

DISCUSSION PAPER:

ABORIGINAL CULTURE AND HERITAGE REFORM



Why is NSWALC consulting?

The current Aboriginal cultural heritage (ACH) laws in NSW, largely outlined in the *National Parks and Wildlife Act 1974 (NSW) (NPW Act)*, are archaic, fail to protect ACH, and do not include roles for Aboriginal people.

Since the late 1970's there have been several government inquiries recommending major reforms to Aboriginal culture and heritage (ACH) laws in NSW.

In 2010, a bipartisan commitment was made to reforming NSW ACH laws. The laws have been under review since.

Despite not legislating yet, the NSW Government has reaffirmed its commitment to ACH reform and is looking for options to reduce the complexity and costliness of ACH systems, increase self-determination and build on existing structures.

Your voice is important.

We acknowledge feedback may have been previously provided, but there is an opportunity for further feedback.

This paper seeks views on how new laws in NSW can be improved to achieve longstanding reform principles.

In particular, NSWALC would like your feedback on:

- Reforms to increase self-determination
- Reform to build on land rights & native title
- Reforms to increase protections

This document builds on [NSWALC's previous consultation](#) on these issues, which have canvassed various issues and options relating to governance, decision-making, functions, & protection mechanisms.

Key Reform Principles

NSWALC has adopted the following reform principles to guide our approach. These principles are based on previous Land Rights Network and Aboriginal community consultations, and human rights instruments including the United Nations *Declaration on the Rights of Indigenous Peoples*. Reforms must:

- a. Strengthen self-determination and empower Aboriginal people;
- b. Be led by Aboriginal people;

- c. Inclusive and respectful of cultural and native title rights;
- d. Build on existing structures of land rights and native title;
- e. Independent of government;
- f. Improve ACH protection, promotion & repair, including rights to say no (free, prior, informed consent) including approaches to protection, regulation, intangible ACH, knowledge, languages, cultural access & use, repatriation, water, cultural practices;
- g. Have no detrimental impacts to land rights, native title or ACH.

Question A

Do you agree or disagree with the above key reform principles?

Do you have suggestions for how these principles could be improved?

What is needed to better protect ACH

Key issues NSWALC is seeking your feedback on:

- Roles & functions of the Minister / Government
- Roles, functions & independence of a State-level Aboriginal cultural heritage body
- Roles, functions & inclusiveness of local Aboriginal cultural heritage bodies
- To what extent and how should existing structures of land rights and native title be built on?
- What's needed to better protect ACH?

More info

Visit our website at: www.alc.org.au/more-than-flora-fauna.

NSWALC is seeking your feedback and comments:

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Key issues

Issue 1 – Roles & functions of the Minister & Government

The 2018 Bill outlined that the Minister would have significant decision-making roles relating to ACH, including:

- Appointing & removing ACH Authority Board members (new State-level body)
- Making key conservation decisions including whether to protect ACH via 'Declarations', Interim protection orders, varying or terminating conservation agreements
- Making key regulatory decisions including approving regulatory Codes of Practice that proponents must follow
- Making decisions about funding

NSWALC is seeking your views about the roles of the Minister & Government. In particular, whether there are opportunities to increase self-determination & independence from government in new ACH laws.

Question 1(a)

Do you think the Minister should have key decision-making roles including ACH conservation and regulatory decisions?

If not, who should undertake these roles?

Question 1(b)

Do you think the Minister should appoint ACH Authority Board members?

If not, who should undertake this role?

Issue 2 – Roles & functions of a State-level ACH body

The 2018 Bill proposed the establishment of a new state-wide ACH body, comprised of all Aboriginal people, to undertake a range of functions including:

- Administering the new laws
- Making some strategic & regulatory decisions, including whether to approve local Aboriginal cultural heritage management plans (that would replace 'Aboriginal Heritage Impact Permits' or AHIPs)
- Making some key policies & procedures, including about how local ACH panels will be established
- Providing support to local ACH panels (which they could delegate to LALCs or other Aboriginal bodies)
- Providing guidance & oversight
- Administering information tools
- Providing advice & recommendations to the Minister, including about areas that should be protected
- Undertaking regulatory compliance.

Question 2(a)

What do you think the roles & functions of a State-level ACH body should be?

Question 2(b)

Do you think key roles proposed to be undertaken by the Minister (as per the 2018 Bill) should be undertaken by the State-level ACH body? Which roles?

Question 2(c)

Do you think the State-level ACH body should be independent of government or part of a government agency?

