



New South Wales  
Aboriginal Land Council

## Comparison table – Aboriginal Culture and Heritage Reform

NSWALC has long advocated for comprehensive new laws to protect Aboriginal heritage. The current laws:

- Do not provide decision making rights for Aboriginal peoples
- Focus on destruction rather than protection and allows Aboriginal heritage to be destroyed at alarmingly high rates
- Are outdated and appear in the *National Parks and Wildlife Act 1974 (NSW) (NPW Act)* – all other States/Territories have standalone or updated Aboriginal Culture and Heritage legislation
- Are reactive and don't consider Aboriginal heritage before planning and development decisions are made
- Include inappropriate and limited definitions of what can be protected.

This document provides an overview of:

- **NSWALC's key criticisms of the current Aboriginal culture and heritage laws** in NSW,
- **NSWALC's key criticisms of the NSW Government's 2013 reform proposals**,
- **A summary of NSWALC's policy positions**<sup>1</sup> to date on new Aboriginal Culture and Heritage laws, and
- **Preliminary comparisons with the NSW Government's 2017 proposals**<sup>2</sup> for a new model and consultation draft Bill released on 23 February 2018. Please note that this includes both the Proposals Framework and the draft Bill.

**We strongly encourage you to provide your feedback on the proposals.** Details about how to **have your say** are at the end of this document.

*NSWALC is undertaking analysis of the draft Bill and will distribute further advice shortly.*

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| <p><b>Aboriginal heritage provisions are primarily contained in the <i>National Parks and Wildlife Act 1974 (NSW) (NPW Act)</i>.</b></p> <p>- Current laws are not effective</p> | <p>New stand-alone Aboriginal Cultural Heritage Act proposed, however many elements were unclear.</p> <p>The principles of better protecting Aboriginal heritage and providing decision-making to Aboriginal peoples</p> | <p>New stand-alone Aboriginal Cultural Heritage Act proposed.</p> <p>Increased clarity and link with planning and development processes.</p> | <p>NSWALC and the Aboriginal Land Rights Network has long been advocating for major changes to NSW Culture and Heritage laws as they are outdated, ineffective, do not provide rights to Aboriginal peoples and do not provide proper respect and protections for Aboriginal heritage.</p> |

<sup>1</sup> Further details about NSWALC's policy positions on Aboriginal culture and heritage reform to date can be accessed on the NSWALC website at [www.alc.org.au](http://www.alc.org.au). This includes NSWALC's [Principles for Reform](#) and [NSWALC's 2014 submission](#) in response to the 2013 proposed Government model.

<sup>2</sup> The NSW Government's 2017 proposals for reform can be accessed at: <http://www.environment.nsw.gov.au/achreform/ACHproposedmodel.htm>

