

Proposals to reform Aboriginal Culture and Heritage laws in NSW

NSWALC Workshops 2012: Outcomes Report





Published by: NSW Aboriginal Land Council

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April 2013

Design by Media & Marketing,
NSW Aboriginal Land Council.

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Introduction

This report provides a summary of issues raised by members of the Aboriginal Land Council network during workshops hosted by the New South Wales Aboriginal Land Council (NSWALC) in May, June and July 2012 to discuss reforming Aboriginal Culture and Heritage laws in NSW. Some of the workshops were attended by representatives from NTSCORP Limited. NSWALC also received feedback from a number of other interested individuals and groups during this period.

Three alternative models for new laws were canvassed at the workshops and feedback sought from participants on the merits or otherwise of each of the proposals. The three models for new laws were proposed in the *'Protecting the Past, Guarding the Future'* research paper commissioned by NSWALC.¹

It is hoped that this report will assist in building on discussions within and between Aboriginal communities, government and industry about the future of Aboriginal heritage protection and management in NSW. As a collation of ideas and feedback we also hope that this report will be considered in the process to reform Aboriginal culture and heritage laws and inform the next steps of the review.

More information about the NSW Government review of Aboriginal Culture and Heritage laws can be obtained by contacting the NSW Office of Environment and Heritage (OEH) or visiting the OEH website: <http://www.environment.nsw.gov.au/achreform/index.htm>.

More information about NSWALC's *'More than Flora and Fauna'* campaign to improve Aboriginal heritage protection and management can be accessed at: <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx> or by contacting the NSWALC Policy and Research Unit.

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Summary of key workshop themes

General agreement was reached on a number of issues discussed at the workshops, including the distinct need for new Aboriginal culture and heritage laws to provide for decision-making and control by Aboriginal peoples, and for Aboriginal heritage to be properly recognised and protected in new laws. A number of issues were discussed at length where no consensus was reached. It is worth noting that the workshops aimed to provide a forum for discussion and debate rather than seeking a conclusive consensus on all issues. Additionally, a number of participants expressed their desire to consider the models in more detail with their communities.

Many participants were **sceptical that the current reform process would result in genuine reforms** given the history of this issue and raised concerns about how the current review was being undertaken. An Analysis Report prepared by consultants engaged by the OEH to conduct the first round of government workshops held in late 2011 also noted community concern with the current process including poor notification, inadequate timeframes, and concerns regarding the composition of the Working Party.²

¹ The *Protecting the Past, Guarding the Future: Models to reform culture and heritage management in NSW* (2012) report is available on the NSWALC website at: <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>

² See *Reform of New South Wales Aboriginal Culture and Heritage Legislation: Stream 2 Workshop Collation Report*, January 2012, Markwell consulting, available at: <http://www.environment.nsw.gov.au/resources/cultureheritage/AnalysisReport.pdf>

Some participants at the NSWALC workshops felt that a significant amount of work and negotiation was required by Aboriginal leaders in order for the government to agree to new laws that could be broadly supported by the Aboriginal community, and that this process would take time.

In respect to the three models, there was **general support for independent Aboriginal structures** to manage and protect Aboriginal culture and heritage, rather than a government body maintaining responsibility. Some participants expressed disagreement with Model 1 (new Commission structure) as it did not incorporate the Aboriginal Land Council network and could be seen as dividing communities. However, overall a number of elements of Model 1 and Model 2 (two-tiered Aboriginal Land Council structure) were broadly supported or viewed as a starting point for a new system. These included:

- ▶ The need for genuinely Aboriginal controlled organisations to operate at both the State and local levels to ensure proper leadership, oversight and appropriate decision making,
- ▶ Benefits of **building on the Aboriginal Land Council network**, as opposed to creating completely new structures, and
- ▶ That the **roles of the State Government and Minister/s should be kept to a minimum.**

The majority of participants did not want culture and heritage functions of Local Aboriginal Land Councils (LALCs) removed or reduced, however the **need for increased resources and capacity** was noted as key issue if LALCs were to gain increased roles and responsibilities. Model 3 (Registered Aboriginal Party structure) was not generally supported as it was expressed that this could be too divisive or replicate problems that exist in the current system. However it must be noted that due to time limitations Model 3 was not discussed in detail at all forums.

While the sentiment that the right people need to **speak for Country** was generally expressed, some participants felt that all Aboriginal people had a right to have a say on Aboriginal culture and heritage issues. In addition, while there was much support for decentralised control of Aboriginal culture and heritage in the form of LALCs there were differing views on how the right people to speak for Country would be recognised in this system. Several participants recommended that close discussions between LALCs and native title claimants occur, and that all Aboriginal people needed to work together.

At most forums at least one LALC representative provided an example of processes LALCs had already implemented to manage culture and heritage issues in a way that recognised people with authority to speak on culture and heritage matters. This generally involved the formal establishment or convening of an Elders Council or Culture and Heritage Committee to undertake various functions such as site work, mapping or making decisions on Aboriginal heritage matters. The LALCs who had developed sub-committees or councils provided these as positive examples of structures that have been formed to address the issue of how LALCs, native title claimants (often referred to as Traditional Owners), Aboriginal Owners and Elders can work together.

A number of mechanisms were suggested for amending the Aboriginal Owners Register process to ensure that the right people are identified and are involved in decision-making. Some suggestions were put forward to promote positive working relationships between Aboriginal Owners and LALCs, such as developing protocols, creating Aboriginal Owner sub-committees within LALCs, or having a percentage of the LALC board represented by Aboriginal Owners.

There was considerable discussion on issues related to LALC membership, Aboriginality, the Aboriginal Owners Register, and definitions/terminology related to who can speak for Country. There were differing views expressed on the merits of utilising the Aboriginal Owners register to determine who can speak for Country and/or have the final decision on Culture and Heritage matters.

The issue of defining **boundaries** was also discussed at length. There was recognition that the current Aboriginal Land Council boundaries do not necessarily represent traditional boundaries. Differing views were expressed on the merits or otherwise of maintaining existing Aboriginal Land Council boundaries in a new system, amending the LALC boundaries to better reflect traditional cultural boundaries, utilising an alternative system such as local government boundaries, implementing a regional structure, or creating formal agreements between LALCs to assist in working together where traditional cultural boundaries overlap.

A number of participants also advocated that any new system needed to be better recognised and **linked with local council processes and planning laws**.

A range of other issues were discussed as participants felt these would require further consideration/attention in any new system including: membership of land councils and Aboriginality, stolen generations, ongoing racist attitudes, the value placed on Aboriginal heritage and the sale of Aboriginal 'artefacts', concerns relating to repatriation, questions raised about land dealings and the need to consider culture and heritage, the importance of transitional arrangement in any new system and the role of international advocacy in advancing culture and heritage issues.

History of Aboriginal heritage laws in NSW

There has long been recognition from Aboriginal peoples, government, archaeologists and industry groups that the laws in NSW to manage and protect Aboriginal culture and heritage are outdated and inadequate.

Since the late 1970s there have been several government inquiries recommending major reforms to Aboriginal culture and heritage laws in NSW, however none have made it past Cabinet.³ Some of the criticisms of the current laws include:

- NSW is the only state that continues to manage Aboriginal culture and heritage through its flora and fauna legislation – the *National Parks and Wildlife Act (NPW Act)*,
- Aboriginal people have no or limited say about the future of Aboriginal heritage as the NSW Government maintains control and management of Aboriginal heritage, and the Crown has ownership of Aboriginal 'objects',
- The NSW government has the power to issue permits to 'harm' or destroy Aboriginal heritage, and does so at rates of up to 3 per week,⁴
- There is a lack of clear guidance or processes to identify Aboriginal people to be consulted on Aboriginal culture and heritage matters,
- The current system allows development to go ahead even where important heritage will be destroyed, and does not take into account cumulative impacts.⁵

With the link between Aboriginal culture and indicators of socio-economic outcomes well recognised, the indignity and ineffectuality of the current legal regime, which regulates Aboriginal culture and heritage under an Act made to protect flora and fauna, must be addressed by 'broad reform'.

³ Please refer to NSWALC publication titled *Our Sites Our Rights* (2010) for an overview of past reviews available on the NSWALC website: <http://www.alc.org.au/media/61784/110215%20our%20sites%20our%20rights%20final.pdf>

⁴ Note that these figures do not reflect that a single permit may authorise the destruction of hundreds or thousand of 'Aboriginal objects' and sites. Additionally, NSW planning laws provide a separate approval process for 'major projects' or 'state significant developments' that bypass the regular need to obtain permits.

