Aboriginal culture and heritage reform
Phase 1 consultations – Summary of feedback

Aboriginal heritage legislation in NSW
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1. Introduction

Background

In September 2011, the NSW Government approved a process to develop options for the reform of Aboriginal heritage laws in NSW to improve the protection of Aboriginal culture and heritage in this state. To date, this process has involved the release of two papers: an issues paper to promote discussion¹ and a paper on reform milestones from 1969 to 2011². This was then followed by statewide public consultation.

An Aboriginal Culture and Heritage Reform Working Party has been established to advise the NSW Government on options for the protection and management of Aboriginal culture and heritage in NSW. The members of the Reform Working Party and its terms of reference are at Appendix A.

The first stage of the reform process involved 26 regional Aboriginal community workshops held throughout the state between November and December 2011. Over 340 Aboriginal people attended these independently facilitated sessions, which provided opportunities for all interested parties to comment and respond to critical issues related to the reform of Aboriginal culture and heritage legislation in NSW. In addition, over 120 people attended a series of multidisciplinary roundtable workshops for industry, government, and environment and heritage interest groups.

The reform process also afforded all interested parties the opportunity to comment via a free phone line, email, written submissions, and a web-based survey. Through these mechanisms 89 submissions were received.

Key responses from this first round of consultation from all stakeholders included comments about:
- the legislation not adequately protecting Aboriginal objects and sites and the need for change
- lack of time for the process and that it shouldn’t be rushed
- the need for Aboriginal control of decision-making around Aboriginal culture and heritage regulation and the establishment of an Aboriginal Heritage Commission
- clarifying who speaks for Country
- delays in establishing the Reform Working Party
- the need for up-front regional assessments and mapping
- the need to address what is significant Aboriginal culture and heritage, and
- the need for respect and understanding to be built into processes.

All reports from the workshops and full copies of the submissions received are available on the Office of Environment and Heritage (OEH) website at www.environment.nsw.gov.au/achreform/ACHconsult.htm. A list of written submissions is at Appendix C.

Aboriginal communities have requested more information about the current state of Aboriginal heritage legislation in NSW and in the other states and territories. To fulfil this request two new documents have been produced:

These documents will also be mailed out to stakeholders. It is hoped that these documents will prompt further discussion via 11 regional feedback forums (see Appendix B) and also through existing community and/or organisational meetings such as regional NSW ALC meetings or the 40 Partnership communities.

Purpose and content of this document

This document presents a summary of the submissions received via the first community and stakeholder workshops, the online forum and written responses. For ease of reference, the layout of this publication uses the same format as the Aboriginal Heritage Legislation in NSW: Public consultation on issues for reform document. The issues are delivered in the same order, using the same headings. Each issue begins with an overview of the key elements of the topic area, followed by details of any concerns already identified with the current legislative regime.

Feedback from stakeholders was prompted by a series of discussion questions, which are repeated here under each issue. Many common themes and ideas arose across NSW, and these are highlighted in shaded boxes with the relevant comments grouped under them. An attempt has been made to capture most elements of the discussions and written submissions and present them in an accessible format. If anyone feels their input has not been adequately reflected in this summary, please send your concerns via email to ach.reform@environment.nsw.gov.au.

At this stage there has been no further analysis of the submissions. The Reform Working Party will use this information to develop an options paper to be discussed later in 2012 (see below).

Where to from here?

This summary report has been created by OEH using the outcomes from the first round of consultations (Phase 1). As part of Phase 2, OEH will provide a second engagement process where they will present the feedback collected and summarised in this document to the Aboriginal community at the 11 feedback forums occurring across NSW (forum locations are listed in Appendix B).

At the same time as the forums, the Reform Working Party will develop an options paper which will include a recommended and costed model, based on the feedback from the first round of community and stakeholder consultations. After consideration by the Minister for the Environment and the Minister for Aboriginal Affairs, the options paper will be passed on to the NSW Government for wider discussion (Phase 3).

Subject to the decision of the NSW Government, the options paper will form the basis for a third round of consultations via a series of roundtables from November 2012 through February 2013 (Phase 4).

Final recommendations will be provided to the NSW Government for consideration in March 2013 (Phase 5). If these recommendations result in a decision to redraft the legislation there will be a fourth opportunity for public comment on a draft Bill before it is debated in Parliament.
The following table outlines the phases of the reform process.

<table>
<thead>
<tr>
<th>Phase</th>
<th>Duration/date</th>
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</thead>
<tbody>
<tr>
<td><strong>Phase 1 commenced October 2011</strong></td>
<td>Three-month period</td>
</tr>
<tr>
<td>Public awareness campaign of the reform process and timetable. Circulation of an issues paper and background materials. Initial community and stakeholder engagement seeking input on the key issues and suggested solutions. The first community and stakeholder engagement included 26 regional briefings, workshops and interviews with Aboriginal stakeholders and a series of meetings with industry sectors, environmental groups, heritage practitioners, local government, government agencies and catchment management authorities.</td>
<td>COMPLETE</td>
</tr>
<tr>
<td><strong>Phase 2 (two simultaneous stages)</strong></td>
<td>Nine-month period</td>
</tr>
<tr>
<td>Collate and review Aboriginal community and stakeholder input and outcomes. OEH will undertake the second community and stakeholder engagement process via 11 forums across NSW to provide the Aboriginal community with feedback.</td>
<td></td>
</tr>
<tr>
<td>The Aboriginal Culture and Heritage Reform Working Party will review outcomes from Phase 1 and develop an options paper for consideration by the Minister for the Environment and the Minister for Aboriginal Affairs. The Ministers’ recommendations will be provided to the Government for consideration.</td>
<td></td>
</tr>
<tr>
<td><strong>Phase 3</strong></td>
<td>September 2012</td>
</tr>
<tr>
<td>Options are provided to Government for consideration.</td>
<td></td>
</tr>
<tr>
<td><strong>Phase 4</strong></td>
<td>Three-month period</td>
</tr>
<tr>
<td>Undertake the third round of community and stakeholder engagement via a series of roundtable sessions on Government endorsed preferred model and outcomes.</td>
<td></td>
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<tr>
<td><strong>Phase 5</strong></td>
<td>March 2013</td>
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<tr>
<td>Provide report and recommendations to Ministers and Government.</td>
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<tr>
<td><strong>Phase 6 (if legislation is to be amended)</strong></td>
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<tr>
<td>Draft Bill and fourth round of community and stakeholder engagement.</td>
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Overview of issue

Aboriginal culture is based on ‘Country’. Country refers to the land and water, people, plants and animals, as well as the seasons, stories and creation spirits of Aboriginal people. It includes both tangible (physical) and intangible (non-physical) aspects – the landscapes, places, objects, customs, and cultural traditions and practices – that communities have inherited from the past and wish to conserve as part of their Country for the benefit of current and future generations. Aboriginal heritage is a fundamental part of the Australian culture, heritage and identity and can be described in the following ways:

- Aboriginal culture and heritage is dynamic.
- One of the issues with the National Parks and Wildlife Act 1974 is that the definition of Aboriginal culture and heritage in terms of ‘places’ and ‘objects’ is based on an archaeological understanding, which does not accord with Aboriginal people’s own concepts of culture.
- Aboriginal people’s definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land. Culture includes tangible and intangible elements that tell a story about the land, environment, people, family, history, law, community and spirituality.
- Aboriginal cultural knowledge is part of Aboriginal culture and heritage and includes:
  - specific knowledge about places and objects
  - knowledge about natural resources and processes, food sources, medicine, biodiversity, land management and landscape functions
  - knowledge about language, cultural traditions and social processes.