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|---|--|--|--|
| <ul style="list-style-type: none"> <li>- NSW is the only State that continues to manage Aboriginal culture and heritage in flora and fauna legislation.</li> <li>- The Aboriginal heritage provisions are primarily contained in sections 83-91 of the NPW Act.</li> <li>- These sections are not well integrated with the development process in NSW. This results in a reactive system that often does not consider Aboriginal heritage until after the development assessment process or when Aboriginal heritage is under threat of destruction.</li> <li>- The NSW planning laws do not require any consideration or protection of Aboriginal heritage.</li> </ul> | <p>were not genuinely reflected in the proposals.</p> <p>Links with planning and development processes were unclear and did not make the necessary improvements.</p> | <p>Implementation of the new framework is expected to take a number of years given the new functions, processes, capacity building and resourcing arrangements.</p>  | <p>NSWALC’s submission to the NSW Government in response to the 2013 model supported new legislation based on NSWALC’s Principles for Reform which includes recognition that Aboriginal communities are the rightful owners of Aboriginal cultural heritage in NSW and provision of proper protections for Aboriginal heritage.</p> <p>NSWALC also recommended that 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.</p>   |
| <p><b>Objects do not recognise Aboriginal peoples or the need to protect Aboriginal heritage. Objects are not holistic.</b></p> <p>The Objects of the NPW Act are very limited as they relate to Aboriginal cultural heritage:<br/> <i>“2A(1)(b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to: (i) places, objects and features of significance to Aboriginal people”</i></p>   | <p>NSWALC did not support the proposed 2013 Objects as they were vague and failed to provide strong and binding language.</p>  | <p>The Objects aim to:</p> <ul style="list-style-type: none"> <li>• Recognise that Aboriginal cultural heritage belongs to Aboriginal people</li> <li>• Assert Aboriginal people’s authority over and responsibility for cultural heritage</li> <li>• Establish effective and timely processes for regulating and managing activities that may impact on Aboriginal Cultural Heritage (<b>ACH</b>)</li> </ul> <p>However, proposed objects do not clearly require protection of Aboriginal cultural heritage, and do not contain any recognition of the <i>Aboriginal Land Rights Act</i>.</p> | <p>NSWALC has called for a comprehensive and holistic system for protecting and promoting Aboriginal culture and heritage that is:</p> <ul style="list-style-type: none"> <li>- Underpinned by the United Nations <i>Declaration on the Rights of Indigenous Peoples</i>,</li> <li>- Promotes self-determination,</li> <li>- Provides decision making and control to Aboriginal peoples, both at State and local levels,</li> <li>- Protects and promotes all Aboriginal heritage,</li> <li>- Recognise Aboriginal peoples are the authority regarding Aboriginal culture and heritage</li> <li>- Recognises and increases roles for the Land Rights Network</li> <li>- Complements the Aboriginal Land Rights Act and Native title legislation</li> </ul> |

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| <p>NSWALC has criticised the current system as outdated and inappropriate.</p>   |  |   | <ul style="list-style-type: none"> <li>- Establishes an effective penalties and reparations system</li> </ul>   |
| <p><b>Definitions of Aboriginal heritage are limited, outdated, archaeologically focused and offensive.</b></p> <p>The current definitions have long been criticised as not reflecting Aboriginal people’s views and values. The NPW Act includes the following definitions (section 5) of Aboriginal heritage:</p> <p><b>Aboriginal object</b> means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes <b>Aboriginal remains</b>.</p> <p><b>Aboriginal place</b> means any place declared to be an Aboriginal place under section 84.</p> <p>Section 84 of the NPW Act states that: <i>The Minister may, by order published in the Gazette, declare any place specified or described in the order, being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act.</i></p> | <p>NSWALC supported the 2013 government proposal to expand the definition of Aboriginal culture and heritage to include both tangible and intangible aspects, that would more closely align with Aboriginal peoples definitions, rather than only focusing on ‘objects’ and ‘places’ as is currently in the NPW Act.</p> <p>However, NSWALC had significant concerns that the new broader definitions were not supported by sufficient the legal mechanisms to protect Aboriginal heritage.</p> <p>NSWALC’s 2013 submission did not support the Government proposal to classify in legislation Aboriginal heritage as ‘low’ or ‘high’ value, and that Government would have roles in this.</p> | <p>New definitions proposed that reflect a more respectful and contemporary understanding of Aboriginal Cultural Heritage values, which recognises both tangible and intangible cultural heritage.</p> <p>New meanings for:</p> <ul style="list-style-type: none"> <li>• ‘Aboriginal cultural heritage’,</li> <li>• ‘Aboriginal cultural heritage significance’ and</li> <li>• ‘intangible Aboriginal cultural heritage’</li> </ul> <p>Proposed definition of <b>Aboriginal cultural heritage</b>:<br/> <i>‘Aboriginal cultural heritage means the living, traditional or historical practices, representations, expressions, beliefs, knowledge and skills – and associated environment, places, landscapes, objects and materials – that Aboriginal people recognise as part of their cultural heritage, and includes ancestral remains.’</i></p> <p>Definitions of ‘Aboriginal object’ and ‘Aboriginal ancestral remains’ similar to the current laws.</p> <p>Proposals paper states that there will be a definition of ‘materials’ (p. 11) – this is not included in draft Bill</p> | <p>NSWALC has supported:</p> <ul style="list-style-type: none"> <li>- A broad all-encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values.</li> <li>- Definition must be accompanied by enforceable mechanisms to protect Aboriginal heritage, including cultural and intellectual property rights.</li> </ul> |