⁵ NSWALC submissions to the NSW Government on Aboriginal heritage issues further identify systemic problems with the current laws. Visit the NSWALC website: <http://www.alc.org.au/culture-and-heritage/site-protection.aspx>. NSWALC Site Protection Fact Sheets outline the laws currently available to protect Aboriginal heritage: <http://www.alc.org.au/publications/fact-sheets.aspx>

Current review and reform process

In late October 2011 the NSW Government announced a revised process for the reform of Aboriginal culture and heritage laws. The previous Working Party (established under the previous Labor Government) was disbanded, new timeframes for the reform process were announced, along with revised terms of reference and the beginning of a 'community consultation' process,⁶ where in some cases, communities were given less than 7 days notice.⁷

A new Aboriginal Culture and Heritage Reform Working Party was subsequently constituted in May 2012 with the aim of advising the Government on options for the protection and management of Aboriginal culture and heritage in NSW by October 2012.

The Working Party held its first meeting on the 14th May 2012, five months after the first and to date only round of 'consultations' were held and public submissions on a discussion paper closed.⁸ The Working Party comprised individuals, rather than representatives of key stakeholder groups and, as such, NSWALC did not have a position on the Working Party.

The OEH had outlined that the Working Party were to develop an options paper which would include a recommended and costed model, based on the feedback from the first round of community and stakeholder consultations by October 2012. A second round of public consultations was to be held from November 2012 to February 2013.

At the time of writing this paper the OEH website indicated that a second round of consultations on a discussion paper *may* be held, but no updated timeframes have been announced.⁹ While the NSW Minister for the Environment and Heritage committed to implementing stand alone legislation,¹⁰ the timeframes for the reform process have been extended. A consultation paper was due for release by the OEH in early 2013, with a consultation process to follow in the first half of 2013. The Working Party are due to provide final recommendations for reform to the NSW Government for their consideration by June 2013.

⁶ The OEH hosted 25 community workshops in November and December 2011. Summaries of these workshops are available on the OEH website at: <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm>

⁷ NSWALC has raised a number of concerns with the NSW Minister for the Environment and the NSW Minister for Aboriginal Affairs about the revised reform process. See for example, Joint Submission by NSWALC and NTSCORP to the NSW Government 'Our Culture in Our Hands', December 2010, available on the 'More than Flora and Fauna' page of the NSWALC website http://www.alc.org.au/media/78829/120112%20nswalc_ntscorp%20broad%20reform%20submission%20final.pdf. More information about the revised reform process and composition of the Working Party can be accessed at: <http://www.environment.nsw.gov.au/achreform/ACHworkingparty.htm>

⁸ The OEH issues paper titled 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform' (October 2011) is available at: <http://www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf>. The OEH 'Summary of Feedback' for the 'Phase 1' consultations is available at: <http://www.environment.nsw.gov.au/resources/cultureheritage/20120403phase1feedback.pdf>

⁹ A Communiqué from the Working Party dated 13 August 2012 states that "The results of all Working Party deliberations will be consolidated into a discussion paper which has commenced development. This paper will be considered by the NSW Government in September and will form the basis for a second round of public consultation and comment." A subsequent Communiqué dated 21 September 2012 states that the Working Party had finalised deliberations and that a "discussion paper will be considered by the NSW Government and may form the basis for a third round of public consultation and comment." It is not clear why this Communiqué refers to a third round of consultations.

¹⁰ General Purpose Standing Committee No. 5, Budget Estimates Hearing, Thursday 11 October 2012, Examination of proposed expenditure for the portfolio areas Environment and Heritage, Transcript available at [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d009fe312b3b6ed5ca257a99000eea46/\\$FILE/121012%20Environment%20Heritage%20Transcript.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d009fe312b3b6ed5ca257a99000eea46/$FILE/121012%20Environment%20Heritage%20Transcript.pdf) (see page 43)

Three proposed models for reform

With the aim of raising awareness and promoting discussion about the reform process NSWALC commissioned research into what a new system for the protection and management of Aboriginal culture and heritage could look like. Three alternative models for new laws were developed. The models were broad in their themes and structures so they could be used as a starting point for discussions around how new systems could work in practice and potential issues and solutions. NSWALC did not endorse any of the models and sought feedback in order to gauge options and elements that could be supported.

Three proposed models for reform were developed based on:

- NSWALC Key Principles for reform,¹¹
- Best practice elements of what has been working in other jurisdictions (both nationally and internationally), and
- The views of key stakeholders and Aboriginal communities.

A brief overview of each of the three models developed is outlined below. The three models are further detailed in the ‘*Protecting the Past, Guarding the Future: Models to reform culture and heritage management in NSW*’ report prepared for NSWALC.¹²

In brief, the three proposed models were:

Model 1: NSW Aboriginal Culture and Heritage Commission

This model proposes the establishment of a NSW Aboriginal Culture and Heritage Commission controlled by Regional Councils or Boards nominated by Aboriginal groups. The Regional Councils/Boards would be elected or selected to reflect traditional Aboriginal nation groupings and would be the one contact point for development decisions, and would undertake consultation with other relevant Aboriginal groups. A State-wide NSW Council would control the Commission and have functions to provide advice, training, community education, research and advice to NSW Government agencies.

Aboriginal Land Councils continue to exercise functions as per the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), with some amendments to recognise that Aboriginal Land Councils no longer have a function to protect culture and heritage beyond the lands which they have claimed or directly control.

This model reflects the recommendations of past reviews of Aboriginal heritage in NSW and some aspects of the Northern Territory Aboriginal Areas Protection Authority. Development of this system would involve the establishment of new structures.

Model 2: Two-tiered Aboriginal Land Councils

This model proposes to build on the existing Aboriginal Land Council structures under the ALRA by creating two complimentary but separate voting memberships within Aboriginal Land Councils. While a LALC Board is currently elected by the general Aboriginal membership of the LALC, a separate ‘Aboriginal Owners Council’ would be selected or elected by Aboriginal Owners and become responsible for making decisions for Aboriginal culture, heritage and culturally significant lands and waters.

At the state level a ‘NSW Aboriginal Owners Council’ made up of elected regional Aboriginal Owners would exercise a culture and heritage advice and oversight role, separate and complimentary to the existing elected Council of NSWALC. This model refers to some Indigenous committees established by some First Nations (North American and Canadian) groups.

¹¹ Available at Appendix 1 of the ‘*Protecting the Past, Guarding the Future*’ report

¹² S. Ellsmore (2012) *Protecting the Past, Guarding the Future: Models to reform culture and heritage management in NSW*, report available on NSWALC website at: <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>

Model 3: Registered Aboriginal Party model

This model proposes a Registered Aboriginal Party (RAP) model, with Aboriginal organisations able to nominate who can become responsible for managing Aboriginal heritage over a particular area. A central State-wide Aboriginal Culture and Heritage Council would be established to undertake some oversight functions including the selection of which Aboriginal groups will become the RAP for an area.

This option references the current *Victorian Aboriginal Heritage Act 2006* (Vic) system, though with significant changes to recognise the existing Aboriginal organisations in NSW such as Aboriginal Land Councils and Native Title groups and to respond to some of the issues which have been identified through the recent reviews of the operation of the Victorian Act.

NSWALC Culture and Heritage Workshops 2012

1. Problems with the current system

Ongoing concern with the current laws was a recurrent theme at all forums. Strong concerns were raised that the current laws are not working to protect Aboriginal heritage and do not provide Aboriginal people control or ownership of Aboriginal heritage. There was general consensus that the current provisions to protect Aboriginal heritage are inadequate and need to be removed from the *National Parks and Wildlife Act, 1974* (NSW) and instituted in separate legislation or incorporated into the ALRA.