Question 2(d)

Do you think that the State-level ACH body should have responsibility for the Aboriginal Owners Register under sections 170-175 of the *Aboriginal Land Rights Act 1983*?

Issue 3 – ACH Authority Board: criteria, composition & selection process?

The 2018 Bill did not specify a process for how ACH Authority Board members would be selected, but outlined the final Bill would include a community-driven process to ensure the Board has legitimacy and requisite skills and expertise to run the new regulatory regime.

The 2018 Bill did not specify criteria or compositional requirements for the ACH Authority Board, but outlined that that ACH Authority members need to be Aboriginal people, meet skills & community confidence requirements, and that a NSWALC representative is to be appointed.

Consideration could be given to running an open, merit-based process for Aboriginal people to apply. A panel of Aboriginal people could be established to assess & make recommendations about who should be appointed to the ACH Authority Board, based on criteria and compositional requirements.

Considerations for criteria and compositional requirements could include:

- As far as possible, a mix of skills and experience for example, relevant to administering a regulatory regime, ACH protection and management, Aboriginal community engagement, land use planning, governance etc
- As far as possible, a spread of geographic areas
- As far as possible, gender balance
- At least some members of Aboriginal Owners, native title groups and Aboriginal land councils

Question 3(a)

What skills & experience criteria should apply to the ACH Authority Board?

Question 3(b)

Do you think there should be considerations or requirements relating to composition?

Question 3(c)

Do you think an open, merit-based selection process should be run to seek applications? Do you think a panel of Aboriginal people should be established to assess applications and make recommendations about who should be appointed? Do you have suggestions for who should be on the selection panel?

Issue 4 – Local ACH bodies

The 2018 Bill proposed the establishment of 'local panels', comprised of Aboriginal people, to:

- Make recommendations on all local ACH matters
- Negotiate directly with proponents about ACH issues and impacts, including Aboriginal cultural heritage management plans

The 2018 Bill did not outline *who* would be on local panels. Instead the ACH Authority, once established, would undertake further community consultation and develop appropriate policies, procedures and guidance materials about their operation.

Local panels would replace the current 'Registered Aboriginal Party' system.

Considerations relating to local panels include:

- To what extent the Bill should support local empowerment, autonomy and self-determination,
- Should the Bill support appropriate flexibility to accommodate local circumstances across NSW
- Resourcing provided by government

Question 4(a)

What should the role/s of local ACH bodies (or local ACH panels) be?

Question 4(b)

Should local panels, including their structure and composition, be determined at the local level? Or should the Bill prescribe who should be on local panels? How inclusive or exclusive should local panels be?

Issue 5 – Local support

The 2018 Bill proposed that LALCs and other Aboriginal organisations could be delegated local administrative and coordination support functions for Local panels.

Question 5(a)

If properly resourced by government, do you support this? If not, what are your concerns with this approach?

Issue 6 – Building on existing structures of land rights and native title

The 2018 Bill proposed creating a new government agency – the ACH Authority – to administer new ACH laws.

Question 6(a)

Instead of creating a new government agency, to increase independence from government, to increase self-determination, and consistent with previous community feedback, would you support building on existing structures of land rights and native title? If so, how do you think this should be achieved? What does this look like in practice?

Question 6(b)

Would you support including new & distinct ACH provisions in the *Aboriginal Land Rights Act*?

Issue 7 – Increasing protections

Definitions

The 2018 Bill proposed the following definition of ACH:

“Aboriginal cultural heritage is the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.”

Question 7(a)

Do you think this definition could be improved? Do you have any alternative suggestions / amendments?

Mechanisms

The 2018 Bill proposed a number of conservation & regulatory mechanisms to improve ACH protection including:

- Increased clarity and link with planning and development processes
- New protection mechanism for protecting intangible heritage
- New offences and higher maximum penalties for harming ACH
- Declarations of ACH (similar to current ‘Aboriginal Places’ under the NPW Act)
- Local strategic plans which could include priority conservation actions, objectives and directions
- Establish ACH conservation agreements
- Stop work orders, interim protection orders and remediation directions to be issued
- Improved investigative powers

NSWALC has previously suggested some improvements including:

- That all development types are subject to the CH process, including major projects; limiting defences, increasing penalties; and ensuring equitable merits appeals
- Key decision making by the ACH Authority, instead of the Minister
- Amendments to other land, natural resource management, water etc laws to ensure earlier consideration, protection and promotion of ACH, including support for cultural practice

Question 7(b)

What additional measures do you think would help to protect & promote ACH?