Best practice Aboriginal cultural heritage regulation would recognise both tangible and intangible heritage.

Question 1: What specific aspects of Aboriginal culture and heritage do you think should be protected by law?

Summary of submissions

Consultation theme: Legislation should recognise the basic rights of Aboriginal peoples in NSW to protect, maintain and develop their culture and heritage in accordance with Articles 3, 4, 11, 12, 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples (2007) (DRIP), and Article 8(j) of the United Nations Convention on Biological Diversity (1992) (CBD).

Comments

- The rights of Aboriginal people should be fundamental to the development of any proposed legislation and it has to include their moral responsibility to protect their heritage.
- The law needs to recognise and support the right of Aboriginal people to practise culture, and access sites/places of significance to them.

Consultation theme: Legislation should be for conservation, and be built upon the premise that the heritage of the Aboriginal peoples of NSW must be respected, protected and conserved for the benefit of current and future generations.

Comments

- Aboriginal culture, although linked to Aboriginal heritage, should be recognised and the right for Aboriginal people to practise culture needs to be supported.
• For NSW the law should only affect the management of Aboriginal heritage and not Aboriginal culture. Culture belongs to the individual, the family and/or the collective families that make up a broader grouping of people of similar beliefs. Heritage management can be the business of the State because it is the heritage of a people that is part of the make-up of the whole of society.

• Aboriginal culture and heritage are linked – culture is a living breathing thing – heritage is the physical/tangible things that provide a link to the past and a connection to the future. Aboriginal heritage, that is, artefacts, places, sites, objects, etc. must be protected by law to ensure those links to the past carry on into the future and these sites remain for both Aboriginal and non-Aboriginal people. Aboriginal culture cannot be protected by law as such, however some aspects of Aboriginal culture can be protected through sharing of selected appropriate Aboriginal cultural traditions (as identified by the local Aboriginal community), and perhaps this can be incorporated into the legislation.

• The law should protect what is left and proactively allow the rediscovery of culturally significant sites, and have them maintained by the Aboriginal community.

• Need to have relationship with private land owners to access our sites/places; need our rights to this reflected in law.

• Place responsibility for decision-making regarding protection of Aboriginal heritage with the Aboriginal peoples of NSW.

Consultation theme: All aspects of Aboriginal cultural heritage should be protected.

Comments
• All Aboriginal sites and places should be protected. The protection should be broader than just protecting 'objects'. Recognition of the importance of the cultural landscape which includes physical evidence of occupation (e.g. stone tools, scarred trees, rock shelters, middens, etc.), sites without physical evidence such as story sites and ceremonial sites, the natural resources and the landscape that connects all of these sites, places and resources to Country.

• Aboriginal heritage be defined to include:
  – Aboriginal languages of NSW
  – Aboriginal areas, places, and sites of significance to Aboriginal peoples
  – Aboriginal cultural landscapes
  – Aboriginal story of place, people, and landscape
  – cultural values and knowledge associated with the natural environment
  – Aboriginal history, and

• Aboriginal heritage law should:
  – recognise the rights of Aboriginal peoples to practise and maintain their culture
  – enable access to places of particular significance to them, and
  – preserve the integrity of cultural practices in a manner determined by Aboriginal peoples (this could include practices such as the intergenerational passage of knowledge, language and story).

• Certainly both tangible and intangible heritage, rather than the main focus being on archaeology. Intangible places don’t need to have stories attached to them. Some places would be the sites of old missions, reserves and settlements. The places hold nostalgia, from just having people living and dying there. It would be the same for earlier sites of middens, rock art, and occupation sites, evidence of people. Our heritage has been shattered into pieces, and we need to put the pieces together again so places of presence, whether or not with stories and tangible evidence, need to be protected.
Interpretation of Aboriginal culture and heritage needs to be protected by law – that is, that only Aboriginal people can interpret and present their culture and heritage, or that only those people who are endorsed by / have the support of the local Aboriginal community can interpret and present Aboriginal culture and heritage.

All sites of significance to Aboriginal people must be protected and appropriately managed. Efforts also must be made to continue the documentation of languages, and keeping them alive and viable.

Specific aspects of Aboriginal culture and heritage that should be protected by law include:
- intellectual property rights (e.g. bush medicine, plants, etc.) and uses of our knowledge
- women’s places – men’s places
- burial sites
- access to spiritual places – understanding why it is important
- non-Aboriginal people have access to sacred sites – who should say who can visit – Elders, traditional owners or community groups?
- recognition of burial grounds which have already been destroyed
- our cultural practices and sharing stories give us our identity and make up who we are as people
- we need to get the legislation to respect and listen to what our Elders are saying (Elders’ words)
- places that contain objects, artefacts – broader cultural associations
- secret / sacred determined by museums – should be what is actually secret / sacred as determined by Aboriginal people
- cultural practices to be protected and legislation to return cultural items / information back to communities
- research processes to be approved / overseen by community. Research activities approved from area of origin / communities
- more than objects, the Act should protect water management and aquatic species
- totem food and medicines
- landforms such as significant places
- stories, for example on Country there are issues of integrity and change (modern versions of stories need to be included)
- oral histories – issues about publishing information and lack of reference to communities
- access to Country and access to information
- challenge is to encompass all existing provisions into useable format – Commonwealth and state and useable by communities within NSW
- this is a dynamic culture and not stagnant – needs to be accommodated
- culture and heritage should protect ‘nations’ rather than individuals
- cultural landscape and features, stories with value
- language as the evidence of value
- information on uses of plants (medicinal)
- protect prior era values from change but respect all eras
- recognise differing values / perspectives
- protect items / areas with demonstrated heritage significance
- develop significance criteria, and
- significance should be determined by the local Aboriginal community.
Consultation theme: Aboriginal heritage conservation law should make it an offence not to respect, protect and conserve the defined elements of Aboriginal heritage that the legislation covers.

Comments

• This concept avoids the issue of property title on which some of the defined elements of heritage may be located, but deals with the element of heritage itself. The heritage values would have grades of significance. The concept also deals with the issue of cumulative impacts on any action that causes the element of heritage being considered to be diminished in any way.

• Relics should meet a threshold of local or state significance.

• For government land and resource management agencies, this concept ensures that their land and resource managers are also required to manage their existing and future legislative functions in full accord with the new Aboriginal heritage law.

• To be effective and practical the regulatory process could require an applicant to apply for a permit not to conserve – with the arguments submitted to be based on conservation values and principles (not just economic). If the applicant is then authorised not to conserve, then any future such permits in a region would have to take into consideration the cumulative impacts on the regional heritage resource that prior permits have affected.