Many examples of negative experiences of the current laws and government policies were provided. The level of dissatisfaction with the current laws was illustrated by the range of issues identified by participants. Some of the concerns included:

“Consultation is not consent”

Consultation, engagement and decision-making

- There is poor notification and consultation processes undertaken by proponents¹³ and local government authorities, with some LALCs not finding out about developments until they were approved or underway,
- Some proponents ‘pick’ who they want to consult with. It was expressed that government and developers “go shopping”, meaning that they choose who proponents will consult with to get the answer they want,
- The current system doesn’t provide Aboriginal people with genuine decision-making roles, and that developments can be approved and permits issued by government even if Aboriginal people do not agree. For example one participant stated that “*Consultation is not consent*”. Another participant stated that “*Decisions are made by government department and agencies but they don’t come and knock on the land councils’ door*”,
- Government consultation policies are too broad and allow people who may not be Aboriginal or may not have a connection to Country to have a say. Participants expressed that Aboriginal places are being destroyed every day as the wrong people are having a say about Aboriginal culture and heritage,
- That the government and proponents use land rights and native title against each other,
- Proponents tell LALCs and government that they have consulted with the community and projects go ahead, when there hasn’t been proper consultation,
- Some government agencies use information from a 20 year old report, rather than consult with the Aboriginal community and LALCs, and
- LALC site officers who do work with proponents and government agencies to undertake site inspections felt that these proponents are just “*ticking a box*”.

¹³ ‘Proponent’ is the term used by government to describe someone who is proposing to undertake an activity or development. In this report ‘proponent’ generally refers to developers and miners, etc.

Destruction of Aboriginal culture and heritage

- There is alarm at the high rate of Aboriginal Heritage Impact Permits (AHIPs) issued to damage or destroy Aboriginal heritage, in addition to the large number of sites destroyed outside of the permit process,
- The conditions of AHIPs aren't always followed, and there appears to be a lack of compliance and monitoring work being undertaken,
- Proponents who do destroy Aboriginal heritage are rarely fined or penalised so there is no incentive for people to protect Aboriginal heritage. A participant stated that all proponents get if they destroy an Aboriginal site is a “slap on the hand”... “They [government] never prosecuted anyone under the old law, and are still not prosecuting”,
- There isn't enough information in the Aboriginal community about what AHIPs are, and that people need more information if Aboriginal people are to fully engage and understand what is being agreed to,
- The due diligence process allows proponents to destroy Aboriginal heritage,
- There are too many “gung ho consultants” who are undertaking work for the money rather than to protect Aboriginal heritage,
- The current laws are too weak to protect Aboriginal heritage, and that under the *National Parks and Wildlife Act* or any law in NSW, there are few mechanisms that actually protect Aboriginal sites. Comparisons were made between the disregard shown for Aboriginal

“Doesn't matter how many consultations we have, we are still not getting control.”

heritage sites that are hundreds or thousands of years old compared to the significance placed on non-Aboriginal sites such as

some 100 year old buildings in Sydney, and

- “Most of the money at the moment is spent on avoiding protecting heritage.”

Aboriginal cultural knowledge

- The emphasis in the current system is on archaeology. Little value is placed on Aboriginal people's knowledge. For example one participant stated that “It's all about scientific knowledge...It's not about our cultural rights”. Some participants expressed that non-Aboriginal consultants and heritage professionals are paid large sums of money by government agencies, miners or developers, but that Aboriginal people are not paid or paid significantly smaller sums for their expertise and knowledge,
- There are problems with archaeologists and the government's reliance on the government database Aboriginal Heritage Information Management System (AHIMS) for all their information. The information in AHIMS is not complete or always correct, and there were concerns regarding the use of the cultural knowledge contained in the database,
- Proponents and consultants are “interfering” with Aboriginal spirituality,
- There was concern regarding cultural mapping projects, and how this information used, particularly if it will be used to destroy sites, and
- There was frustration that even when the proper process is followed, and Aboriginal people provide local councils or proponents with information about the location of Aboriginal sites, sites are still destroyed.

**“It's all about scientific knowledge...
It's not about our cultural rights”**

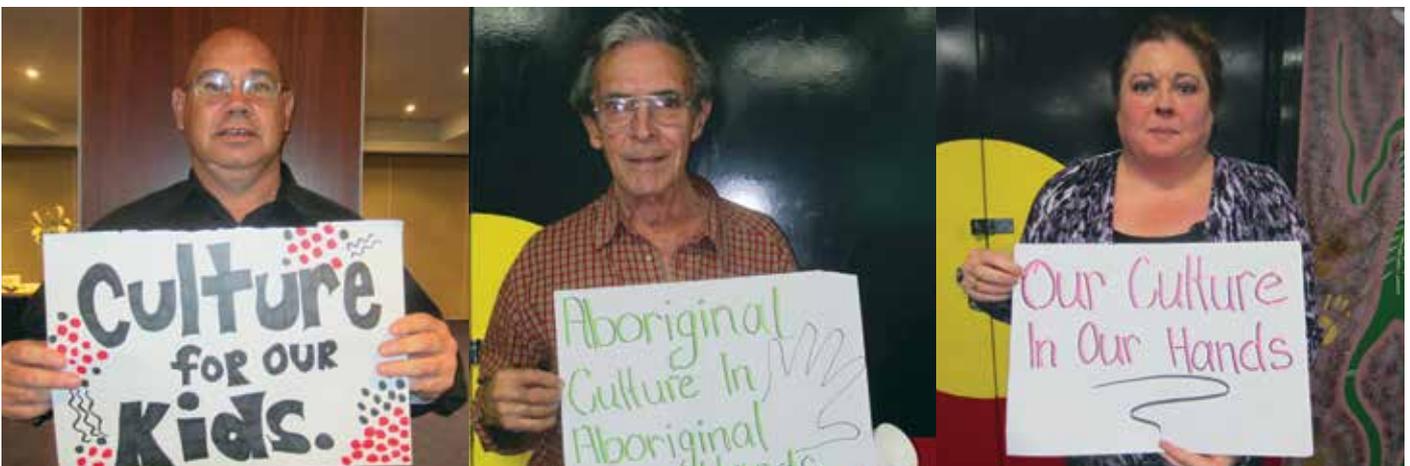
Inequities in the current system

- There are tensions and hostility between some communities and government agencies/ proponents. As a result some communities feel the only way to have a say is to protest in order to stop the destruction of Aboriginal heritage sites,
- There are structural inequities in the current system between bigger industries or companies and the Aboriginal community. Some participants noted that the laws and processes are complicated, and the Aboriginal community needs more information to properly engage. It was also felt that the government and developers have all the control over the process.

A number of participants mentioned that they had started to work closely with their Local Government Authority and that this had assisted in ensuring LALCs were consulted in development assessment (DA) processes. Other LALCs noted that they had some success in dealing with proponents by making it clear up front that if they listened to what the community wanted and worked through the proper process it would save the proponent time and money later on.

Overall there was:

- ▶ There was consensus that the current laws are deeply flawed and are failing to protect Aboriginal heritage, even in circumstances where clear destruction has occurred.
- ▶ The 2010 amendments have not increased protections for Aboriginal heritage. The due diligence process is flawed as it does not require any consultation with Aboriginal people, even where there are works taking place in the vicinity of known Aboriginal objects, in addition to providing broad defences for proponents.
- ▶ There was opposition to maintaining the status quo, particularly in relation to maintaining a large role for government in culture and heritage decision making and management.
- ▶ New laws need to be separate from the National Parks and Wildlife Act 1974.
- ▶ New laws must recognise Aboriginal peoples rights.
- ▶ New laws must provide rights for redress for Aboriginal people, and must include merit appeals where Aboriginal heritage has been destroyed.



2. Review and reform process

Concerns about the current reform process were raised and discussed at all forums, with some participants suggesting ideas for how NSWALC and the Aboriginal Land Council network should respond. Some participants felt that there was not a genuine commitment by Government to returning control and ownership of Aboriginal heritage to Aboriginal peoples, which included proper funding and resourcing for Aboriginal organisations to actively protect Aboriginal culture and heritage. Some participants raised concerns about disengagement by Aboriginal people due to the lack of faith in government to deliver real reforms.

Timeframes

Many participants felt that the government's timeframe for reform was too short and that this could be a deliberate strategy to discourage people to have a say. Other participants expressed that the reform process was going to be a hard road, but was worthwhile if Aboriginal people would get control of Aboriginal culture and heritage. Some participants recognised that NSWALC had been circulating lots of information to LALCs on culture and heritage issues but felt that there were a number of other important issues that were creating competing priorities for LALCs including the ALRA review, sustainability of the network and the regular reporting and compliance requirements under the ALRA.