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| <p><b>Aboriginal remains</b> means the body or the remains of the body of a deceased Aboriginal person, but does not include:</p> <p>(a) a body or the remains of a body buried in a cemetery in which non-Aboriginal persons are also buried, or</p> <p>(b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons.</p> <p>Current laws do not define desecration.</p> |   | <p>NSWALC has previously raised concerns regarding the use of ‘significance’ as it may limit what can be protected. ‘Significance’ does appear in the current laws in relation to:</p> <ul style="list-style-type: none"> <li>• objects of the NPW Act (s2A, (1)(b)(i))</li> <li>• Declaration of Aboriginal Places if, in the opinion of the Minister, the place is or was of special significance (s84, NPW Act)</li> <li>• Factors to be considered in determining an AHIP includes significance of the object or place (s90K, NPW Act)</li> </ul> <p>While the current laws include <i>significance</i> they do not include a definition. The proposed definition includes ‘<i>significance to Aboriginal people or communities</i>’.</p> <p>There is a gap in the proposals regarding protection of Aboriginal areas/places that are not ‘declared’.</p> <p>A new protection mechanism for protecting intangible heritage will be included, and there will be new offences and penalties for breaching intangible cultural heritage agreements.</p> <p>The bill does not include a definition of desecration.</p> |  |
| <p><b>Very limited consultation with Aboriginal peoples and consultation processes are insufficient.</b></p>  | <p>Aboriginal people would have some advisory and decision-making rights, however many decisions would be retained by Government.</p> | <p><b>Aboriginal people to make key decisions via a State level body</b> (ACH Authority) of all Aboriginal people with decision making,</p>  | <p>NSWALC has supported embedding and building on existing structures of NSWALC and Local Aboriginal Land Councils (<b>LALCs</b>) to create a unified, accountable and workable system that complements the roles of</p> |