• This requires the development or imposition of a graded system of heritage values ranging from some clearly defined heritage elements being of such high and intrinsic value that they must be conserved and no permits to not conserve can be issued, through to a low value heritage element or asset that, although it should be conserved, can be issued a permit with minimum difficulty. There would need to be a range of options between these two extremes and also a process of review which routinely assessed (on a local area or regional basis) into which category the various heritage elements of the area / region were to be classified (again the notion of cumulative impact).

• The deficiencies in the current Due Diligence process need to be urgently addressed to provide for some form of limited consultation, and assessment that is not based on land disturbance but on site distribution and landscape analysis.
Overview of issue

The responsibility for protecting Aboriginal culture and heritage in NSW primarily rests with the NSW Government. However, Commonwealth heritage legislation can also come into play where state laws have proven to be ineffective in protecting certain objects or artefacts. The primary Commonwealth legislation for the protection of Aboriginal heritage is the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). Under this Act, the Australian Government may consider and respond to requests made by an Aboriginal or Torres Strait Islander person to protect certain areas or objects. The ATSIHP Act is currently being reviewed by the Commonwealth, with the aim of improving Indigenous heritage protection laws nationally.

In NSW, there is legislation at various levels that deals with Aboriginal culture and heritage. However, currently, the primary piece of legislation for the protection of Aboriginal culture and heritage in NSW is the *National Parks and Wildlife Act 1974*. Under this Act, the Director General of the Department of Premier and Cabinet is responsible for the protection of Aboriginal cultural heritage and for issuing permits to cause harm to Aboriginal objects or places.

The Aboriginal Heritage Information Management System and the Aboriginal Heritage Impact Permit approval processes and compliance or enforcement measures are managed and administered by the Office of Environment and Heritage (OEH), Department of Premier and Cabinet, as well as the development of any related policies.

Past Aboriginal heritage reviews have supported the creation of an independent administrative structure to fulfil these roles. The two-tiered structure previously proposed, was intended to allow for decision-making at a local or regional level by Aboriginal people, with a central body or commission to provide for the monitoring and review of locally made decisions, as well as for the resolution of disputes. The previous reviews have also recommended that additional administrative options or processes, such as plans of management entered into between land owners and Aboriginal communities, are needed to provide adequate protections for Aboriginal culture and heritage.

Question 2 (a): Who should be responsible for making decisions on the management and protection of Aboriginal culture and heritage?

Summary of submissions

**Consultation theme:** Elders, traditional owners, custodians, knowledge holders, Aunties and Uncles, etc.

**Comments**

- The local Aboriginal community with continuity of connection and residency should have responsibility, plus independent arbitration defined in stand-alone legislation.
- Decision-making should be with traditional knowledge holders and custodians with agreements with land owners and government departments.
- Aboriginal people via pre-registered / listed Aboriginal parties with direct consultation rights have responsibility for decisions, for example registered traditional owners.
- The Aunties and Uncles as a collective group are responsible for decisions over that mob’s land. These are the people that are responsible for making decisions since they hold the knowledge.
- There is a cross-over between traditional owners and communities, the boundaries are difficult to define.
• Decision-making must be guided by the appropriate legislative regime that recognises that Elders, both male and female, who are culturally authorised by their cultural status and community, are afforded the cultural and legal respect to determine the future management and custodianship of Aboriginal culture and heritage.
• The decision-making process needs to give time to people to come together and sort out differences, perhaps through independent facilitation and mediation.
• The legislation needs to consider who can speak for Country. It needs to ensure that connection in the process. It needs to align with Aboriginal processes for who speaks for Country such as genealogy.
• Aboriginal voices should be in the decision-making process. They need to be elevated in the process to have real binding effect and meaning.
• Although these terms are more acceptable to the Aboriginal community (Elders, traditional owners, custodians, knowledge holders, Aunties and Uncles) none of them have any form of legislative definition in the laws of NSW.

**Consultation theme:** Local Aboriginal Land Councils.

**Comments**
• Let Local Aboriginal Land Councils (LALCs) protect Aboriginal cultural heritage. Land Councils can be supported and given admin support, with a coordinated functioning board to assist with decisions within their own regions/areas. They also have access to a central legal advice resource.
• At the local / regional level, Local Aboriginal Land Councils, potentially modified or compartmentalised to better represent tribal areas, should work as Joint Consent Authorities with local / regional bodies (local / shire councils, Rural Partnership Program – a Commonwealth program).
• At the state level, an Aboriginal body (either the NSW Aboriginal Land Council (NSWALC) or a new body), voted in by Aboriginal people, should work as the Joint Consent Authority with the Department of Planning.
• The local Aboriginal community with continuity of connection and residency should have responsibility, plus independent arbitration defined in stand-alone legislation.
• NSWALC to review their Rules and Regulations to be in line with the new Aboriginal heritage legislation.
• The role of LALCs is currently unclear and needs to be addressed. It has been highlighted that LALCs have an existing structure in place and it could be used as a model or utilised.
• Any reference to our culture should come through our Local Aboriginal Land Councils.
• LALCS need powers to enforce infringements under any new legislation.

**Consultation theme:** The Government should be responsible, but with Aboriginal people having a stronger role in the decision-making process.

**Comments**
• Aboriginal people should have more of a role in this process. At the moment Aboriginal people don’t have a final say in what happens to their heritage. They can advise the proponent / archaeologist / the Office of Environment Heritage of the significance of the site / place which can be taken into consideration, however, at the end of the day, the Government makes the decision which sometimes can be in the community’s favour but most times not. It needs to be much stronger and also have an aim to protect Aboriginal heritage.
• Aboriginal people should be involved in the process at all levels, supported in parallel by government bodies where and when required.
• Government, with strict terms relating to the incorporation of the views of appropriate Aboriginal custodians and an independent heritage assessment process.
• Government in close collaboration with the local Aboriginal community / Local Aboriginal Land Council, etc. Ideally Aboriginal people should be within the Government sector to work between the two.
• Responsibility and legislation are two different parts of the bigger process. In the end Government will always be the final decision-maker and to suggest otherwise is dishonest. There are too many different interest groups who participate and are affected by any piece of legislation and to suggest that there is a simple solution or pathway is misleading. Government will always have to arbitrate regarding the outcomes of processes that affect the economy.
• The Government in consultation with the registered traditional owners of the land involved.
• Role of the State of NSW as a regulator and not a decision-maker. Its role is to ensure that the process is fair. There needs to be an intermediary body to work on behalf of the Aboriginal people.
• There’s a cross-over between traditional owners and communities and so the boundaries are difficult to define.
• Aboriginal voices should be in the decision-making process. They need to be elevated in the process to have real binding effect and meaning.
• At the state level, an Aboriginal body (either the NSW Aboriginal Land Council or a new body), voted in by Aboriginal people, should work as the Joint Consent Authority with the Department of Planning.
• The Commonwealth Government is too distant to oversee individual state issues. The Office of Environment and Heritage’s management and protection methods need to be reviewed because how many issues actually get through to the Chief Executive for consideration?

Question 2 (b): What management structures and processes will effectively manage Aboriginal culture and heritage protection in NSW?