Engagement and consultation

Several participants who attended the OEH consultations held in late 2011 criticised how the consultations had been conducted. Concerns cited included the short notification provided, in some cases less than one week; that the consultations weren't genuine as there wasn't enough time to discuss the issues in detail; that consultations were only held in a small number of locations; that OEH staff outnumbered community members at the forums; and the attendance of LALC representatives was not recorded in some instances. One participant felt that "they [the facilitators] didn't want to listen to what we had to say".

Some participants stated that LALCs and the Aboriginal community are getting tired of government consultation processes where there are no outcomes for the community or what the community says isn't listened to.

Several participants questioned the point of the two hour OEH 'feedback forums' held in 11 locations in June and July 2012, and felt that resources were being wasted on these forums, which should have been directed at hosting proper consultations instead.

In addition, there were strong concerns that the government was trying to put a wedge between native title claimants and LALCs, and that the reforms if not done properly, would create conflict in Aboriginal communities. There was acknowledgement at the majority of forums that Aboriginal people should be united around Aboriginal culture and heritage issues, however there were concerns regarding issues such as payments for site surveys, who speaks for Country and who should have final say (discussed further below).

Participants felt that there needed to be more community awareness and discussion around any proposed models and that more time would be needed to properly canvass the views of Aboriginal communities more broadly. In addition, there was uncertainty about how Aboriginal communities could ensure their views were taken into account in the government reform process.

Working Party

Many participants expressed concern regarding the formation and composition of the Working Party including that the invitation process was restricted, and that the majority of the membership of the Working Party were non-Aboriginal people. Some participants questioned where the working party would be getting their information from, and how the Working Party would make decisions. Some participants felt that it was disingenuous to create a Working Party that did not directly consult with Aboriginal people and was industry driven, having individuals who came from the mining, development and farming industries having positions on the Working Party, rather than more Aboriginal members. A number of participants felt disempowered and stated that industry groups only care about this issue due to money stating that “*It’s all about commercialisation and the dollars*”.

The perceived confidentiality and lack of transparency around the Working Party and the reform process was also questioned. Some participants raised concerns that the Working Party experience was similar to the way in which some government committees operate where strict confidentiality clauses are in place, driven by government bureaucrats and committee members are not able to seek independent advice or information before being asked to make decisions. Some participants felt that such committees are used by government as a “*rubber stamp*” for government to say they consulted with Aboriginal people or Aboriginal people had input into the policy.

Participants were also alarmed that NSWALC and NTSCORP were not represented on the Working Party.

Lack of trust in government

On several occasions participants expressed a lack of faith in government and in the current process to create a better system for managing and protecting Aboriginal heritage, particularly given the history of reviews and the apparent lack of transparency in the current process. One participant stated “*Where is the fairness, equity, openness, transparency?*” Another participant stated that it “*doesn’t matter how many consultations they have, we are still not getting control*”. Other similar comments were made, with some participants quite disheartened at the prospect that the reform process had “*nothing to do with safeguarding Aboriginal sites...*” or that government are “*setting us all up to fail*”. Some participants felt that trying to pursue a community driven model would not work as government would already have their own model.

Some participants were concerned that the reform process was being used to “streamline” planning and development processes for proponents and government who want to reduce the opportunities for Aboriginal people to be consulted, rather than to better protect Aboriginal heritage. There was some concern raised that new laws could just be a cut and paste of the *National Parks and Wildlife Act*.

Several participants felt that LALC members needed to become more ‘proactive’ and apply to the Registrar of the ALRA to be on the Aboriginal Owners register as there was distrust in the government to utilise or build on the land rights system in new culture and heritage laws.¹⁴ Strong concerns were raised at comments made by OEH staff that NSWALC is not representative of LALCs and that NSWALC is just one voice.¹⁵

¹⁴ It was noted that some people who had applied to be listed on the Aboriginal Owners Register were refused on the basis that the Registrar’s Office was under-resourced and was only able to include people on the Register if they were part of lands handed back or due to be handed back to Aboriginal people under the Joint-Management provisions in the National Parks and Wildlife Act.

¹⁵ See Ministerial briefs prepared by OEH staff, publicly released as a result of an Order for Papers lodged in the Legislative Council of NSW Parliament by Greens MLC David Shoebridge on 14 February 2012. Hansard available at: http://www.parliament.nsw.gov.au/prod%5Cparliament%5Chanstrans.nsf/V3ByKey/LC20120214?open&refNavID=HA6_1

Calls for increased community awareness and participation

A number of suggestions to increase community awareness were put forward by participants who felt that the reform process was not genuine. Suggestions included:

- A campaign to raise awareness, lobby government, collect signatures, protest, and march to NSW Parliament, and that Aboriginal people and other Aboriginal service providers and organisations should be made aware of this issue,
- Utilise the United Nations Declaration on the Rights of Indigenous Peoples UNDRIP and take international action on this issue,
- That there should be big community forums on culture and heritage where LALCs, Aboriginal Owners and native title groups are all invited. One participant stated that “It’s an overarching issue – it’s not about LALCs or native title – it’s about protecting Aboriginal Culture and Heritage”, and
- That participants from the forums should take the information presented at the workshops back to their communities and have local meetings to discuss the models.

Overall there was:

- ▶ Frustration and lack of faith in the current process to deliver genuine reforms.
- ▶ Feedback that reforms shouldn’t be a ‘cut and paste’ of current laws.

3. Aboriginal control, management and decision-making

Background

Under the current laws, the Chief Executive of the OEH is responsible for the protection of Aboriginal ‘objects’ and declared Aboriginal ‘places’, as well as issuing permits (AHIPs) to ‘harm’ Aboriginal heritage.

All three models propose that many of the functions currently undertaken by NSW Government, principally the OEH, be transferred to Aboriginal controlled organisations, with some oversight functions for the Registrar of the ALRA and the Minister for Aboriginal Affairs or Minister for Heritage. This means significantly increasing the roles and responsibilities of Aboriginal peoples. In brief, Model 1 proposes a decreased culture and heritage role for Aboriginal Land Councils with the establishment of new regional councils and a state-wide commission. Model 2 proposes a significantly increased role for LALCs. The role of LALCs in Model 3 depends on whether a LALC becomes a RAP.

“We need our own Act that has the powers...”

Aboriginal Culture and Heritage Commission or Aboriginal Land Councils?

Some participants expressed strong disagreement with Model 1 as it did not incorporate the Aboriginal Land Council network and could be seen as dividing communities while other participants felt that an Independent Aboriginal controlled Commission or body could be supported with some changes.

Overall a number of elements of Model 1 and Model 2 were broadly supported or viewed as a starting point. Some participants suggested that the idea of an Independent Aboriginal Commission (Model 1) could be positive however recommended that LALCs are expressly incorporated. Several participants stated that currently many LALCs are the key organisations who take care of Aboriginal sites, and this needed to be recognised in a new system. Several LALCs stated that they currently need to make room in their budgets to undertake Aboriginal heritage work, even though LALCs have no powers, and this can be very difficult. This point highlighted the need for funding and resources to be provided if the government were to hand back control of Aboriginal heritage to Aboriginal peoples (further discussed in section 6 below).

There were several calls to strengthen the culture and heritage sections of the ALRA and a number of participants expressed that the ALRA was originally intended to be accompanied by provisions for culture and heritage.

A number of participants were concerned that Model 2 would put a lot of strain on the Aboriginal Land Rights network unless it was properly resourced and that it could be a cost-shifting exercise for government, and as such wouldn't mind a new structure if Aboriginal people had control over it. Another participant felt that the new system should be independent of Aboriginal Land Councils as it could be too confusing to bring culture and heritage into the ALRA.

There was a suggestion that none of the models should reference a 'Commission' as this word was associated with negative connotations historically.

Building on existing structures

It was generally expressed that creating new structures or identifying 'individuals' could divide Aboriginal communities. Several participants expressed that they didn't want another structure on top of what already exists, and felt that in NSW there are already two main groups – Aboriginal Land Councils and Native Title. It was expressed that adding another group to the mix would create more problems. A number of participants felt that Model 3 would cause conflict and divisions, and is similar to the current system, which is not working well. One participant questioned "Why do you want to set up a new body when you already have a State Land Council?" Another participant stated that there are "Too many groups already". Recent experiences with various government policies were also drawn upon to express how the creation of new structures by government could divide communities and waste money. Concerns were also raised about creating competition for scarce funding and resources by creating new structures.