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| <p><b>Aboriginal peoples have no decision making rights.</b></p> <p>Section 85(1) of the NPW Act states that <i>“The Chief Executive shall be the authority for the protection of Aboriginal objects and Aboriginal places in New South Wales.”</i> In practice this means that the Office of Environment and Heritage (OEH) has most decision making roles about Aboriginal heritage.</p> <p>Section 90K(1) of the <i>National Parks and Wildlife Act 1974</i> (NSW) outlines that the Chief Executive of the Office of Environment and Heritage, in determining whether to grant an Aboriginal Heritage Impact Permit (AHIP) ‘must consider’ (among other factors, including economic consequences):</p> <p><i>(f) the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit (including any submissions made by Aboriginal people as part of a consultation required by the regulations),</i></p> <p><i>(g) whether any such consultation substantially complied with any requirements for consultation set out in the regulations,</i></p> <p>Clause 80C of the NPW Regulation 2009 outlines that:</p> | <p>NSWALC and LALCs were excluded from the 2013 model.</p> <p>The 2013 model proposed to retain the Aboriginal Cultural Heritage Advisory Committee (ACHAC) as an <b>advisory body to Government only</b>, and the OEH would continue to undertake all key roles.</p> <p>Over 20 LALCs and two Aboriginal Land Council regions (Sydney-Newcastle &amp; Wiradjuri) made <a href="#">submissions</a> in response to the 2013 proposed Government model which recommended:</p> <ul style="list-style-type: none"> <li>• <i>“Aboriginal controlled administrative and governance structures are needed to support decision-making”</i></li> <li>• <i>“Building on the existing structures of the Land Rights Network is supported if properly resourced and funded.”</i></li> </ul> | <p>compliance and coordination functions. NSWALC representation proposed.</p> <p><b>Feedback is sought on who should be on the ACH Authority and how it should be formed.</b></p> <p><b>Local Aboriginal Land Councils</b> may be authorised to undertake specific functions ie. ‘local coordination and support roles’ for the Local ACH Panels such as assisting the Local Panel with mapping, preparing strategic plans, being the first point of contact for proponents, coordinating local ACH consultation panels.</p> <p>OEH advise that LALCs will be <u>resourced</u> to carry out new roles.</p> <p>NOTE: The draft Bill does not outline detailed functions for the 'support' body.</p> <p><b>NSWALC is seeking the Network’s views in particular on the proposal for LALCs to undertake local coordination and support roles.</b></p> <p>The ACH Authority may delegate local coordination and support functions to other Aboriginal organisations on an interim basis in certain circumstances eg. if LALC chooses not to take on functions or LALC does not have capacity.</p> <p>Local ACH ‘<b>consultation panel</b>’ proposed to provide advice about local ACH and negotiate</p> | <p>Aboriginal Land Councils, and builds on the investment in the Aboriginal Land Rights system.</p> <p>NSWALC’s 2013 submission recommended that a new system provide for:</p> <ol style="list-style-type: none"> <li>Genuinely Aboriginal controlled organisations to operate at both the State and local levels to undertake decision-making.</li> <li>Roles for Government should be kept to a minimum.</li> <li>A genuinely independent Aboriginal Culture and Heritage Commission (or similar body) to undertake key roles currently done by Government including compliance functions. NSWALC’s position on a State level Aboriginal Cultural Heritage Authority include that it: <ul style="list-style-type: none"> <li>• Is composed of all Aboriginal peoples,</li> <li>• Has key decision making functions,</li> <li>• Has key functions Government currently undertakes including compliance,</li> <li>• Is independent from Government as far as practicable,</li> <li>• Has NSWALC representation / involvement,</li> <li>• Is structured so that it has legitimacy within the Aboriginal community,</li> <li>• Is properly resourced by Government.</li> </ul> </li> <li>Build on the existing structures of the Land Rights and Native Title with proper resourcing by Government.</li> <li>Aboriginal communities must be supported to make decisions about matters that affect them.</li> <li>Local ACH Committees must have the appropriate community and representative authority and be capable of properly consulting/granting</li> </ol> |

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| <p><i>“Before making an application for the issue of an Aboriginal heritage impact permit, the proposed applicant must carry out an Aboriginal community consultation process.”</i></p> <p>However, Clause 80C(9) states that “An application for an Aboriginal heritage impact permit is not invalid merely because the applicant for the permit failed to comply with any one or more of the requirements set out in this clause.”</p> |                           | <p>agreements with proponents which may include harm to ACH.</p> <p><b>Feedback is sought on who should be on the Local Panels and how they should be formed.</b><br/> <i>Note: The draft legislation does not propose to define who speaks for Country. Proposed that the ACH Authority establish a Policy to guide how local ACH consultation panels will be comprised and formed in consultation with NSWALC, LALCs and Aboriginal peoples once the ACH Authority is established. Feedback is sought on possible options.</i></p> <p>The proposals outline that the Minister:</p> <ul style="list-style-type: none"> <li>- Will retain some oversight and approval roles particular for matters with whole of Government or regulatory implications. The Minister will <b>not</b> have powers to direct the Authority but will have a decision-making role and discretion in a number of important areas including the ACH maps, and the Code that governs the negotiation and approval of agreements to harm ACH. The Authority will be able to employ its own staff.</li> <li>- Will formally appoint members to the Authority. Recognising the need for the Authority to have legitimacy in the community, and that Ministerial appointments have not previously been supported, it is proposed that a community driven process is undertaken.</li> </ul> | <p>permission on behalf of community with regard to Aboriginal culture and heritage.</p> <p>g. In recognition that there are differing views and approaches across the State, sufficient flexibility is needed for local Aboriginal people to determine the structure and composition of local decision making groups</p> <p>Since the Keane Select Committee released its first report in 1980, all subsequent inquiry reports have recommended that an independent commission to protect and manage Aboriginal culture and heritage be established in NSW. The consensus extends to the view that such a commission must be governed by representatives of the Aboriginal communities of NSW.</p> |

