



New South Wales  
Aboriginal Land Council

## Summary of key NSWALC positions compared to 2018 Government proposals

*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, it 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 proposed Government model and details about **how to have your say** are available on the Office of Environment and Heritage website at: [www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage](http://www.environment.nsw.gov.au/topics/aboriginal-cultural-heritage)

NSWALC Position	2017-2018 Government proposal (Proposals Framework and Draft Bill)
Genuine decision making and control to Aboriginal peoples at local and State levels, building on existing structures of Land Rights and Native Title.	Aboriginal peoples will make key decisions via a State level Aboriginal Cultural Heritage (ACH) Authority. Proposals paper states that Local ACH Panels are to provide advice on local ACH matters, supported by 'local coordination and support' body proposed to be LALCs in first instance. While the draft Bill does not specify, there is a consultation note on page 7 of the draft Bill regarding this.
A State level, genuinely independent Aboriginal controlled body to provide key roles government currently undertakes.	<p>A State level ACH Authority, composed of all Aboriginal peoples, proposed to be established to undertake key roles currently done by Government. Will have key decision making, oversight, approval, regulatory, compliance, mapping and advisory roles, some of which will be exercised independent of the Minister.</p> <p>The Minister is proposed to:</p> <ul style="list-style-type: none"> <li>- Retain decision-making for a number of roles including the declaration of ACH, the mapping methodology, the funding allocation strategy and the Code that will govern the negotiation and approval of agreements to harm ACH. The Minister will <b>not</b> have powers to direct the Authority and the Authority will be able to employ its own staff.</li> <li>- Formally appoint members to the Authority and discretion to remove members from the Authority. However, 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. <b>Feedback is sought on options.</b></li> </ul> <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>
Build on the Land Rights network and an increased role for LALCs, with proper resourcing and capacity building.	The Proposals Paper states that LALCs who wish to provide local roles (and subject to meeting certain requirements) can be delegated functions from ACH Authority. This is not reflected in the draft Bill (however there is a consultation note on page 7 of the draft Bill regarding this). Functions include supporting the Local ACH Panels with mapping, first point of contact for proponents, coordinating local ACH consultation panels. OEH advise that LALCs will be resourced to carry out new roles. <b>NSWALC is seeking the Network's views in particular on this proposal.</b>
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.	The draft Bill does not define who speaks for Country. Proposed that the ACH Authority develop a Policy in consultation with Aboriginal community to guide how local Aboriginal Cultural Heritage consultation panels will be comprised and formed. <b>Feedback is sought on this proposal.</b>
That the NSW Government fund the expansion of the Aboriginal Owners Register under the <i>Aboriginal Land Rights Act (NSW)</i> to cover the whole of NSW, to enable Aboriginal Owners to be the authority to speak for Country.	As above, proposed that the ACH Authority will further review and consult on these matters and develop a Policy.

<p>Improved definitions of Aboriginal heritage and protections for intellectual property and intangible heritage.</p>	<p>New definitions that recognise Aboriginal people’s views of culture and heritage and new protections for cultural knowledge are proposed. However definitions of ‘Aboriginal object’ and ‘Aboriginal ancestral remains’ similar to the current laws and offences of harming ACH will only apply to objects, ancestral remains and declared ACH. The proposals paper states that there will be a definition of ‘materials’ however this is not included in draft Bill. Proposals include definition of significance as ‘<i>significance to Aboriginal people or communities.</i>’ NSWALC has previously raised concerns regarding the use of ‘<i>significance</i>’ as it may limit what can be protected. The current laws include <i>significance</i> however they do not include a definition. The Bill removes ‘desecration’ from the definition of harm but does not include a new offence for desecration. The Proposals Paper indicates that a definition of desecration is intended to be included in the draft Bill.</p>
<p>Provision of best practice protection tools and mechanisms for Aboriginal Culture and Heritage.</p> <p>New laws must empower and support the rights of Aboriginal peoples. Aboriginal people must have the right to refuse an activity or development.</p> <p>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.</p> <p>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.</p> <p>Any timeframes must allow for meaningful consultation and must be culturally appropriate with allowances for cultural priorities such as sorry business.</p> <p>New system must focus on protection rather than just regulating destruction.</p>	<p>Proposed to replace Aboriginal Heritage Impact Permits (<b>AHIPS</b>) with Aboriginal Cultural Heritage Management Plans (<b>ACHMPs</b>).</p> <p>ACHMPs proposed to be negotiated between proponents and local ACH consultation panels in accordance with a Code to be developed by ACH Authority and approved by the Minister. Proposed that final decision on ACHMP is by the ACH Authority that will require Aboriginal heritage to be considered before planning approvals are obtained (for non-State significant developments). Proponents will be able to appeal to the Land and Environment Court for a ‘merits review’. There will be no appeal rights for Aboriginal people relating to the approval of ACHMPs.</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. However, the proposals paper flags very short negotiation and determination timeframes.</p> <p>Due diligence to be replaced with a new Assessment Pathway. Under the Pathway, proponents will be required to check a map to trigger consultation and assessment. .</p> <p>Potential improvements on the current system include:</p> <ul style="list-style-type: none"> <li>- New provisions to protect intangible ACH</li> <li>- Clearer interaction with <i>Heritage Act 1977</i> (NSW)</li> </ul>
<p>Roles for Government kept to a minimum, recognising that transitional arrangements will be needed.</p>	<p>Yes, however implementation and transition proposed to occur over several years.</p>
<p>LALC boundaries are utilised. Protocols and agreements can be developed where cultural boundaries may cross over.</p>	<p>Boundaries not proposed to be outlined in legislation. The distribution of ACH consultation panels to be determined by ACH Authority Policy.</p>
<p>Improved links and interactions with local government and planning laws and processes.</p>	<p>Proposed to bring assessment of Aboriginal cultural heritage upfront so that it occurs before and informs development application (DA) processes (with some exceptions). Will not amend the laws relating to State significant projects, which will continue be exempt from the ACH requirements, though the State significant projects regime will be updated.</p>
<p>A rigorous system of compliance, offences, penalties and enforcement is needed.</p>	<p>Proposed that the new legislation establish updated compliance and enforcement provisions including:</p> <ol style="list-style-type: none"> <li>a. ACH Authority to undertake compliance and enforcement</li> <li>b. Investigative and prosecution powers</li> </ol>

<p>Proper appeal processes that allow Aboriginal peoples to challenge decisions are needed including merit appeals.</p>	<ul style="list-style-type: none"> <li>c. Merits appeal for proponents if ACHMP is refused. Aboriginal people can bring proceedings for breaches of the Act.</li> <li>d. New definition of harm, however this will still only apply to Objects, ancestral remains and declared ACH.</li> <li>e. Still broad defences if Aboriginal heritage is harmed</li> <li>f. New tiered penalties, maximum penalties for the most serious offences \$1,650,000 for a corporation &amp; \$300,000 for individual</li> </ul>
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**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.**