While there was generally strong support for building on the Land Rights network there were also concerns raised about sustainability of the network, increasing workload placed on LALCs, and the threat of LALCs that being closed down if they are not compliant or didn't "get on board" with sustainability. It was expressed that creating more functions for LALCs could make it easier for the government to play everyone against each other. A number of participants noted that there is already a lot of compliance and other things LALCs are required to do including Community Land and Business Plans (CLBPs) and raised concern that additional functions could be a burden on LALCs unless funding and capacity issues were properly addressed.

Several participants expressed one of the major problems with the ALRA at the moment is that there are no rigorous provisions or mechanisms for LALCs to protect Aboriginal Culture and Heritage. Participants stated that culture and heritage is a big part of land rights which Aboriginal people fought hard for and questioned why LALCs would want to give that away. Additionally, many participants felt that Model 2 “*will be getting back to core business*”. Other participants stated “*What’s the use of having a LALC if they don’t have culture and heritage?*” and called on government to “*Make us [LALCs] strong with legislation*”. Concern was expressed by some participants as to why LALCs should have to justify their culture and heritage role, and that LALCs should be supported in undertaking the culture and heritage work they already do. It was also noted that there are already provisions in the ALRA to create sub-committees that could address the need to ensure Aboriginal Owners and Traditional Owners are able to be accommodated in a new system.

A number of participants stated that the Aboriginal Land Council system already provides proper governance and reporting structures which should be strengthened, not undermined by a new system. It was also noted that the new system should direct all culture and heritage matter through the channels of the Land Council system so LALCs know what’s going on and can follow through and monitor.

The question of destruction

There were some concerns raised regarding the proposal that Aboriginal people would directly be asked to destroy Aboriginal culture and heritage under the proposed models. Some participants responded to this by stating that Aboriginal people are already being asked to destroy Aboriginal culture and heritage. It was questioned whether it was preferable for this decision to be in the hands of government, emphasising that it was preferable for Aboriginal people to have control.

Government oversight

A number of participants suggested that a key success factor for a new Aboriginal Culture and Heritage system, whether it was an Aboriginal Council, Commission, LALCs, or RAPs was to ensure that the Aboriginal body reported to and advised a senior Cabinet Minister directly, and not get filtered through layers of bureaucracy and government departments. Another suggestion was that there should only be one Minister with responsibility for Aboriginal Culture and Heritage so that there was a clear line of responsibility, so that this responsibility couldn’t be shifted.

There was strong opposition to the use of Ministerial appointments in any new model, particularly in reference to a Commission structure. Furthermore, there was opposition to government bureaucrats participating in an Aboriginal culture and Heritage Council or Commission. Participants suggested that LALCs or Aboriginal people should elect who sits on an Aboriginal Heritage Commission or state-wide body. Many participants were wary of Government established boards and committees. Concerns were raised regarding the operation of some current government boards or committees including that they were too influenced or controlled by government or seen as ‘ticking a box’ for government. It was discussed that any new system should ensure that Aboriginal people are elected by Aboriginal people and are independent of government.

Need for efficiency and operational capacity

Many participants were keenly aware that whatever the new system was, it was pertinent that it worked *in practice* and highlighted the need to avoid setting up a system that would fail. Participants also made reference to the expected perception of government and industry that returning control to Aboriginal people would slow down developments. A number of participants stated that any new system would need to be workable for government and proponents as all they want to know is “*who they can go to to tick their boxes*”. These issues are discussed in further detail in Section 6.

Overall feedback was given that:

- ▶ Aboriginal culture and heritage needs to be removed from the National Parks and Wildlife Act.
- ▶ More discussion is needed as to whether new laws should be in a new stand alone Aboriginal Culture and Heritage Act or amendments to the Aboriginal Land Rights Act.
- ▶ A new system should aim to bring Aboriginal people together.
- ▶ There was general support for building on existing structures rather than creating new ones if properly resourced and funded.

4. Who speaks for Country

Background

The current system in NSW for managing culture and heritage generally recognises three main groups as speaking for Country and/or representing the Aboriginal community on culture and heritage matters. These groups are:

- **Native Title** holders, and registered native title claimants, who in most cases are represented at the State level by NTSCORP,
- ‘**Aboriginal Owners**’ as listed on the Aboriginal Owners register established under the *ALRA 1983*, and
- **Aboriginal Land Councils**, established under the ALRA, including LALCs at the local level and NSWALC at the State level.

In NSW there are also a number of Aboriginal corporations, Elder, custodian and nation groups, advisory committees and other organisations who play important roles in relation to Aboriginal culture, heritage and Country.

The three models propose the **expansion of the ‘Aboriginal Owners’ register** under the ALRA to cover the whole of NSW, and that Aboriginal Owners would be the authority to speak for Country. Currently, section 171 of the ALRA states:

1. The Registrar is to use the Registrar's best endeavours to enter in the Register of Aboriginal Owners:

- a. the name of every Aboriginal person who has a cultural association with land in the State, and*
- b. the location of the land with which the Aboriginal person has a cultural association, and*
- c. the nature of the cultural association that the Aboriginal person has with the land.*

2. The name of an Aboriginal person must not be entered in the Register unless the Aboriginal person:

- a. is directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and*
- b. has a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land, and*
- c. has consented to the entry of the person's name in the Register.*

Each of the models proposes that successful native title claimants would automatically be included Aboriginal Owners Register. Model 2 proposed amendments to the **membership** structures of LALCs to create two separate voting memberships and two separate boards.

To date, the role of the Aboriginal Owners Register has been largely limited to areas where jointly managed national parks have, or may be, established (approximately 700 people). Currently the Aboriginal Owners Register is maintained by the Registrar of the ALRA, who determines who is eligible to join the Register.

A number of issues were interwoven with discussions regarding speaking for Country including administrative and governance structures to support decision-making and suggestions for different ways this could be addressed. Another key debate concerned support for inclusive structures and processes while other participants felt that ensuring only the right people had a say was paramount over a more democratic process. Issues regarding equity in respect to any financial or other benefits that may flow from culture and heritage works was also discussed.

Discussion of who has the right to speak

While most participants agreed that the 'right' people needed to speak for Country there was much discussion around who the 'right' people were, how they would be identified and ensuring that proper administrative and governance processes were in place to support engagement and decision making. Some participants stated that culture and heritage work and site jobs should always be undertaken by Traditional Owners. In addition, concerns were raised regarding people who may say they are Traditional Owners, but are not known in the community, and are given more rights or a special status by government agencies.

Other participants felt that all Aboriginal people should be consulted, and that processes should be more democratic. There was a strong sense that government appointed committees didn't have the right to speak.

Other views were expressed that anyone who is a LALC member should be entitled to either be consulted or make decisions about culture and heritage. Views were also expressed that people with ‘historical’ ties or knowledge should also be consulted or involved in some way. One participant supported “*Traditional Owners and Aboriginal Owners being recognised but not being given special powers – we are all the same*”. Another participant stated that “*We don’t want LALCs to be pushed out.*”

Administrative structures to support decision-making

The need for administrative oversight and governance structures in addition or separate to the ‘right’ people speaking was viewed as important. Participants were concerned to ensure that proper processes were followed and that any potential for a lack of capacity, poor governance or corruption risks were minimised, particularly if people making decisions were closely linked to payments from proponents.

There was also discussion of competition within communities to be employed for culture and heritage work or site jobs, which some participants felt was not an equitable system. Many participants supported Model 2 as they felt LALCs would get visibility of issues and place at the table to negotiate on behalf of the whole Aboriginal community. Some participants felt frustrated at situations where groups had “popped up” in an area due to the potential to earn money or gain funding for culture and heritage related works, and LALCs have few avenues available to oppose this.

Land Councils and Native Title as a starting point

A number of participants observed that NSWALC and NTSCORP are the peak Aboriginal bodies in NSW that deal with culture and heritage matters, and as such should be the key bodies involved in a new system. While it was recognised that some people who are Elders might not be involved in the Aboriginal Land Council or native title system, some participants expressed that at some point LALCs and Native title groups need to work together and “stand together”. It was suggested that LALCs need to try to ensure Elders to play more of a role in the Aboriginal Land Council system particularly in relation to ensuring lore and custom protocols are followed.

Utilising the Aboriginal Owners Register

There was no clear consensus on utilising the Aboriginal Owners Register, or similar system, to define who speaks for Country in a new model. Much of the discussion regarding ‘Aboriginal Owners’ was intertwined with ‘Traditional Owners’. Participants raised a number of potential issues that would need to be addressed if the Aboriginal Owners register were to be expanded and incorporated into a new system.