Summary of submissions

| Consultation theme: An Independent Statutory Aboriginal Authority linked to Regional Aboriginal Heritage Management Authorities. |
| Comments |
| • At the statewide level there needs to be an independent statutory authority (akin to the existing Natural Resource Commission but with a NSW Aboriginal Commissioner) with all Aboriginal membership supported by a statewide advisory Council made up of the Chairs of the regional based authorities. The State Aboriginal Heritage Authority (Commission) will be supported by the necessary policy, administrative, liaison, regulation, and program staff. |
| • The primary functions of the State Aboriginal Heritage Commission would be: |
| – development and promotion of mandatory standards by which Aboriginal heritage shall be managed |
| – periodic monitoring, evaluation and reporting of regional authority, state agency and local government, and industry performance against statutory Aboriginal heritage management standards |
| – development, management and review of Register of Aboriginal Custodians (formerly Register of Aboriginal Owners under the Aboriginal Land Rights Act (ALRA)) |
| – determination of appeals made against the decisions of the proposed regional Aboriginal heritage authorities regarding regulatory applications to not conserve elements of Aboriginal heritage |
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- dispute resolution regarding issues of contention between independent regional authorities
- possible funding source for statewide and inter-regional heritage programs undertaken through regional authorities or local communities
- regulation prosecutions at request of regional authorities
- promotion of statewide Aboriginal heritage conservation and understanding
- the creation of an independent body staffed by Aboriginal people can work, provided it is appropriately funded and staffed. The current Victorian experience would suggest that one of the key issues that Registered Aboriginal Parties (RAPs) have struggled with is adequate resourcing.

- An independent body, made up of true representatives from regions, who work to an agreement with an exact path to decision-making. It’s about time all methods of decision-making are reviewed and a better process set in place.

- A statewide body cannot represent the views and ideas of all NSW Aboriginal people. Mechanisms must be put in place to allow for issues to be discussed at a regional and local level.

- At the regional level there needs to be a number of independent regional statutory Aboriginal heritage offices, each with a Board of Directors made up of Aboriginal custodians (traditional owners), Local Aboriginal Land Council and community representatives. Each regional office would be supported by necessary regional community based administrative, liaison, regulation, policy, and program staff.

- The primary functions of the proposed Regional Aboriginal Heritage Management Authorities could include:
  - support local communities to protect and manage Aboriginal heritage throughout region
  - record regional heritage sites, places, stories, language, history, etc.
  - provide advice to local communities, regional agencies, local government, on Aboriginal heritage management policy, strategy, actions, consultation, and compliance to the Act, etc.
  - assist community capacity to effectively manage Aboriginal heritage
  - assist communities in developing partnerships and agreements with land and natural resource management agencies, industry, and individuals, to better manage Aboriginal heritage in the region
  - in partnership with communities undertake conservation works, record stories and heritage values and develop resource and education materials
  - assist communities in the development of cultural resource centres, keeping places, etc.
  - assist community negotiations with stakeholders, and
  - regulate the Act and refer alleged breaches to the state authority for prosecution.

- The issue of the identification of the proposed regions can be either determined within the Act or enabled to be developed over the first 12 months of the enactment of the legislation.

- Within Aboriginal communities there is a general understanding of traditional boundaries based on language areas, Country areas, etc. It would make sense for any regional heritage area to reflect traditional Country areas as far as possible and align these boundaries with an appropriate statutory boundary – i.e. either in groupings of local government areas or groupings of Local Aboriginal Land Council areas.

- If past reviews have supported the creation of an independent administrative structure so that decisions can come from a local or regional level from Aboriginal people, and a central body who could monitor and review decisions and resolve disputes, why wasn’t it trialled?

- The Aboriginal community have a structure and process, its called the lore. Aunties and Uncles determine when it’s time for things to happen. This has been in force for a long, long time. It’s being able to carry out cultural activities, without Government management interference, that’s the problem.
- The consultation process is far too confusing and causes conflict. It is drawn out and inefficient. There needs to be a sliding scale as to the level of consultation and management input.
- Aboriginal control over the protection and management of our heritage is imperative to ensure we can preserve our heritage for future generations.
- Aboriginal Culture and Heritage Advisory Commission and Office as a separate statutory body similar to the NSW Ombudsman.

**Consultation theme:** Management structure options include conservation, protection, recording, and genuine engagement in decision-making.

**Comments**

There are a variety of management options available, the main ones being:

1. **conservation** (as in permanent long-term secure tenure for that purpose with the appropriate plan of management in place, and removed from impacts, disturbance, destruction, etc.).
2. **protection** (as in the active protection of a place / item / landscape, etc.). This is usually in the context of other activities occurring around or even within the place / item / landscape being protected. With an Aboriginal Place for example, the values of that area are being protected by the fact that a management regime is in place and there is regulation in place that means any activities within the Aboriginal Place need to be considered and managed. A great many activities are allowed, as long as they are part of the agreed management plan.
3. **recording** (video, film, photos, illustrations, etc.) of the place / item / landscape to provide the permanent record of what will be impacted, destroyed. The question to ask is whether this record is adequate? What makes it adequate from the community point of view?
4. **engagement** – obviously community people must be active participants in the final decisions about the heritage that is being threatened and that there is genuine engagement. What has happened in the past is that the engagement has often been tokenistic and therefore the failure of past ‘legislation’ is not necessarily the intrinsic failure of the legislation, but the implementation in the face of competing interests. Those competing interests will always be there, and it is how these are managed that becomes critical.

**Consultation theme:** State government to continue its management of Aboriginal culture and heritage.

**Comments**

- A separate administrative body is a good idea but in practice hard to operate without guaranteed certain level of funds. Within a bigger department such as OEH or DAA, Aboriginal cultural heritage protection will always have much better resources available. This includes human resources, technological, infrastructure and project money.
- Currently, the government commitment to the inclusion of Aboriginal community views is so poorly defined as to be counter-productive. If there is a policy that ‘it is up to the community to decide who speaks for country’ then it is contingent upon government to support that process.
- The real world process should be recognised and supported. In a scenario where an object or site is listed, assessed, subject to management recommendations and potentially impacted by an application, and involves Aboriginal community consultation and a separation of heritage assessment and land management goals, it makes sense that a case manager be nominated by government with an accountable role.
- The current structure of OEH is appropriate; however more integration at the local council level could improve outcomes.
- Hold the department accountable
- Take cultural heritage out of NPW Act – this legislation is outdated.
Overview of issue
Aboriginal people and communities in NSW have consistently asserted their ownership of Aboriginal cultural heritage objects, ancestral remains, places and ‘intangible’ cultural heritage. Currently, the law states that:

- under the National Parks and Wildlife Act 1974, almost all NSW Aboriginal objects are the ‘property of the Crown’
- ownership of land can be granted to Aboriginal people and groups under the Aboriginal Land Rights Act 1983. Native title law can recognise ownership rights over places and cultural knowledge.

Question 3 (a): Should any proposed legislation make a statement about ownership of physical and intangible Aboriginal heritage?

Summary of submissions

Consultation theme: Yes – there should be a statement stating that the ownership of physical and intangible Aboriginal heritage belongs to the Aboriginal people of NSW.