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|  |   | <p><b>Feedback is sought on options for this process.</b></p> <p>The proposals do not describe the role of government agencies in the new arrangements except to enable the ACH Authority to delegate some of its functions to agencies should it choose to.</p> <p>Aboriginal 'objects' currently 'owned' by the Crown will be owned by the ACH Authority on behalf of Aboriginal people, with arrangements for repatriation to local Aboriginal peoples.</p>  |   |
| <p><b>Focus on regulating destruction of Aboriginal heritage, rather than protection.</b></p> <p><b>Aboriginal heritage is destroyed at alarmingly high rates.</b></p> <p>Under the NPW Act, it is generally unlawful for a person to 'harm' or 'desecrate' an Aboriginal 'object' or declared 'Aboriginal place' in NSW without permission from the Office of Environment and Heritage (section 86, NPW Act).</p> <p>The NSW Government has the power to issue Aboriginal heritage impact permits (<b>AHIPs</b>) to harm, destroy or desecrate Aboriginal heritage (section 90, NPW Act). Previous NSWALC research showed</p> | <p>NSWALC did not support the 2013 Government proposals as they:</p> <ul style="list-style-type: none"> <li>- Allowed proponents to '<i>proceed with caution</i>'</li> <li>- Outlined very short timeframes for Aboriginal communities to respond to proponents,</li> <li>- Had limited mechanisms for Aboriginal people to prevent destruction,</li> <li>- Lacked best practice standards for managing Aboriginal heritage, including the proposed unexpected find process,</li> <li>- Continued of flawed processes from current laws including 'due diligence' and 'low impact',</li> <li>- If ACH was classified as of 'low ACH value', no consultation and no</li> </ul> | <p>Proposed to replace Aboriginal Heritage Impact Permits (<b>AHIPs</b>) with Aboriginal Cultural Heritage Management Plans (<b>ACHMPs</b>) that will require Aboriginal heritage to be considered before planning approvals are obtained (for non-State significant developments), with some exceptions.</p> <p>Proposed to bring assessment of Aboriginal heritage upfront so that it occurs before and informs development application (<b>DA</b>) processes (with some exceptions). Proposed that the State significant projects regime will be updated to require proponents to complete assessment activities in accordance with ACH Authority guidelines and codes.</p> <p>ACHMPs proposed to be negotiated between proponents Local consultation panels based on guidance set by the Minister. Proposed</p> | <p>NSWALC's 2013 submission recommended that:</p> <ol style="list-style-type: none"> <li>1. New laws must empower and support the rights of Aboriginal peoples. Aboriginal people must have the right to refuse an activity or development.</li> <li>2. Timeframes must allow for meaningful consultation and must be culturally appropriate with allowances for cultural priorities such as sorry business.</li> <li>3. 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.</li> <li>4. Processes that further weigh the process in favor of development are not supported. Proper criteria and guidelines must be developed. 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.</li> </ol> |