Some participants were not familiar with the Aboriginal Owners Register while other participants raised concerns with how the Register is currently utilised and administered. Not all participants were comfortable with the term ‘Aboriginal Owners’, due to the use of the term ‘ownership’. A number of suggestions were made in respect to amending the definition of Aboriginal Owner, the administration of the register and how the register would be utilised in a new system.

Some participants agreed with using the Aboriginal Owners ‘test’ to determine who speaks for Country as “It’s about going back to where your mob came from”, however other participants were concerned that the register is too focused on identifying individuals rather than groups, and were also concerned with how this aspect of the proposed models would work in practice.

Concerns were raised regarding potential situations where there may only be a small number of Aboriginal Owners in an area or no Aboriginal Owners in an area, and what this would mean if only a limited number of people were able to have a say and make decisions about Aboriginal culture and heritage. Another issue raised was the potential for all Aboriginal people within an area to be Aboriginal Owners, and so there would need to be some clear criteria, policies or guidelines around who would be charged with decision-making roles or be on a board.

There were also issues raised that related to the definition of 'Aboriginal Owners', and that Aboriginal Owners could have cultural associations with more than one area. This raised questions about one person potentially being listed as an Aboriginal Owner for numerous areas.

Other concerns in relation to utilising the Aboriginal Owners register in a new model included:

- What the process will be to ensure the right people are listed on the Aboriginal Owners board,
- How long it would take to ensure that all the right people are listed on the register,
- How much it would cost to update and maintain the register, and how would this be funded,
- What provisions would be in place to ensure transparency of the Aboriginal Owners register as currently the Registrar doesn't tell people who is on the Aboriginal Owners Register, and what checks and balances would be in place,
- The proposed increase in responsibilities, powers and broadness of the authority of the Registrar of the ALRA and concern about the broader role the Registrar will play and how much power one person could potentially have,
- Concerns regarding how a register system would work in practice, particularly as many LALCs are already under-resourced.

Other comments in respect to the Aboriginal Owners register included:

- Some suggestions were made that NSWALC and NTSCORP should source funding to work on the Aboriginal Owners register,
- Aboriginal Owners should be consulted but not necessarily have the final decision,
- NTSCORP advised that they have recommended amendments to the Aboriginal Owners section of the ALRA to recognise adoption,
- In relation to the current Aboriginal Owners register criteria, concerns were raised that bloodlines give you 'ownership' rights but not necessarily cultural knowledge. It was suggested that some people might have the knowledge but not the bloodlines. There was also a suggestion to link traditional knowledge holders/custodians with the 'Aboriginal Owner' register by creating two tests to become registered, that is through bloodlines and family tree or as a "knowledge holder",
- Criticism of current Aboriginal Owners register and that it should be controlled by an Aboriginal person,
- Suggestion that the Aboriginal Owners register should recognise the tribal country and how Aboriginal people identify,
- Whether or not there is a potential conflict of interest with the Registrar as this role is part of the Aboriginal Land Council system.

A number of participants requested that the Registrar of the ALRA provide information sessions on the Aboriginal Owners register, and suggested sessions be hosted at regional forum.

Traditional owners and native title

As discussed previously, issues regarding how native title groups would be recognised or incorporated into a new system were debated. A number of questions relating to the operation of native title laws more broadly were raised including how people who were born off Country but are still from the area, can be part of native title claims, and the type of evidence used in native title applications. Other concerns raised included that some native title claims are being lodged that some people felt were not legitimate.

Similar to some of the concerns raised about the Aboriginal Owners register, participants raised concerns with Traditional Owners who may say they are from several areas. Another issue raised was that in some areas there isn't consensus within communities on the principles that are followed to determine lineage, including using the maternal line.

Historical ties

The role of people with historical or more contemporary ties to Country in a new system was discussed. Several participants felt that people who have historical ties and knowledge should be provided for in a new system or have a recognised role.

Some participants were concerned that even though several generations may have lived in an area, they are still not 'traditional owners', however have still been looking after Country and protecting culture and heritage.

Issues for further discussion

A number of participants felt that the issue of speaking for Country needed further discussion within communities and without government influence. However, there was also recognition that this process was not always easy particularly when talking about who gets to make the decisions. There were also concerns that some people get involved in culture and heritage issues for the money, and that this can create complications and conflict.

The legacy of the stolen generations, dispossession of lands and dispersal of Aboriginal people away from Country and how these factors relate to speaking for Country was also discussed. Many participants felt that a new system would need to particularly address issues around people living away from Country, and any related roles or decision-making capacities. There was also recognition that different mobs have different processes, so government might try to divide people on this.

Overall:

- ▶ There was no clear consensus on utilising Aboriginal Owners to define who speaks for Country.
- ▶ It was recognised that Aboriginal Land Councils and Native title can be used as a starting point.

5. Boundaries

Utilising Aboriginal Land Council boundaries

There was general recognition that the current Aboriginal Land Council boundaries don't necessarily represent traditional boundaries, and that this issue would need to be further addressed particularly if Model 2 were to be pursued. Differing views were expressed on the merits or otherwise of maintaining existing Aboriginal Land Council boundaries in a new system, amending the Aboriginal Land Council boundaries to better reflect traditional cultural boundaries, utilising an alternative system such as local government boundaries, a regional structure, or creating agreements between LALCs to provide for LALCs to work together where traditional cultural boundaries overlap.

Many participants expressed that keeping LALC boundaries would be preferable as they were already in place and are workable. Suggestions were put forward that where LALCs had a problem with their boundaries they could ask the Registrar of the ALRA to change the boundaries. A number of participants expressed that formal processes to recognise where traditional cultural boundaries overlap with one or more LALC boundary would be a positive step, stating that *"All LALCs should be united and acting as one."*

Some participants felt that while LALC boundaries were not culturally appropriate Memoranda of Understanding or agreements could be negotiated between LALCs to ensure that the right people were consulted in making decisions. A few participants suggested that the issue of amending LALC boundaries could be looked at further but felt that this could take a long time and create tensions so agreed protocols between neighbouring LALCs should be developed. Some participants stated that the Aboriginal Land Councils structure is *"the best we have"*, and that boundaries are pretty close to traditional lands in some areas – *"LALC boundaries are still pretty good"*. A number of participants felt that when traditional boundaries cross two or three LALC boundaries, this should be respected in local areas. However, one participant noted that currently there are many Aboriginal sites being destroyed in their Country, and it is difficult for the LALC to protect such sites as the sites are in a neighbouring LALC's boundary.

Mapping cultural boundaries

It was suggested that LALC boundaries were originally created in a certain way as it would have been difficult to recognise the tribal boundaries exactly for a range of reasons, including that some areas could be significant to a number of nation groups or that some boundaries were contentious. In addition it was noted that if LALC boundaries were amended to reflect nation boundaries now there would be a reduction in LALCs.

A few participants felt that the LALC boundaries were not culturally appropriate and should be changed. However, the difficulties and potential issues related to changing LALC boundaries to reflect traditional cultural boundaries were noted, with one participant stating *"It wouldn't happen in my lifetime"*, and the general recognition that some changes could be controversial. One LALC gave an example of how their boundary area straddles 4-6 different nation groups and there isn't agreement about where the traditional boundaries are.

Another issue raised in respect to boundaries was that some traditional boundaries crossed over into other states and that more effort should be made to deal with other state governments about this issue. One participant stated that *"Our policy should be culture and heritage protection at all costs"* and that the issue of traditional boundaries needs to be dealt with by native title.

Overall:

- ▶ Building on Aboriginal Land Council boundaries may be a workable option, however formal protocols or agreements could be made to address issues between overlapping boundaries.

6. Administration, funding and capacity

Funding and costs

Participants were very aware of the risks of cost shifting by government and the resources that would be required to move towards an Aboriginal controlled system, particularly transitional costs. Issues discussed included:

- Whether money would be allocated to the LALC or Aboriginal Owners board. Some concerns were raised with past experiences where money was only going to the Traditional Owners and not being shared among the broader Aboriginal community. Many participants strongly felt that any benefits should flow to the whole Aboriginal community,
- That in the current system it was expressed that heritage professionals earn more money than Aboriginal people and Aboriginal communities and that a new system needs to ensure that money goes to Aboriginal communities,
- Parallels were drawn with the current housing model to highlight that LALCs can only receive money for housing from the Aboriginal Housing Office if they abide by 'conditions', and that this could be a risk in a new system,
- Participants called for government to be clear and upfront, with some stating that functions shouldn't be delegated to LALCs if there are no resources,
- Participants called for money going to government department to be redirected to LALCs.