Comments

- All Aboriginal objects should be ‘property of Aboriginal people’ not the Crown and the Aboriginal community should look after it. The legislation is useless if it doesn’t make a clear statement about ownership.
- Yes, the protection of Aboriginal traditional intellectual property, including collectively owned culturally managed traditional practice and knowledge is not protected under any NSW Act. This includes songs, dances, ceremonies, and traditional uses of plants for food or medicine. This extends to protection or recognition of all aspects of cultural heritage other than physical heritage items and places, for example, the processes of natural resource and biodiversity management based on traditional knowledge.
- The Aboriginal people of NSW are to be recognised as the rightful owners and should have control, ownership, power and responsibility of their culture and heritage.
- A formal legal or corporate structure should be put in place in order to have ownership a part of the law including the ability to inform the regulation and prosecution of the law.
- A Director General or department cannot own Aboriginal heritage. The ownership of Aboriginal heritage objects could for example, be under the control of an Aboriginal managed legal trustee body.
- Ownership will provide the formal opportunity in the heritage conservation system for Aboriginal communities to work immediately towards agreement on their long-term priorities for protecting heritage, be active in the conservation decision-making and conservation activities, and monitor the effectiveness of the conservation outcomes, based on recognition of Aboriginal culture and heritage.
- Perhaps Aboriginal people should register their rights to their heritage in a proven region or area. People would need to state how they link to that Country and those links need to be clear and proven with fact.
- Ownership could be established through NSW Aboriginal Land Rights Act – Aboriginal Owners provision (Register of Aboriginal Owners).
- Ownership should be given to traditional owners.
• The question is one of ‘custodianship’ of the physical (tangible) or Aboriginal objects under the National Parks and Wildlife Act, and one of ‘ownership’ of the intangible as the intangible is about beliefs, etc.

• If the Crown is to retain a role it should be one of a ‘trustee’ of Aboriginal cultural materials held on behalf of the Aboriginal peoples who are to be recognised as the ‘rightful cultural owners’.

**Consultation theme:** No – there should not be a statement regarding the ownership of physical and intangible Aboriginal heritage.

**Comments**

• Our people are moving a lot now and more in control of our lives and we are living off Country.

• Certain aspects of culture and heritage cannot be documented.

• There are numerous issues attributed to ‘ownership’ including:
  – Who will own?
  – Who will be responsible?
  – Who will decide on both the above issues?

• Ownership makes it complex for Aboriginal people to protect.

• One does not own one’s culture. Aboriginal people live, understand and think their culture. It’s for everyone, they don’t own it. There are many facets and complexities that come from many different historic and social origins of a person’s culture.

• Ownership is problematic and should remain the property of the Crown.

• Perhaps the solution to the ownership issue is to develop a different form of Crown ownership such as the Crown being the trustee on behalf of the Aboriginal peoples of the state.

• Ownership shouldn’t be legislated as it belongs to the Aboriginal community.

**Question 3 (b):** If you agree that any proposed legislation should address the issue of ownership, how should any new laws address ownership of physical and intangible Aboriginal heritage?

**Summary of submissions**

**Consultation theme:** Physical and intangible ownership of Aboriginal culture and heritage should not be ‘owned’ by anyone other than the Elders or the clan group of a particular area. No one individual or organisation can own Aboriginal culture.

**Comments**

• Law needs to be clear about ownership. The use of the word ownership should be changed.

• Physical and intangible ownership of Aboriginal culture and heritage should not be ‘owned’ by anyone other than the Elders or the clan group of a particular area. No one individual or organisation can own Aboriginal culture.

• Exclusive rights to ‘owning’ culture and heritage should not be given to Local Aboriginal Land Councils (LALCs) because not all Aboriginal people are members of a LALC and some of these are knowledge holders.

• If you strip back Aboriginal culture and heritage – take away the stories, language, history, the intangible, the tangible – you strip it back to a blank page. No one knows anything about all these things, the one day someone comes across an artefact or burial site then ask yourself who would you go to fill that page?

• Lore cannot be owned. No legislation can attempt to bind it into white man’s law to put it in words, give it a value, ownership or place.
• Law should state that cultural property belongs to Aboriginal people of a particular area/group but not any individual or organisation.
• Ownership should be given to traditional owners.
• Cultural property should become property of the LALC.
• Aboriginal people are the rightful owners.
• Aboriginal owners currently have a right to have Aboriginal objects transferred back to them as per section 85A of the National Parks and Wildlife Act (NPW Act). This and other relevant sections should be taken out of the NPW Act and put into the ‘proposed’ new legislation.
• By admitting there is a responsibility and cost that goes with ownership. There must be recognition that heritage and culture belongs to the Aboriginal history and is associated with displacement and loss.
• Objects to be used as collections by Native Title holders or LALCs.
• Preamble in legislation acknowledging Aboriginal ownership.
• If ownership is established, provision needs to be made for management.

**Consultation theme:** Custodianship not ownership of Aboriginal culture and heritage.

**Comments**

• Everything of Aboriginal heritage should come under custodianship or trustee.
• The notion of ‘custodianship’ may be a more culturally appropriate term. Moving towards the notion of custodianship also helps eliminate the consideration of Aboriginal heritage being limited to the ‘property’ or, ‘commodity’ thinking underpinning current legislative processes.
• ‘Custodianship’ also introduces the concepts of ‘duty of care’ for current and future generations, which then links to the notion of ‘inter-generational equity’.
• The local Aboriginal community are the custodians of the song lines, dreaming, and maintainers of the spiritual teaching sites.
• Aboriginal knowledge and its significance to Aboriginal people is:
  – not a right it’s a responsibility
  – owned by Aboriginal people – individuals and families
  – recognition for non-physical associations and values
  – knowledge empowers Aboriginal people
  – women’s and men’s business – can transcend regions and families
  – handed down – learnt
  – patrilineal and matrilineal lines, and
  – Aboriginal people should be believed.

**Consultation theme:** New legislation with the Crown as a trustee of cultural property with community management and dealing with copyright and intellectual property rights.

**Comments**

• At present Aboriginal objects are the ‘property of the Crown’ but can be held and housed by community groups on behalf of the Crown. This then enables the Crown to regulate these objects as a piece of Crown property – i.e. the Crown can protect and conserve its property OR it can allow the destruction of its property as it sees fit.
• The notion of cultural ownership needs a clear definition which establishes that cultural property ‘belongs’ to all Aboriginal people of a particular area or cultural grouping and is the ‘collective property’ of the entire group, not the property of any individual or organisation.
If the Crown is to recognise the rightful cultural ownership by Aboriginal peoples of Aboriginal objects, then the Crown can either remove itself entirely from having any role in the regulation of the ‘objects’ OR the Crown can assume the role of being ‘trustee’ of the Aboriginal objects until such time that the rightful legal owners of the objects can be identified and ownership transferred to those persons or groups.

As trustee the Crown may still regulate, but any decision that the Crown makes under these circumstances must be in the best interests of the rightful cultural owners and have the prior and informed consent of the rightful cultural owners.

Clear recognition of Aboriginal people’s sovereign rights to their knowledge and ownership of their culture as part of a broader relationship with managing their land and culture should be part of Aboriginal heritage legislation.