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| <p>that AHIPs were being issued at a rate of 3-5 per week.</p> <p>While AHIP numbers have decreased in recent years this is attributed to the new broad defences for proponents such as the due diligence and low impact regimes. In addition, State Significant projects are not required to obtain AHIPs.</p> <p>There is no consideration of cumulative impacts and it is unclear whether Aboriginal people's views are considered at all.</p> <p>The system does have some 'conservation' measures though these are limited (see below).</p> | <p>project agreement would be required.</p>  | <p>that final decision on ACHMP is by the ACH Authority.</p> <p>ACH Authority will be able to refuse an ACHMP. Proponents will be able to appeal to the Land and Environment Court.</p> <p>Mandatory timeframes will not be set out in the Bill, but will be set out in a Regulation to be developed after the Bill is finalised. OEH advise that mandatory timeframes will reflect the scale of the project. Timeframes will be based on the ACHMP tier. <b>NOTE</b> – the proposals paper flags very short negotiation and determination timeframes.</p> <p>A new mapping system is proposed that will be the first check for all proponents to determine whether any further assessment is necessary where ACH is present or likely.</p> <p>New provisions to protect intangible ACH and clearer interaction with <i>Heritage Act 1977</i> (NSW).</p> | <ol style="list-style-type: none"> <li>5. 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.</li> <li>6. The proposal to allow proponents to 'proceed with caution' is not supported. Where agreements cannot be reached between a proponent and Local Aboriginal people an independent Aboriginal heritage commission should have roles here to decide whether or not the project can proceed and any conditions.</li> <li>7. Consultation must occur with peak Aboriginal organisations on all supporting regulations, policies, minimum standards and other supporting documents.</li> </ol> |
| <p><b>Mapping, databases and Aboriginal Heritage Information Management System (AHIMS) are insufficient.</b></p> <p>Section 90Q of the NPW Act establishes the Aboriginal Heritage Information Management System (AHIMS) as a database containing Aboriginal heritage information.</p>   | <p>NSWALC did not support the 2013 Government proposals to:</p> <ul style="list-style-type: none"> <li>- Emphasise upfront mapping that bypassed the rights of communities to have a say on individual developments</li> <li>- That Government retain ownership and management of cultural heritage registers and mapping systems</li> </ul> | <p>Proposed that the new legislation provide for a range of mapping products for operational, regulatory and strategic planning purposes including:</p> <ul style="list-style-type: none"> <li>- A restricted access ACH Register is established for operational day to day use by authorised database administrators for statutory land use planning activities</li> </ul>  | <p>NSWALC's 2013 submission recommended that:</p> <ol style="list-style-type: none"> <li>1. 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.</li> </ol>  |

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| <p>While there NPW Act states that AHIMS information and records may be subject to conditions or restrictions, there are no legislated protections for cultural knowledge. AHIMS is also used to provide information to groups such as developers who are carrying out due diligence.</p> <p>A range of concerns have been raised that Aboriginal peoples' knowledge is contained in a Government database, and that AHIMS is not a comprehensive system and should not be relied upon.</p>   |   | <ul style="list-style-type: none"> <li>- A public portal to support strategic, landscape scale planning and management of Aboriginal heritage</li> </ul> <p>Registers and mapping to be owned and operated by the Aboriginal Cultural Heritage Authority. LALCs and local Aboriginal Panels may be delegated to undertake mapping roles.</p>  | <ol style="list-style-type: none"> <li>2. 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.</li> <li>3. 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.</li> <li>4. 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 <i>Declaration on the Rights of Indigenous Peoples</i>.</li> </ol>   |
| <p><b>Broad defences against prosecution including 'due diligence' processes and 'low impact' activities for people who harm or destroy Aboriginal heritage</b></p> <p>Section 87 of the NPW Act outlines a number of defences against prosecution if Aboriginal heritage is destroyed including if the proponent:</p> <ul style="list-style-type: none"> <li>- Was acting in compliance with an approved AHIP</li> <li>- Had exercised 'due diligence' – the current due diligence process is insufficient. Proponents and land managers are currently able to self-assess Aboriginal heritage and are not required to consult with Aboriginal peoples. There is no transparency in the process and it is</li> </ul> | <p>Proposed to retain due diligence and low impact processes.</p> | <p>Proposed that a broad range of defences will remain including:</p> <ul style="list-style-type: none"> <li>- A defence if the activity was undertaken in accordance with an approved ACHMP</li> <li>- Due diligence to replaced with a new ACH Assessment Pathway which will still require a map review to trigger further assessment and consultation</li> <li>- Ability for the Minister to make additional defences in Regulations for acts done in accordance with additional Codes of Practice.</li> <li>- Low impact activities, however OEH are seeking feedback on this list</li> </ul> | <p>NSWALC is concerned that the due diligence and low impact regimes fail set a best practice processes for proponents to follow.</p> <p>NSWALC has recommended that:</p> <ol style="list-style-type: none"> <li>1. 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.</li> <li>2. 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.</li> </ol> |

