whether definitions are comprehensive enough to protect all ACH
Aim B – Decision making by Aboriginal people			
Decision making – includes sections 12, 20, 21, 28, 49	Minister and OEH have all decision making and administrative roles	• Aboriginal people (via ACH Authority made up of all Aboriginal people) to have some decision making.	• Minister to retain key decision making with no parameters • Proposed that Minister will appoint ACH Authority based on a community driven

[3] Please note this is a guide of some key provisions only.

		• Legislated roles for Aboriginal peoples in making Policies, Maps, Codes etc and administering the system	process. **Feedback is sought on eligibility and appointment process for ACH Authority**
Roles for NSWALC – section 8	NSWALC has one seat on the *'Aboriginal Cultural Heritage Advisory Committee'* (**ACHAC**) – this body is advisory only	NSWALC to have one seat on ACH Authority which will have advisory, administrative and decision making roles.	**Feedback is sought on the composition and process to form the ACH Authority**
Roles for LALCs – section 13	LALCs do not have any legislated roles under the NPW Act. LALCs are referenced in current OEH consultation policy.	LALCs may be delegated functions by ACH Authority, *'local coordination and support'*	**NSWALC is seeking feedback on proposed roles of LALCs.**
Roles for local panels – section 14 - 17	Minister and OEH have all decision making and administrative roles. The results of any consultation with Aboriginal people is one factor that OEH is to consider when deciding whether to issue an Aboriginal heritage impact permit.	Local panels to negotiate directly with proponents and provide advice on local Aboriginal heritage matters	**Feedback is sought on how the local ACH consultation panel should be formed.** This is proposed to be set out in ACH Authority policies and guidelines. Note Local Panels will play a key role in the new Assessment Pathway. Very short timeframes for negotiation are proposed. Adequate resourcing will be critical.
Aims C – Better information management			
Mapping – section 19	Mapping managed by OEH. No roles legislated for Aboriginal peoples in managing Aboriginal Heritage Information Management System. Allows access to AHIMS by Aboriginal people and organisations, those undertaking due diligence, and public and local authorities.	Mapping managed by ACH Authority. Proposals paper provides that Local ACH maps to be developed by Local Consultation panels with their support body (LALCs proposed to be delegated these roles) to refine and improve upon the NSW ACH Map. Support body may be delegated roles to administer maps at local level. Proposed to be a restricted access and public portal.	ACH Authority to prepare NSW ACH Map which will be the first stage of the Assessment Pathway. Maps and mapping methodology to be approved by Minister. The proposals paper outlines that the Minister will only need to approve the NSW ACH Map which is not proposed to publicly identify specific locations or details about ACH. The relationship between the draft Local maps and the ACH Map and the approval process in relation to these maps needs further clarification.

Aim D – Improved protection, management and conservation of ACH			
Declared ACH – section 18	Minister may declare 'Aboriginal Places' if Minister is of the opinion the place is or was of special significance with respect to Aboriginal culture.	Declared ACH to replace the current 'Aboriginal Places' provisions. Some consultation with local panel and others including landholders required.	Minister proposed to make declarations on recommendation of ACH Authority. No timeframes for Minister to make a decision. Minister may allow additional activities to take place.
Intangible ACH agreements – sections 36- 38	Not included in current NPW Act	New Intangible ACH agreements, new offence for knowingly using registered intangible cultural heritage for commercial purposes without agreement.	Further safeguards may be needed
Repatriation – section 25	Provisions for 'disposing' of Aboriginal objects which may include returning.	New repatriation provisions setting out processes for the ACH Authority to return Aboriginal cultural heritage including consultation with the local ACH Panel	
Offences and penalties if Aboriginal heritage is harmed – sections 40, 41, 119	Maximum penalty amounts for most serious offences $1.1 million For corporations, and $ 500,000 for individuals (+ up to 2 years imprisonment).	Maximum penalty amounts for most serious offences proposed to be $1,650,000 for a corporation & $330,000 for an individual (+ up to one year imprisonment).	Extra elements of "*intentionally and recklessly*" have been added to the harm offence which will make it harder to prove. Aggravating factors have been removed. Concern regarding how Aboriginal heritage will be protected if it's not '*declared*'. There will no longer be higher penalties for the strict liability offence of harming an Aboriginal place (now 'declared ACH'). Proposals paper outlines that definition of desecration will be in Bill however it hasn't been included.
Ownership of certain Aboriginal objects – section 24	Certain Aboriginal objects current the property of the Crown	Certain Aboriginal objects to be transferred to the ACH Authority to hold on behalf of Aboriginal people	

