



**New South Wales
Aboriginal Land Council**

Recommendations from NSWALC submission in response to 2013 Government Model

Key recommendations:

1. Prior to the release of any draft legislation for Aboriginal culture and heritage protections in NSW, there must be further consultation with peak Aboriginal organisations, including NSWALC and NTSCORP. This must include consultations on any revisions of the government's proposed model, and any regulations and associated policies and guidance materials.
2. Aboriginal Land Councils culture and heritage roles must be recognised in any new legislation.
3. Public consultation on draft Aboriginal culture and heritage legislation should allow at least 3 months for comment/feedback.

The current reform process:

4. The schedule for the development of any new Aboriginal culture and heritage legislation must be prioritised in order to ensure meaningful input by Aboriginal peoples and its successful passage through Parliament. Any amendment to the proposed schedule should be discussed with key stakeholders including NSWALC and NTSCORP.
5. The Government must outline clear timeframes for the development and implementation of new Aboriginal culture and heritage laws, regulations and associated policies and guidance materials.
6. Clarification should be provided about what resources will be available to develop new legislation, to what extent existing mechanisms will inform any new legislation, and opportunities for communities to have a say in these processes.
7. Given the significance of the proposed reform of Aboriginal culture and heritage laws in NSW, public consultation on the draft legislation should allow a minimum of three months.

Creation of standalone legislation:

8. Any new Aboriginal culture and heritage law must build upon existing Aboriginal controlled administrative and governance structures; Aboriginal Land Councils and Native Title groups must be incorporated.

Objectives and preamble:

9. New laws and related instruments for Aboriginal culture and heritage must include the following objectives:
 - a. To protect and promote all Aboriginal culture and heritage,
 - b. To promote self-determination, including to provide decision-making and control to Aboriginal people, both at State and local levels,
 - c. To provide an ecologically, economically and socially sustainable framework for the protection of Aboriginal culture and heritage,
 - d. To complement the *Aboriginal Land Rights Act*,
 - e. To complement the *Native Title Act*,
 - f. To vest ownership of Aboriginal heritage in Aboriginal people, not government, and
 - g. To establish an effective system of prosecution, penalties and reparations.

In addition, international human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples*¹, must underpin new laws.

10. The new laws for Aboriginal culture and heritage in NSW must provide for:
 - a. Specific enforceable mechanisms that operationalise and implement these objectives, and
 - b. Robust and transparent review, appeal and monitoring mechanisms.

Interactions with other legislation:

11. Aboriginal culture and heritage laws must integrate with and complement planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning and development assessment processes.
12. Any new system to better protect Aboriginal heritage will require thorough consideration of amendments to planning legislation to ensure that, at a minimum, planning laws include objectives to protect Aboriginal heritage and processes that require engagement with Aboriginal people in the identification and any subsequent decisions about Aboriginal heritage.
13. Existing statutory mechanisms for protecting Aboriginal heritage should be factored in to any new legislation, including Land Rights and Native Title.

Composition and appointment of Local Aboriginal Culture and Heritage Committees:

14. The composition of any Aboriginal Culture and Heritage Committee or body established under a new law must ensure:
 - a. Aboriginal people have genuine decision-making roles and are the sole determiners of Aboriginal cultural heritage,
 - b. Aboriginal Land Councils culture and heritage roles are recognised in any new model, including their advocacy and support roles. Aboriginal Land Councils should be able to provide a body corporate role auspicing and holding assets for the local committees, and
 - c. Sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local committees.
15. NSWALC supports Aboriginal controlled administrative and governance structures, at both the local and state levels, for the management and protection of Aboriginal culture and heritage. NSWALC does not support the use of Ministerial appointed committees as being the appropriate source of cultural authority.
16. NSWALC strongly recommends the Government fund the expansion of the Aboriginal Owners Register under the *Aboriginal Land Rights Act (NSW)* to cover the whole of NSW, to enable Aboriginal Owners to be the authority to speak for Country on Aboriginal culture and heritage issues.