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| <p>unclear if proponents and land managers are following it.</p> <ul style="list-style-type: none"> <li>- The activity was classed as a low impact activity – the current low impact activity list includes activities that are not genuinely low impact</li> </ul>   |   |   |   |
| <p><b>Conservation mechanisms</b></p> <p>Aboriginal groups can apply for protection of an area by requesting that the Minister for the Environment declare it an ‘Aboriginal Place’, ‘Aboriginal Area’ or even a ‘National Park’ or another reserve type (See NSWALC Site Protection Fact Sheet 3: <i>Aboriginal Places</i>).</p> <p>There are joint-management options that may be available for Aboriginal groups to jointly manage National Parks with the Government.</p> <p>Aboriginal groups can seek to have the heritage values of a site recognised by Local Councils. It is now a requirement for Local Councils to consider Aboriginal heritage, along with non-Aboriginal heritage as part of their Local Environment Plans (LEPs).</p> <p>Under the <i>Heritage Act 1977</i> (NSW), LALCs and other persons can apply to the Heritage Council to have a site which is of</p> | <p>Some conservation mechanisms and processes, though uncertainty about key elements.</p> | <p>Proposed conservation mechanisms:</p> <ul style="list-style-type: none"> <li>- Provide for declarations of ACH similar to Aboriginal Places but with provision to protect broader ACH values</li> <li>- Clearer links with the State Heritage Register</li> <li>- Establish local strategic plans which could include priority conservation actions, objectives and directions, and use maps to effectively communicate strategic intent.</li> <li>- Government agencies and public authorities to consider strategic plans when exercising their legislative functions including planning proposals and regional plans.</li> <li>- Establish intangible ACH agreements</li> <li>- Establish ACH conservation agreements</li> <li>- Provide for stop work orders, interim protection orders and remediation directions to be issued</li> </ul> | <p>NSWALC has repeatedly called for best practice protection mechanisms for Aboriginal heritage at all levels and better tools to protect Aboriginal heritage proactively and Aboriginal heritage under threat of harm, desecration or destruction.</p> |

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| <p>'state significance' listed on the NSW State Heritage Register.</p> <p>If a landholder is interested in protecting an area containing Aboriginal cultural sites or areas, they can enter into a Voluntary Conservation Agreement with the NSW Minister for Environment.</p> <p>Where Aboriginal heritage is under threat the current laws allow stop work orders, interim protection orders and remediation directions to be issued (Part 6A NPW Act)</p>   |  |   |  |
| <p><b>Review, compliance, offences, penalties and appeals</b></p> <p>The <i>National Parks and Wildlife Act</i> currently contains some offences for harming or desecrating Aboriginal objects or places that have been in force since 1 October 2010 (section 86). They include:</p> <ul style="list-style-type: none"> <li>• A 'strict liability' offence for harming or desecrating Aboriginal objects or places. This does not require someone to know that it is an Aboriginal object or place they are causing harm to in order for them to be prosecuted</li> <li>• An offence for 'knowingly' harming and Aboriginal object</li> </ul> | <p>Dispute resolution, appeal and review processes proposed, but no detail was provided.</p> | <p>Proposed that new legislation establish review, compliance and enforcement provisions including:</p> <ol style="list-style-type: none"> <li>ACH Authority to undertake compliance and enforcement</li> <li>Investigative and prosecution powers</li> <li>Merits appeal for proponents if ACHMP is refused and judicial review for others.</li> <li>New definition of harm</li> <li>Extra elements of "intentionally and recklessly" have been added to an offence</li> <li>Aggravating factors have been removed</li> <li>Still broad defences if Aboriginal heritage is harmed</li> <li>New tiered penalties, maximum penalties for the most serious</li> </ol> | <p>NSWALC's 2013 submission recommended:</p> <ul style="list-style-type: none"> <li>• Local Aboriginal communities should have key roles in determining penalties for individuals or organisations that have damaged or destroyed Aboriginal heritage. In addition, any fines should be directed to the local Aboriginal community where the offence occurred. It is important strong penalties for harming or desecrating Aboriginal cultural heritage are set out in new legislation.</li> <li>• 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.</li> <li>• Proper appeal processes and review rights must be incorporated into any new Aboriginal culture and heritage legislation to providing mechanisms for Aboriginal peoples to challenge decisions, including merit appeals, and to seek</li> </ul> |