Governance and administration

As discussed above, there was broad recognition that proper governance structures were needed to support decision-making.

It was noted that the Aboriginal Land Council structure had been in place for 30 years, was well understood in community and provided rigorous governance structures regulated under the ALRA. As a result it provided an opportune governance structure to manage and protect Aboriginal heritage. However, it was also noted that there are different protocols than those outlined in the ALRA - that is, community and cultural protocols and 'lore'. Some participants noted that they would support Model 2 if there were additional consultation protocols and regulations to recognise cultural protocols, and that this will help to strengthen Model 2.

Other issues discussed included;

- Whether or not the Aboriginal Owner and LALC boards as proposed in Model 2 would be equal. There was also discussion of how two boards would report to the one CEO, and what could happen if the boards made differing recommendations. In addition, potential difficulties were identified with CEOs who do not come from Country who may face difficulties in interacting with the Aboriginal Owners boards,
- Some participants felt that there are already a lot of protocols in place, it's just a matter of implementing them,

- Some participants expressed that LALCs want Traditional Owners to be part of the LALC, but they need to know what their responsibilities are, and need compliance and guidance around this,
- Concerns that decision makers could be corrupt or susceptible to pay-offs.
- There was discussions that more work needs to be done on LALC administration and compliance issues in a new system and how it will work in practice,
- Some participants expressed the need to resource and inform Elder groups or Aboriginal Owners boards as it was expressed that if these groups are not properly resourced then they may be vulnerable to making bad decisions,
- There was suggestion that an ethics committee could be built into a new system to make sure that decisions are made within protocol,
- In respect to Model 3 questions were raised around election processes for LALC members to elect a LALC board and Aboriginal Owner members to elect an Aboriginal Owner board, and how this would work in practice to ensure that resources aren't wasted.

Decision making at the local level and regional levels

As outlined in previous sections there was discussion around exactly who had authority to make the decisions and how the appropriate checks and balances could be implemented to support this decision-making. Overall, many participants supported decision-making occurring at the local levels, while there was some recognition of the value of regional structures, particularly in terms of efficiency and resources.

Issues and comments discussed included:

- Suggestion that there be a regional model where LALCs meet and nominate people to deal with culture and heritage issues, and that this would be useful as *“We already have too many committees, and we already have a regional focus now”*.
- A regional model is needed to fill the gap (there is currently a gap between NSWALC and LALCs). Suggestion that there should also be a national body for Aboriginal culture and heritage matters.
- Suggestion that amendments could be made to the *ALRA* that land dealings could only be dealt with by Aboriginal Owners members.
- LALCs need to be involved at regional level structure. Suggestion that new Aboriginal heritage commissions could be co-located with LALCs.
- Another suggestion was that there are sometimes several LALCs in one local government area, and that these LALCs could form alliances based on these boundaries. It was also suggested that if there is a regional body this could address issues regarding several LALCs in one local government area.

**“Land is Culture
and Heritage.”**

Decision making at the state level

Some participants felt that Model 1 could be workable but that NSWALC should be involved at the state level, with no involvement of the Office of Aboriginal Affairs.

Many participants didn't like the idea of state level body deciding who a RAP or other local / regional decision making body would be.

Overall:

- ▶ If control and responsibility for Aboriginal heritage is returned to Aboriginal organisations, resourcing and funding issues need to be discussed upfront, and LALCs or new Aboriginal controlled bodies will need to be properly funded.
- ▶ Proper governance structures are needed to support decision-making, but also need to take into account cultural values.

7. What is protected?

One of the criticisms of the current laws is that there is too much focus on archaeology and protecting 'Aboriginal objects'. Previous Aboriginal heritage reviews have argued strongly for legislation which recognises both tangible and intangible Aboriginal culture and heritage, including broad recognition of Aboriginal hunting, fishing and gathering practices, in addition to cultural knowledge.

In current laws there are some limited provisions to recognise broader cultural values, such as the protection of 'Aboriginal places' under the *National Parks and Wildlife Act*.¹⁶ However these provisions only apply to places that have been gazetted by the Minister for the Environment in circumstances where, in the opinion of the Minister, the place is or was of special significance to Aboriginal people. Currently there are 78 declared Aboriginal Places in NSW.

Furthermore, issues have been raised about recognising and protecting more contemporary Aboriginal heritage, such as former Aboriginal missions and reserves. Under the current laws, a small number of places have been listed on the State Heritage Register under the Heritage Act 1977 for their Aboriginal heritage significance, including former missions, former Aboriginal children's homes, and protest sites.

Another issue related to protecting Aboriginal heritage relates to questions of significance. It has been argued by a number of industry groups and archaeologists that Aboriginal cultural heritage laws should focus on protecting what is significant to Aboriginal communities, because applying a standard level of protection to all Aboriginal heritage wastes time and can devalue particularly important places.¹⁷

Another criticism of the current laws relates to 'moveable' Aboriginal objects (eg. stone tools) being defined as the property of the Crown, while immovable Aboriginal heritage, such as rock art and scarred trees are considered the property of land owners. Furthermore, while Aboriginal people hold cultural knowledge, this is not acknowledged or recognized in current laws.

¹⁶ Section 84, *National Parks and Wildlife Act*

¹⁷ See S. Tran on behalf of the NSW Minerals Council Inc (9 December 2011) *Submission on Aboriginal Heritage Legislation in NSW: Public Consultation on Issues for Reform*, available to download from <http://www.environment.nsw.gov.au/achreform/ACHconsult.htm>

The *National Parks and Wildlife Act* currently contains some limited provisions for Aboriginal peoples to undertake cultural practices in National Parks. In addition, sections 47 and 48 of the ALRA includes provisions for LALCs to obtain access permits for cultural hunting, fishing and gathering on both public and private lands. In practice, these provisions are rarely utilised.

Issues regarding what is protected was not discussed at length at the forums though it was generally noted that significance shouldn't be defined in laws, that defining 'high' or 'low' significance was not supported, and that water and related issues such as access and practising culture should also be factored in to new laws. Comments made included that "*It's all significant*" and that "*Everything should be protected*". Furthermore concerns were raised in relation to heritage professionals not properly understanding concepts of 'cultural landscape', in addition to problems with archaeologists just relying on the government AHIMS for all their information. Issues relating to *access* to places and sites were also raised as of key importance, and to be factored in to any new system.

Issues regarding the term 'ownership' and what that means were also discussed, and questions regarding the legal sense and responsibilities of 'ownership' were raised.

Overall, there was:

- ▶ A strong sense that all Aboriginal heritage is important, and that decisions must be made by local Aboriginal people.
- ▶ Agreement that new laws must empower and support the rights of Aboriginal peoples to practice culture and access places and sites.

8. Methods of protection

The current NSW laws have been criticised as a reactive system that regulates destruction rather than actively protecting Aboriginal culture and heritage. In practice the current system largely relies on a person who is likely to 'impact' on Aboriginal heritage to identify the need to apply for a permit authorising the activity they plan to undertake, or undertaking some other action which they think will avoid the 'harm' (due diligence).

The three proposed models do not outline a detailed alternative permit system or cultural heritage assessment system, other than proposing that the Aboriginal Owner Council / Board / Party become the primary contact for proponents to approve or set conditions on proposed developments/activities.

Overall, the models propose significantly increasing the roles and responsibilities of Aboriginal peoples. Part of this role will involve Aboriginal groups assessing and approving Aboriginal cultural heritage assessments, reports, permits, management plans or setting conditions on developments or activities proposed by proponents, such as developers. Another role of Aboriginal groups could include undertaking consultation with relevant Aboriginal people, rather than the proponent undertaking this function.

The issue of exactly what mechanisms would be implemented in a new system were not discussed in detail however a range of suggestions were proposed:

- Suggestion that for every development that impacts on culture and heritage there should be an 'offset',
- A robust policy should be written to ensure that Aboriginal communities are properly compensated when Aboriginal heritage is destroyed, and consideration of cumulative impact should be taken into account,
- Calls for Aboriginal culture and heritage laws to be linked in with local council processes and planning laws,
- Suggestion that when proponents are planning to do developments, there could be a 'Cultural Impact Statement' similar to the current EIS (environmental impact statements) that are currently required,
- Development applications should include culture and heritage considerations,
- At the initial planning level Aboriginal people should have input into where the areas are that the proponents/archaeologists can investigate,
- Legislation needs to incorporate proper requirements to engage with Aboriginal people,
- There is a need to ensure that other laws such as natural resource management also incorporate Aboriginal culture and heritage considerations, and
- There were calls for funding to be directed to LALCs to support employment of site officers and rangers.