Roles and responsibilities of Local Aboriginal Culture and Heritage Committees:

17. New Aboriginal culture and heritage laws must provide for genuine decision-making powers to be given to local Aboriginal peoples in relation to the day-to-day management and protection of Aboriginal heritage; processes that do not allow Aboriginal people to have meaningful input into

¹ The United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly in 2007 and endorsed by the Australian Government in 2009, identifies international principles that Australian laws and planning should consider in order to close the gap between the lives of Aboriginal peoples.

activities and developments and/or bypass processes that provide for proper consultation and assessment are not supported.

18. Local Aboriginal Culture and Heritage Committees must be properly resourced and they must be able to attract representatives with the necessary skills to ensure free and informed decision making at the local level.

Funding and remuneration:

19. The Government model fails to identify how the new system will be funded, in particular how the new local Aboriginal Culture and Heritage Committees will be resourced to carry out their functions which are broad, resource intensive and ongoing; proper resourcing and funding of a new system and the administrative structures underpinning this system are required from both government and proponents.
20. The resourcing of a new law for the protection and management of Aboriginal culture and heritage must not be solely reliant upon funds provided from proponents for compensation for the destruction of Aboriginal heritage based upon negotiated agreements; the Government must contribute resources to support the ongoing management and protection of Aboriginal culture and heritage.

Governance:

21. NSWALC supports a state level Aboriginal controlled body, *separate from Government*, to undertake governance, oversight and support functions for a new model for the protection and management of Aboriginal culture and heritage; NSWALC does not support significant governance oversight to continue to be maintained by Government.
22. Any new model to support the protection and management of Aboriginal culture and heritage must build on existing Aboriginal community controlled structures; NSWALC supports building on the Aboriginal Land Rights structures to support a new model for Aboriginal culture and heritage laws.

Role of Local Aboriginal Land Councils (LALCs):

23. NSWALC strongly opposes a Government model for reform that fails to acknowledge the crucial role of Aboriginal Land Councils in the protection and management of Aboriginal culture and heritage in NSW.
24. NSWALC encourages the Government to reconsider the recommendation of the Government Working Party to build upon the land rights network to support new laws for Aboriginal culture and heritage protection and management. A new model for reform must acknowledge the current roles and functions of Aboriginal Land Councils and ensure roles for Aboriginal Land Councils in the new model that are genuinely complimentary to these functions.

Aboriginal Culture and Heritage Advisory Council (ACHAC):

25. NSWALC supports a genuinely independent Aboriginal Culture and Heritage Commission to undertake key oversight, governance, support, advocacy and compliance functions in a new system and not a Ministerially appointed committee. The Commission can be resourced through re-allocating funds from the OEH to the Commission.

Roles for Government:

26. Government roles must be kept to a minimum and the key oversight functions with regard to Aboriginal culture and heritage protection and management must lie with an *Independent* Aboriginal Culture and Heritage Commission with appropriate resourcing.

Consultation:

27. NSWALC does not support a new model for reform of Aboriginal culture and heritage laws that allows proponents to bypass Local Aboriginal Culture and Heritage Committees in relation to potential harm to Aboriginal culture and heritage; Aboriginal communities must be supported to make decisions about matters that affect them.
28. Local Aboriginal Culture and Heritage Committees must have the appropriate community and representative authority and be capable of properly consulting/granting permission on behalf of community with regard to Aboriginal culture and heritage.

Boundaries:

29. Boundaries in a new system should be based on Aboriginal Land Council boundaries, with the development of protocols and agreements to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.

What is protected?

30. NSWALC supports the Government's position that a broad all-encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values must be included in new laws. However this broad definition must be accompanied by enforceable mechanisms to protect Aboriginal heritage, including cultural and intellectual property rights.
31. Mechanisms to identify and record Aboriginal heritage must be based on mandatory and uniformly applied best practice standards for the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information.
32. NSWALC recognises that all Aboriginal heritage including contemporary heritage is important to Aboriginal people and supports decision making by local Aboriginal people about Aboriginal culture and heritage. Proposals to classify Aboriginal heritage as 'low' value are not supported by NSWALC.