New legislation to consider copyright and intellectual property rights regarding Aboriginal cultural knowledge of natural resources, the landscape, language, and cultural practices.

Legislation to require agreed protocols to recognise Aboriginal owners as the primary source and knowledge about their heritage, Aboriginal control, and to include ‘free, prior and informed consent’ (FPIC).

Manage and develop the Intellectual Property Rights processes for the Aboriginal community so that Aboriginal people have the rights over their knowledge and heritage.

Heritage objects to remain property of the Crown however Aboriginal people should be the regulator and determinant of impacts to objects and places, including on Crown lands. Need for management plans that nominated procedures and processes for the ongoing protection of Aboriginal heritage.

State Aboriginal Heritage Council (as a sub-body of the Crown) to oversee ownership and management of Aboriginal culture and heritage.

**Consultation theme:** Object management – museums, keeping places and resale of Aboriginal objects.

**Comments**

For museums:

- Employ an independent Aboriginal arbiter to manage issues such as museum collections.
- Reform must address ownership of objects and issues with Australian Museum lodgement and acceptance of items.
- Transfer museum / institute ownership to Aboriginal people but allow negotiated transfer.
- There is a well established and effective framework for collections of cultural material, however further development to Aboriginal communities is needed to assist in further employment of Aboriginal staff in collection management and digital story telling in museums.
- Significant objects to be retained by Australian Museum, whilst less significant objects returned to Aboriginal communities.
- Care should be taken not to have objects currently in collections caught up in any new regulatory regime due to definitions.
- Museum concern focuses on Aboriginal Heritage Impact Permits (AHIPs) with conditions that material must be lodged with Australian Museum – it is not a legal requirement to accept or assume custody. The Museum should also retain discretion to take control / custody.
- In the near future the Museum expects to incorporate only some of the collections into its care, even when AHIP conditions stipulate this. This may leave the holder in a potentially legally uncertain position.
For keeping places:
- Include and develop the importance of keeping places under new legislation. So as to record and maintain associated traditional cultural knowledge, and protect this information under Intellectual Property Right regulations.
- Return objects to Country / keeping places – gives access and by implication gives ownership.
- Return of Indigenous Cultural Property (RICP) program works well with returning material to communities and provide advice regarding keeping places.

For sale of Aboriginal objects:
- New legislation must address the need to control the sale of cultural objects. Controls over sales of ‘objects’ needs revisiting, some means to intervene.
Overview of issue

Amendments to the NSW National Parks and Wildlife Act 1974 and regulations in 2010 have created clear steps and requirements to ‘consult’ with Aboriginal people before applying for a permit to harm Aboriginal heritage. These steps are reflected in Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010, and are available at: (www.environment.nsw.gov.au/licences/consultation.htm).

In addition, under existing laws, there are people and groups with recognised rights, responsibilities and roles with regard to Aboriginal culture and heritage such as Native Title Holders, Aboriginal Owners and Aboriginal Land Councils. Other people and groups that undertake culture and heritage activities may also have these cultural rights and responsibilities, but may not have the same statutory recognition. Identifying the people or groups within Aboriginal communities who have a role in making decisions about the management and protection of Aboriginal culture and heritage is often complex and requires time to navigate.

Given this complexity, one mechanism that can be used is a process or ‘protocol’ which helps the broader community identify the appropriate people and groups within Aboriginal communities.

Another approach is the Victorian model where Registered Aboriginal Parties (RAPs) are appointed to speak for Country by a state Aboriginal Heritage Council. These RAPs have a number of legislative functions including approval of Cultural Heritage Management Plans and advising on permits.

Question 4 (a): What are your views about who speaks for Country?

Summary of submissions

Consultation theme: The Aboriginal community should be able to decide who is able to speak for Country.

Comments

- This issue is a community issue and needs to be dealt with and resolved by the Aboriginal community themselves and the decision belongs with community and not with government.
- While this should be determined by the Aboriginal community, recognition needs to be made of both traditional owners and the wider Aboriginal community, some of whom may have important historical links with Country.
- Should be Local Aboriginal Land Councils (LALCs) and NSW Aboriginal Land Council (NSWALC).
- People who come from Country should be able to decide who is able to speak for Country, such as senior Elders, and where appropriate, junior Elders.
- The Aunties and Uncles of the local Aboriginal community are the learned people. No one else can speak about Country without their approval. Just as I listen and respect when visiting another mob’s Country, I expect others to do the same in my mob’s Country. As there is more than one Aunty and Uncle they are all able to speak about Country. Depends on ‘issues’ and ‘audience’ – cultural issues.
- It should be people in the community who put themselves forward and perhaps they should have to register as a traditional owner. But they need to be accepted and pass the registration test, in truth, to hold that role.
- The people’s birthright is their right to speak about land on which they belong and people linked to and living on Country should have the right to speak first about Country.
Perhaps Aboriginal people should register their rights to their heritage in a proven region or area. People would need to state how they link to that Country and those links need to be clear and proven with fact.

The legislation needs to consider who can speak for Country. It needs to ensure that connection in the process. It needs to align with Aboriginal processes for who speaks for Country, such as genealogy.

**Consultation theme:** Local Aboriginal Land Councils and other Aboriginal organisations have a brokering role to ensure Aboriginal people who speak for Country are afforded opportunity to be involved.

**Comments**
- The Local Aboriginal Land Council (LALC) map layer should stand and make them a ‘determining party’ in their area, but not exclusively so, even in the absence of any other approved ‘determining party’. The conditions of becoming a ‘determining party’ should include mechanisms to prevent multiple representations of the same lineages and disallow individual membership of more than one party accepting separate traditional owner and LALC membership.
- Should be LALCs and the NSW Aboriginal Land Council.

**Consultation theme:** ‘Traditional owners’.

**Comments**
- This includes traditional owners, lawmen and lawwomen, Aboriginal Owners, language groups, custodians, Native Title Holders, Elders (who are nominated by the community) and knowledge holders.

**Consultation theme:** Government to sponsor registration of, and to support and recognise speakers for Country.

**Comments**
- Without question, a government sponsored process should be in place that registers groups or individuals through a mechanism far more robust than the current ‘anyone who puts their hand up’. This should be by either Office of Environment and Heritage (OEH) (or future equivalent) or a separate Aboriginal-run body.
- Extend the current Register of Aboriginal Owners under the Aboriginal Land Rights Act (ALR Act) to include registration of a wider definition of persons authorised to speak for Country and transfer management of register to new Aboriginal heritage management authority.
- Currently, government commitment to the inclusion of Aboriginal community views is so poorly defined as to be counter-productive. If there is a policy that ‘it is up to the community to decide who speaks for Country’ then it is contingent upon government to support that process and require all government agencies to comply rather than running their own agendas.
- Perhaps Aboriginal people should register their rights to their heritage in a proven region or area. People would need to state how they link to that Country and those links need to be clear and proven with fact.

**Note:** Some of the terms mentioned above have no legal definition in NSW law and if they are to be used in legislation, guidelines, or policy, they will need to be legally defined.
Question 4 (b): What do you think are the best ways to ensure that the appropriate people speak for Country in public processes, including who resolves conflict?