New voluntary conservation agreements – sections 28 - 35	Agreements may be made between land owners and Minister	Agreements may be made between land owners and the ACH Authority	Mining and petroleum activities may still be carried out despite a conservation agreement.
ACH Fund – sections 63-70	Not currently in NPW Act, though there is some funding for Aboriginal heritage eg. 'Protecting our places' program	New provisions to guide the prioritisation of funding on Aboriginal cultural heritage conservation in NSW.	Clearer provisions needed regarding ACH Fund Minister approves the Funding Allocation Strategy.
Aim E – Greater confidence in the regulatory system			
ACH Assessment Pathway – sections 54- 59	Due diligence process currently set out in OEH guidelines	Key stages of new 'Assessment Pathway' set out in Bill.	Additional safeguards and minimum standards needed. Still relies on proponent to check map of 'known and likely' Aboriginal heritage to trigger further assessment and consultation. Details to be set out in a Code of Practice developed by ACH Authority and approved by Minister.
ACH Management Plan (ACHMP) – sections 46 - 52	Aboriginal heritage impact permits (**AHIP**) which can authorise harm to Aboriginal heritage are issued by OEH	ACHMP to replace AHIPs. ACHMP to be negotiated between proponent and local panel, and approved (or refused) by ACH Authority	Very short timeframes for Panel and proponent to negotiate ACHMPs proposed. Additional safeguards needed. Amendments to decision making criteria needed.
Integration with planning system – sections 60 - 62	No legislated requirement for proponents to consider Aboriginal heritage before seeking development consent. No clear links with NSW planning laws. No requirements for state significant development to consider Aboriginal heritage.	Proponents to seek Aboriginal heritage approvals prior to seeking development consent with some exceptions including for State significant development and complying development.	No legislated requirements for state significant development to consider Aboriginal heritage however Secretary's Environmental Assessment Requirements (SEARs) is proposed to be updated to adopt key features of ACH Management Plan negotiation process and supporting guidelines. Clearer provisions needed regarding complying and integrated development. The proposed interaction with the planning system is complex.
Defences – sections 42- 45	Broad defences available if Aboriginal heritage is harmed including for low	Review of 'low environmental impact' list is being undertaken	Broad defences proposed to be retained including 'low environmental impact',

	impact, due diligence and codes. Codes can only be made if meet minimum standards and consultation with ACHAC.		following Assessment Pathway (previously due diligence) and Minister may make additional defences via Codes.
Appeals and reviews – includes section 52	Judicial reviews and merits appeals available for proponents	Some dispute resolution processes proposed	Judicial review available for breaches of the Act. Merits appeals of ACH Authority's decision about ACH Management Plans available for proponents but not for Aboriginal people. Equitable merits appeals should be available.
Compliance and enforcement – Parts 7, 8 and 0	Aboriginal people have no role in compliance and enforcement. OEH may issues stop work and interim protection orders.	• ACH Authority to undertake compliance and enforcement. • New investigation powers ability to issue stop work orders. • Anyone may bring proceedings for breaches. • Scope for LALCs to be delegated functions eg. 'authorized officers'.	

*This document provides information about the NSW Government's proposed model for new Aboriginal Culture and Heritage laws. This document has been prepared by the New South Wales Aboriginal Land Council (**NSWALC**) for Local Aboriginal Land Councils (**LALCs**) and Aboriginal communities in NSW.*

***Please Note**: While all care has been taken in the preparation of this document, the advice it contains should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of 7 March 2018.*

Overview – proposed structures and functions

Courts	•Proceedings for offences •Judicial review of administrative decisions •Some merits appeals – eg. Refusal of proposed ACH management plan (section.52)
Minister *Proposals Paper, page 21*	•Appoint ACH Authority members – s.8(2) •Approve ACH declarations as recommended by ACH Authority – s.18 • Approve NSW ACH maps prepared by ACH Authority (not local maps) and mapping methodology - s.20 • Approve ACH assessment pathway Code of Practice – s.54
ACH Authority All Aboriginal People NSWALC represented Draft Bill, ss.6-12	• Form local ACH consultation panels – s.12(2), ss.14-15, s.17 • Approve or refuse ACH management plans (ACHMPs replace AHIP) – s.49 • Establish and manage ACH information system – s.19 • Enter into ACH conservation agreements – s.28 • Manage ACH fund – s.64 • Compliance and enforcement – Part7, 8 & 9 •Repatriation – s.25
Local coordination and support Draft Bill s.13(3) Proposals paper, p.19-21	•Coordinate formation of consultation panels and support their operation •Gather ACH information, prepare maps and administer the ACH Information System database at the local level •Prepare ACH Strategic Plan, seek and invest funding for conservation outcomes •Be first point of contact for proponents and coordinate contact •*ACH Authority may delegate functions to other Aboriginal organisations if LALC chooses not to take on functions or LALC does not have capacity – see consultation note*
Local ACH Consultation Panel Draft Bill, ss.14-17 Proposals paper p.17	•Represent Aboriginal cultural heritage authority – s.16(1) •Negotiate ACH management plans with proponents – s.16(2)(a) •Prepare local maps and develop ACH strategic plans for approval – s.16(2)(b) •Advise ACH Authority on recommendations for declaration of ACH, nominations for State Heritage Register, proposed ACH conservation agreements, repatriation of Aboriginal objects – s.16(2)(c)

Note: Section numbers refer to draft Bill; page numbers refer to 'A proposed new legal framework' document.