Timeframes:

33. Any mandatory timeframes set out in legislation must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities.

Aboriginal Culture and Heritage register, mapping and Plans of Management:

34. Maps and plans should be used as guidance 'tools' for proponents, and must not be used as the sole decision-making tools. NSWALC does not support a system that relies on mapping and Plans of Management to make important decisions about Aboriginal culture and heritage management and protection, at the expense of consultation with Aboriginal people.
35. Processes that do not allow Aboriginal people to have a say over activities and developments and/or bypass proper consultation and assessment mechanisms are not supported.

36. Clear requirements for best practice consultation with Aboriginal peoples must be developed in consultation with peak Aboriginal organisations in NSW and Aboriginal communities and enshrined in new laws.

Flexible regulatory processes:

37. Mechanisms that further weigh the system in favor of proponents are not supported. Mechanisms must be developed, including proper criteria and guidelines, to ensure the process of negotiation between Local Aboriginal Culture and Heritage Committees and proponents are fair, equitable and genuine. Proper assessment and consultation processes are needed and must include provisions for assessing cumulative impacts and compensating Aboriginal people for the destruction of Aboriginal heritage.
38. New laws must provide rights for Aboriginal people to refuse an activity or development. There must be processes to refuse a project based on unacceptable impacts to Aboriginal heritage values. This is consistent with Articles 8 and 11 of the United Nations *Declaration on the Rights of Indigenous Peoples* outlining Aboriginal people's rights to practice and revitalise culture, and rights to redress where cultural heritage is harmed without free, prior and informed consent.
39. The proposal to allow proponents to 'proceed with caution' is not supported. Where agreements cannot be reached between a proponent and Local Aboriginal Culture and Heritage Committee an independent Aboriginal heritage commission should have roles here to decide whether or not the project can proceed and any conditions.
40. Consultation must occur with peak Aboriginal organisations including NSWALC and NTSCORP in the development of any draft Regulations, minimum standards and other supporting documents.

Continuation of current flawed process:

41. The due diligence regime should not be carried over in new legislation in its current form. An independent assessment of the due diligence regime and consultation process to determine its effectiveness in protecting Aboriginal heritage should be undertaken.
42. The low impact activity list should be amended to remove a number of activities that are not low impact. An independent assessment of the definitions of low impact activities should be undertaken to ensure that activities are genuinely low impact and do not bypass consultation processes with Aboriginal people where there is a risk of harm to Aboriginal heritage.

Protection of Aboriginal cultural and intellectual property:

43. New laws must include enforceable rights that recognise and protect Aboriginal peoples cultural and intellectual property rights in line with Article 31 of the United Nations *Declaration on the Rights of Indigenous Peoples*.

State of Aboriginal Culture and Heritage Report:

44. New laws for Aboriginal heritage protection must include robust monitoring and reporting, beyond a single state-wide report every 3 years; this reporting must include:
 - a. Operation of the register, maps and Plans of Management,
 - b. Implementation of project agreements,
 - c. Ensuring any due diligence processes are being followed,
 - d. Monitoring cumulative impacts,
 - e. Monitoring illegal destruction,
 - f. Regular compliance checks,
 - g. Operation of administrative structures and decision-makers, and
 - h. Protection outcomes at the local, regional and state levels.

Funding, training and capacity building:

45. A system for managing Aboriginal heritage needs to be appropriately resourced by the Government and proponents in order to properly carry out its functions. Building on the existing structures of the Land Rights Network is supported if properly resourced and funded to reflect the increase in functions performed.
46. The NSW Government must provide the long term funding for programs and initiatives that are necessary to build capacity and generate the sustainable employment and economic development opportunities needed for Aboriginal peoples to engage in a new system for protecting Aboriginal heritage.
47. Any indicative costings, cost benefit analysis and other documents related to the resourcing of this reform process should be publicly released prior to any draft Bill or other consultation materials being publicly released.