**Summary of submissions**

**Consultation theme:** An independent body to be established to ensure that the appropriate people speak for Country and to resolve conflicts.

**Comments**

- An independent Aboriginal body that is sponsored by government needs to be established to resolve conflicts. This body should register groups or individuals through a mechanism far more robust than the current system. It can’t be a Land Council or a community group. It has to be a body that has no interest other than truth and fairness.
- The term traditional owner needs to be properly defined. At present this term has no legal definition or standing. Establish a Council of Elders and regional committees or boards of people who speak for Country. Cultural Elders and community Elders have different roles in communities.
- Any future Aboriginal culture and heritage legislation should also empower an independent statutory position of a Registrar to assist in the interpretation of the legislation, register Aboriginal Elders.
- Local Aboriginal Land Councils and other Aboriginal organisations have a brokering role to ensure Aboriginal people who speak for Country are afforded opportunity to be involved. Guidelines are required to assist to ensure the right people speak for Country (open process, assistance, education, awareness, genealogical support).
- An independent body formed with the use of genealogies is a form of evidence, such as Country of origin. They are gender balanced and reflective of all Aboriginal communities. A clear outline providing certainty to all members of the community, government and other stakeholders.
- The Victorian model is a good base in that the Registered Aboriginal Parties have more control of the system in that they have the power to approve and refuse management plans. Aboriginal people to decide who speaks, whilst government arbitrates as an independent body.

Question 4 (c): Should these mechanisms be reflected in any proposed legislation or in protocols and guidelines?

**Summary of submissions**

**Consultation theme:** Yes – in both legislation and in protocols and guidelines.

**Comments**

- Overarching legislation that sets the intent and parameter in relation to ‘who speaks for Country’ – with regulations sitting beneath in the form of guidelines, protocols, advisory bodies, arbitration councils and the like.
- The consultation process set up as part of the implementation of legislation needs to be very clear, time-framed and have unambiguous (in so far as this is possible) requirements.
- Principle / basic requirement in legislation – mechanisms in protocols / guidelines.
- The legislation must define who speaks for Country.
- Guidelines are required to assist to ensure right people speak for country (open process, assistance, education, awareness, genealogical support).
• Legislative processes are in conflict with one another at federal / state / local levels e.g. Native Title Claim process, registration of Native Title claimant process, registration test requirements, etc.

• Boundary disputes and clarification with nations and Country will be an issue that will require sorting.
Overview of issue

Protecting heritage values before they are under immediate threat allows long-term strategies to be developed and improves the heritage protection environment. The planning system works in three ways – it guides planning for the future use of particular areas, it makes rules for responding to proposals to use land, and makes rules for dealing with specific issues (e.g. protecting koala habitats).

In Victoria, where an activity is planned in an identified culturally sensitive area or is a certain type of activity, cultural heritage management plans are approved by the Registered Aboriginal Party. These plans are then linked to the planning system as they are submitted with the development application.

A separate process is underway to review the Environmental Planning and Assessment Act 1979, the primary piece of planning legislation in NSW.

Question 5 (a): Do you understand how Aboriginal cultural heritage is protected in legislation and planning instruments?

Summary of submissions

Consultation theme: Levels of understanding ranged between very high to low.

Comments

- People were generally aware of the array of legislation that applied across the three levels of government. A range of views emerged regarding the effectiveness of the legislation and included the following:
  - Aboriginal cultural heritage is largely ignored.
  - Regional policy – in that Part 4 Assessment does not always require a consultation process.
  - Local Environmental Plans are understood and are viewed as a good / powerful instrument but councils don’t have the expertise and / or resources to include Aboriginal culture heritage in them.
  - Development Approval processes specifically relating to Aboriginal culture assessments raise the following issues: time restraints, subdivisions, rezoning and lack of timing, and they are also very process driven.
  - Legislation is very protective of post-contact heritage (buildings, etc.).
  - People are aware that some legislation and planning instruments do and don’t have consultation processes.
  - The consultation processes associated with various legislation differs considerably and is often easily confused.

- Reasons for people not understanding the legislation and planning instruments in place to protect Aboriginal cultural heritage were noted as follows:
  - Legislation and planning instruments use different language.
  - They sometimes duplicate.
  - Different Acts cover different situations, and are not integrated.
  - The legislation and planning documents are having the opposite effect from their purpose and are not conserving Aboriginal culture and heritage.
  - Different consultation processes are used by different agencies and this creates conflict.
Question 5 (b): How could Aboriginal heritage be better protected through land-use plans and other planning instruments?

**Summary of submissions**

**Consultation theme:** There should be close linkages between heritage legislation and state planning legislation and state planning policies.

**Comments**

- New legislation needs to be better integrated with planning legislation and needs to include protection and management of significant Aboriginal heritage values including of intangible heritage values into both.
- Planning legislation and policy needs to overcome current bias towards development approval and create a balance between the protection of Aboriginal culture and heritage, and economic development.
- Lack of direct legal requirement to properly engage and negotiate with community in planning law. Planning and procedures to be developed for and by Aboriginal people to work in conjunction with all professionals and levels of authority.
- Legislation needs to provide for a statewide audit of the impacts that planning and development have on Aboriginal heritage conservation, with audit compliance and outcomes reporting to Parliament and community (public).
- The nexus between heritage and planning decision-making could be strengthened through a jointly developed and agreed Aboriginal Heritage Conservation State Environmental Planning Policy (SEPP) which could embrace agreed principles, standards, policy and strategies to apply across the plan-making and development decision-making processes of the Environmental Planning and Assessment Act.
- A statewide policy on the use of Aboriginal Cultural Heritage Sensitivity Overlays in Development Control Plans would be a good interim step for councils who cannot afford to do a full regional assessment (which can then have sites protected through zonings or overlays within the Local Environmental Plan).
- An important principle of Environmentally Sustainable Development is ‘intergenerational equity’. Aboriginal people’s right (particularly future generations) to enjoy their spiritual, cultural and physical relationships with land are now recognised as an important component of intergenerational equity. This concept needs to be equally embraced within both Aboriginal heritage and planning laws within NSW.
- A ‘significance’ approach would be in line with amendments to the *Heritage Act 1977*.
- Sites to be mapped to allow for identification. (i.e. capture early in planning stages). Allow exemptions for low impact activities (e.g. farming). Identified through Local Government 149 certificates/LEPs.
- Put Aboriginal culture and heritage regulation into the Environmental Planning and Assessment Act.

**Consultation theme:** There should be close linkages between Aboriginal heritage legislation and local government decision-making in planning and development activities.

**Comments**

- Aboriginal Heritage Master Plans (AHMPs) should become compulsory for all councils. The AHMPs are tied into the Local Environmental Plans (LEPs) and state planning processes, using a standard template and outputs (all would need to be sufficiently detailed), then Aboriginal heritage would be afforded greater protection. The Act should require the compilation of such information in every shire.
• Draft LEPs are to be provided to the local community Elders representative entity/organisation for endorsement prior to its submission to the relevant Minister for approval and taking legal effect.