Overall,

- ▶ A new system needs to be linked with local council processes and planning laws.
- ▶ Further consideration should be given to building in better assessment processes for Aboriginal heritage, including assessing cumulative impacts, and better engaging with Aboriginal communities, in addition to compensating Aboriginal people for the destruction of Aboriginal heritage.

9. Compliance, penalties and enforcement

The three models propose that the Aboriginal Commission / Land Councils / RAPs will be able to seek enforcement of the laws through the Land and Environment Court.

There was much frustration amongst participants at the lack of compliance with the current laws and policies, with several examples provided of LALCs reporting damage or destruction to the OEHL but no penalties or other actions being taken. Some participants felt that there should be more oversight of this issue by NSWALC or at the state level.

Aboriginal communities continue to feel frustration at the apparent lack of penalties imposed on people and corporations who destroy Aboriginal heritage. Furthermore, there is a strong sense of dissatisfaction with the current laws being quite restrictive, particularly the limitations Aboriginal peoples have to take action to prevent someone from destroying Aboriginal heritage or to pursue a prosecution when Aboriginal heritage is destroyed.

Overall, feedback included that:

- ▶ A new system needs active monitoring and compliance.

10. The proposed models

In response to each of the three proposed models a number of specific suggestions were made:

In respect to **Model 1** comments and suggestions included:

- There were low levels of support for the proposed regional bodies or councils to make decisions as it was expressed that local groups should make decisions. Participants stated that decisions should be made at the local or sub-regional/nation level. It is preferable to only have one nation group making decisions about their Country
- In respect to proposed regional councils concerns were raised regarding circumstances where there may be several member nations of a regional council as this raises the prospect of people making decisions about other people's country which many participants felt would be inappropriate,
- If regional councils were instituted, it was suggested that Protocols could be established so that the regional council must seek consent from the nation group before making decisions, and
- One man and one woman from each nation on each regional wouldn't necessarily work as some nations cover large areas, so further consideration may need to be given to increasing representation on any boards or councils that cover large areas.

In respect to **Model 2** comments and suggestions included:

- Aboriginal Owners/Traditional Owners could have speaking rights in areas they are associated with but only voting rights in one LALC area. Another suggestion was to allow Aboriginal Owners/Traditional Owners to vote at several LALCs covering their Country, but only participate on one board,
- A unified approach could be one option where Aboriginal Owners and regular membership of LALCs both make decisions, and that equal representation, balance of power and shared responsibility could be preferable. That is, a LALC board that has 50% Aboriginal Owner membership and 50% regular LALC membership,
- That the Aboriginal Owners board could be a legislated sub-committee of an Aboriginal Land Council,
- If the Aboriginal Owners is a sub-board/sub-committee to the LALC then they should have a seat at the LALC board table, or a percentage of Aboriginal Owners should sit on the LALC board,
- That the Aboriginal Owner membership could make recommendations to the whole board, or that the Aboriginal Owner board could have a recommending/advisory/sub-committee role. There were some concerns raised that 'Aboriginal Owners' who no longer lived in the area could potentially have control over decision making,
- To have only one board with a percentage elected or selected from Aboriginal Owners. Members of LALCs could either be members by association or members by cultural attachment,
- The process of registering people on the Aboriginal Owners register shouldn't be an additional function for LALCs, but should sit with the Registrar for the ALRA, or someone independent,
- The Aboriginal Owners board could recommend who speaks for Country ie. Once Aboriginal Owner members are elected to the Aboriginal Owners board, they should nominate knowledge holders,

- At one forum there was general agreement that the Aboriginal Owners should be an advisory committee to the LALC, not a separate board,
- At another forum there was support for a LALC model in the form of Model 2, however the Aboriginal Owners register was not supported,
- There was agreement that Aboriginal people should be allowed to sit on both the LALC board and Aboriginal Owners but would need to work out some limitations / criteria around what circumstances, who and how many,
- Concerns were raised that there could be too much control by a ‘chosen few’,
- There should be protocols built into this model to ensure that Aboriginal Owners boards consult with Elders, Men, Women etc. There was, recognition that not all Elders would want to sit on a board, so there is a need to ensure that communication processes are in place, and ensure that the right people are consulted with, including Native Title claimants and holders,
- Concern that Elders could be ‘locked out’ of the process if they are not on an Aboriginal Owners board,
- Decisions should come back to a membership base, that is, LALCs.

In respect to **Model 3** comments and suggestions included:

- That Model 3 was not a good model as one family could control a RAP at any one time.
- One problem with RAP model is that there can only be one RAP and there is no need to consult with other Aboriginal groups in the area.
- Questions were raised regarding whether there be more than one RAP in an area? If so, there would need proper protocols in place. There was discussion of how the system works in Victoria, and that any new model would need to address issues currently being faced in Victoria’s RAP model.

Suggestions for **a new model** included:

- A number of people could be selected from each of the three groups, that is LALCs, Aboriginal Owners and Traditional Owners (native title) to come together with an independent person to develop protocols and regulations which can be agreed by all three parties,
- Suggestion that the proposed role of the Registrar in respect to Aboriginal Owners could be moved to an Aboriginal body/commission. Some participants were not comfortable with the Registrar having a final say on who gets to be on the Aboriginal Owners Registrar. It was also noted that there has to be a relationship with tribal councils, and that this is going to take time.
- One forum drafted an alternative model based on a Commission type structure of Model 1 but with regional and local councils/committees that were more closely linked or located within the Aboriginal Land Council network. This model clearly provided for Traditional Owners recognised through native title, Aboriginal Owners, LALCs and other members of the Aboriginal community who may not be want to identify with or be eligible to participate under the Native Title/Aboriginal Owners/LALC ‘categories’ to form a local council or committee. This model was not unanimously endorsed at the forum and the following issues were raised: Concern that native title groups are having “*two bites of the cherry*” if they are Aboriginal Owners as well as traditional owners. It was also suggested that one person could potentially be associated with native title, Aboriginal Owners and LALCs.

A suggestion to address this was that anyone who wanted to be part of the committee has to represent who they are there to represent. There were also suggestions that there could be an election process through this model.

- One suggestion was to just have the LALC network with either native title or Aboriginal Owners included, not both.
- There were comments that one of the first things about the ALRA in terms of membership is that you can qualify in a number of ways. There are benefits of this but also potential conflicts in the form of people from the area vs. people who have become residents of the area. There was thought that there was scope for the ALRA to be amended to include special membership to recognise who can speak for land, Country and culture.
- There was suggestion that having an independent person make some decisions, rather than LALC memberships, might help to minimise conflicts.
- One LALC has established an Elders group to advise their LALC on culture and heritage matters – this could be a model for other LALCs. The Elders group is open to all Aboriginal people (not only LALC members). The LALC has established a criteria and protocols. Elders group was established in recognition that the LALC needs guidance and needs a formal structure to be able to make good decisions.

Conclusion

Aboriginal culture and heritage continues to be an issue of significant importance within the Aboriginal Land Rights network and Aboriginal communities across NSW more broadly. The reform of the laws and systems to manage and protect Aboriginal culture and heritage continues to generate discussion and debate on a range and depth of issues as experienced at this latest round of workshops.

However, the stories that continue to be told are of ongoing destruction and a lack of faith in government to deliver a robust system that genuinely recognises and provides for Aboriginal peoples rights. At the same time, there is lots of good work being undertaken by LALCs and Aboriginal communities in conjunction with other government, industry and other bodies, and a recognition that this work needs to be built upon to better protect and support Aboriginal culture and heritage for future generations.

The high level of ongoing interest and discussion not only highlights the need for change in this area, but the significant contributions and efforts already being made within Aboriginal communities to protect and promote Aboriginal culture and heritage, despite the range of challenges communities face.

It is hoped that the views and ideas raised at the NSWALC workshops during 2012 and as outlined in this report will continue the discussions on new directions for Aboriginal heritage laws and will contribute to the latest review process.



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