Compliance, penalties and enforcements:

48. Mechanisms to actively monitor compliance of the provisions of a new Aboriginal Culture and Heritage Act, coupled with stronger enforcement of breaches of the Act, are needed in a new system.
49. Proper appeal processes and review rights must be incorporated into any new Aboriginal culture and heritage legislation providing mechanisms for Aboriginal peoples to challenge decisions, including merit appeals, and to seek redress where Aboriginal culture and heritage has been damaged or destroyed.

Concerns with the reform process:

50. It is essential that laws and regulations relating to Aboriginal Culture and Heritage in NSW not be adopted without proper consultation with Aboriginal people and peak Aboriginal representative bodies, including the Land Rights network and Native Title groups. This is consistent with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples which states: *“States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”*
51. That when proposing to host consultations Government Departments and Agencies should:
 - a. Contact the relevant LALCs to seek advice about appropriate consultation dates, time and locations, invite LALC staff and members to attend, and enquire about protocols for Welcome to Country ceremonies,
 - b. Contact NSWALC and other peak Aboriginal organisations for advice about appropriate methods for undertaking consultations and any other issues to take into account,
 - c. Provide funding for travel and accommodation for participants to attend meetings where travel will be required,
 - d. Ensure that Government staff undertaking consultations with Aboriginal people are experienced senior staff and have completed cultural awareness training prior to undertaking consultations. This should include training about Acknowledgement of Country and Welcome to Country protocols,
 - e. Provide at least one month’s written notice about upcoming consultations to Aboriginal communities and peak Aboriginal organisations. A minimum of two months should be allotted for communities to provide comment.
 - f. Advertise consultations and workshops widely, including via direct post, email, local and Aboriginal media, local radio in addition to providing direct notification to peak local and

- state Aboriginal organisations. It is insufficient to place details about a consultation on a government website only. It should be noted that in far west NSW there are often significant delays in communities receiving mail,
- g. Seek advice on and take into account local issues /circumstances and important dates for Aboriginal communities such as NAIDOC week when arranging meetings or consultations,
 - h. Contact details of participants should be recorded so that records of meetings can be circulated to meeting participants, and direct opportunities to correct any meeting minutes can be provided,
 - i. Provide plain English documentation and explanations of what the current issues are / rationale for why changes are needed, the content of the proposed reforms, what any proposed reforms are intended to achieve, and evidence for why the reform proposals are justified,
 - j. Provide ongoing, regular reports back about the process, how people can get involved, and when to expect further opportunities to comment,
 - k. Avoid arranging consultations over holiday periods when many organisations may have a close down period; if consultations are to be held during this period, additional time will be needed to allow comment,
 - l. Ensure that consultation periods are coordinated between other government departments and agencies minimise overlap and avoid over consultation with Aboriginal communities,
 - m. Engage independent Aboriginal facilitators to run consultations including facilitating discussions and taking notes,
 - n. Allow time at the beginning of the consultation for participants to introduce themselves to the forum, for any issues to be addressed upfront, and be flexible in format recognising that issues may be different across the State and dynamics may be different – there are ways to convey the same information but using different formats,
 - o. Ensure that if government staff do attend consultations, their presence and roles are made clear (such as an observer, to answer questions), that they are briefed properly on the proposals and process so any questions can be answered, and that they do not have influence over any feedback that might be provided, and
 - p. Ensure venues are booked that are easy for people to travel to, can accommodate additional people at short notice, and for issues of key importance to Aboriginal communities consideration should be given to hosting one day workshops.
52. All submissions made in response to the reform of Aboriginal culture and heritage laws should be made public.
53. A disclaimer should be added to the workshop notes outlining that the notes have not necessarily captured whether there was support for the statements, that views were not necessarily representative or endorsed as part of the consultation process, and that some people raised issues outside of the group or formal part of the workshop.
54. The next stage of the reform process must provide clear information on timelines for proposed changes and details on transitional arrangements.

NSWALC's full submission in response to the proposed 2013 Government model can be accessed at:

<http://alc.org.au/media/97179/140402%20NSWALC%20submission%20Aboriginal%20Culture%20and%20Heritage%20Reform%20FINAL%20.pdf>