| Current laws and policies   | 2013 Government proposals | 2017 Government proposals (Bill and Proposals Framework)   | Summary of NSWALC policy positions  |
|---|---------------------------|--|---|
| <p>Certain ‘circumstances of aggravation’ such as previous convictions for harming Aboriginal objects or places, or causing harm in the course of a commercial activity, may double the penalties for individuals who harm Aboriginal objects.</p> <p>There are also offences for:</p> <ul style="list-style-type: none"> <li>• Failing to notify OEH of the location of an Aboriginal object</li> <li>• Contravening any condition of an Aboriginal Heritage Impact Permit (AHIP)</li> </ul> <p>Some of the penalties are as follows:<br/>The maximum penalties for ‘<u>knowingly</u>’ harming or desecrating an Aboriginal object are:</p> <ul style="list-style-type: none"> <li>• For individuals, \$275,000, or imprisonment for 1 year, OR \$500,000 or imprisonment for 2 years in circumstances of aggravation</li> <li>• For corporations, \$1.1 million</li> </ul> <p>The maximum penalties for harming or desecrating an Aboriginal object (<u>strict liability offence</u>) are:</p> <ul style="list-style-type: none"> <li>• For individuals, \$55,000, OR \$110,000 in circumstances of aggravation</li> <li>• For corporations, \$220,000</li> </ul> |                           | <p>offences \$1,650,000 for a corporation &amp; \$330,000 for individual</p> <p>i. Higher maximum penalties for most strict liability offences: \$660,000 for a corporation, \$132,000 for an individual – however the higher penalty for the strict liability offence of harming an Aboriginal place (now declared ACH) has been removed.</p> | <p>redress where Aboriginal culture and heritage has been damaged or destroyed.</p> |

| Current laws and policies  | 2013 Government proposals | 2017 Government proposals (Bill and Proposals Framework) | Summary of NSWALC policy positions |
|--|---------------------------|--|------------------------------------|
| <p>The maximum penalties for harming or desecrating an Aboriginal place (<u>strict liability offence</u>) are:</p> <ul style="list-style-type: none"> <li>• For individuals, \$550,000, or imprisonment for 2 years, or both</li> <li>• For corporations, \$1.1 million</li> </ul> |                           |  |                                    |

*This document provides information about the NSW Government’s proposed model for new Aboriginal Culture and Heritage laws. This document has been prepared by the New South Wales Aboriginal Land Council (NSWALC) for Local Aboriginal Land Councils (LALCs) and Aboriginal communities in NSW. **Please Note:** While all care has been taken in the preparation of this document, the advice it contains should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of 23 February 2018.*

The 2017 proposed Government model, consultation draft Bill and details about **how to have your say** (including workshop dates) are available on the Office of Environment and Heritage website at:

<http://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage/legislation/draft-aboriginal-cultural-heritage-legislation-2017-consultation>

OEH can also be contacted by phone: 131555 or email: [ach.reform@environment.nsw.gov.au](mailto:ach.reform@environment.nsw.gov.au). Comments to OEH are due 6 April 2018.

**For more information please visit the NSWALC website [www.alc.org.au](http://www.alc.org.au), call the NSWALC Strategy and Policy Unit on 02 9689 4444 or email us at [policy@alc.org.au](mailto:policy@alc.org.au). NSWALC submissions, reports and fact sheets on Culture and Heritage reform are available on the NSWALC website.**