• A clearer and more specific Ministerial Direction for the making of culturally appropriate LEPs by councils. This should require the proactive development and use of regional or sub-regional (i.e. grouped LGAs) Aboriginal heritage studies in partnerships between councils, local communities and the proposed regional Aboriginal Heritage Authorities. This would require the direct funding of councils or groups of councils to undertake such studies with the study methodologies and community engagement strategy being undertaken with the support and agreement of the Regional Aboriginal Heritage Authority and local communities.

• Local environment planning to recognise the landscape approach rather than object based and include ‘Aboriginal Conservation Areas’. Non–tangible cultural heritage should be included.

• Need a legislative instrument to give effective power to local government to require whole of LGA heritage studies to be done and periodically updated.

• Regional landscape assessments need to be undertaken and completed as a key part of the planning approach toward better protection of Aboriginal culture and heritage. Regional landscape assessments are preferred over a model based on due diligence.

• Use of current LEP templates does not provide local government with necessary incentive to undertake proper Aboriginal heritage studies to inform LEPs.

• ‘Intergenerational equity’ – Aboriginal people’s right (particularly future generations) to enjoy their spiritual, cultural and physical relationships with land are now recognised as an important component of intergenerational equity. This concept needs to be equally embraced within both Aboriginal heritage and planning laws within NSW.

• Information and skill sharing between the heritage body and the council should be enhanced.

• Encourage a development tax; which could provide certainty.
Overview of issue

Land and natural resource management, or caring for Country, is central to Aboriginal culture. For Aboriginal peoples, this approach to land and natural resource management includes cultural and/or spiritual values or aspects, and deals with all elements of an environment together.

There are potential benefits for NSW in the ‘best practice’ management of natural resources of Country, through the integrative and connective understandings contained within Aboriginal culture.

A large part of Aboriginal culture and heritage is based around caring for Country.

There are a number of mechanisms at the ‘landscape scale’ for involving Aboriginal people in natural resource management. These include:

- national park hand-backs
- Indigenous Land Use Agreements
- Indigenous Protected Areas
- programs managed by catchment management authorities.

Question 6 (a): How well do you think current natural resource management processes help protect Aboriginal heritage?

Summary of submissions

Consultation theme: Not very well and should be improved.

Comments

- Under current situation the cultural and the natural are separate and when one is protected the other is often destroyed.
- Not enough interaction between catchment management authorities (CMAs) and culture and heritage management authority.
- Natural resource management (NRM) managers are not interested in Aboriginal cultural heritage as it is not seen to be their business and it seems too hard – this is reflected in funding disparity between general NRM programs and Aboriginal NRM programs – separate funding arrangements creates division.
- CMAs don’t commit to their own principles when it comes to Aboriginal cultural heritage – even where there are principles enshrined in law, unless there is sufficient definition around them the implementation becomes problematic.
- CMA processes do not explicitly provide for Aboriginal culture and heritage. Often a secondary consideration at best – CMA activity is seen commonly as being by default, rather than intent.
- Resources required to support changes – do not rely on existing agency budgets e.g. CMA or OEH.
- Spiritual connection is essential to be preserved and cannot place a $ value on it. Places to be preserved that have intangible value – unable to be valued but need to be preserved.
- Protection of natural resources if they have cultural significance. Assessment criteria based on regional plans (by language group or nation) and the language group / nation assesses and determines significance.
• Need to define natural resource management – tenures (public, private and others) and resource management conditions according to tenure types.
• No criteria around heritage sustainability – stated as principles but no policy and procedures around them.

Question 6 (b): How could Aboriginal cultural values and knowledge be better incorporated into natural resource management processes?

Summary of submissions

Consultation theme: Aboriginal heritage should not be divorced from natural heritage.
Natural and cultural values are seen as one by Aboriginal people.

Comments
• Catchment management authorities (CMAs) need to conform to heritage legislation and comply with cultural heritage authorities policy and procedures.
• Natural resource management (NRM) system needs to integrate / coordinate with culture and heritage management system.
• NRM and culture and heritage should not be separated – natural and cultural values are seen as one and the same by Aboriginal people.
• Legislation to have a defined process of collecting / acknowledging / owning and using intellectual copyright and cultural knowledge in the use of natural and environmental resources.
• Ensure legislation broadens the current basis of natural resource practices to include a wider perspective including all natural resource use and management associated with marine, land and sea environments. This is to include native vegetation, biodiversity conservation, aquatic resources management of marine, riverine and estuarine environments, mineral resources, etc.
• Include definition, protocol and a requirement to obtain prior and informed consent from Aboriginal custodians / knowledge holders to use Aboriginal cultural knowledge, particularly pertaining to use of natural resource knowledge.
• Enable use of agreement making as an enforceable management tool, such as the Aboriginal Natural Resources Agreement (ANRA) Kit developed by the Natural Resource Advisory Council (NRAC) in association with Booroongen Djugun Aboriginal Corporation.
• Aboriginal culture and heritage and associated natural resource values assessment and conservation must be included in CMA-managed property vegetation planning (PVPs) processes, as well as into CMA land remediation protocols and funding programs.
• All catchment action plans (CAPs) and PVPs should be required to have an Aboriginal cultural heritage and landscape assessment undertaken and incorporated into the drafting of such (with the endorsement of the local Elders representative entity) before they take legal effect.
• There are cultural associations in all concepts of marine, land and sea environments.
• Conservation of Aboriginal heritage under the legislation should incorporate conservation of natural resources.
• Recognition that Aboriginal knowledge and cultural practices are important and should be utilised, understood, recorded and valued, e.g. where Country floods, cultural burning, etc.
• Education both ways, Aboriginal and non-Indigenous.
Issue 7

Additional comments

Question 7: Do you have any other comments or suggestions on the reform of Aboriginal culture and heritage legislation in NSW?

Summary of submissions

Consultation theme: Access to heritage sites on private lands.

Comments

- The right to access heritage sites for traditional purposes and educational values on private property needs to be addressed and legal procedures and requirements have to be embedded in legislation to allow for this, so as to recognise the obligations and responsibilities of Aboriginal people to the protection of their culture.
- Law to provide incentives and enable a shared responsibility between land owners and Aboriginal people, so as to ensure protection of ‘off park’ (national park) Aboriginal sites and objects.
- Access is the only way Aboriginal people can gain complete ownership over their own heritage.
- The new legislation should encourage farmers to allow Aboriginal people to register sites and objects on their lands.
- Overall values should be able to be defined/mapped regardless of whether it is located on public or private land.
- Act to recognise certain cultural practices and include the opportunity under the new legislation for Aboriginal people to access their Country regardless of its tenure. This is important for the following reasons:
  - to collect materials for community learning, for example timber for carving during culture camps
  - access to sites along rivers and creeks for local Aboriginal communities
  - allowing Aboriginal groups access to meet on traditional lands and at keeping places
  - create more parks/land on Aboriginal land (conservation); and
  - cultural importance and practice should override other law (e.g. biodiversity).

Consultation theme: Consider Aboriginal heritage legislation and policy in other jurisdictions.

Comments

- Refer to the Victorian Regional Authorities model and other relevant Australian state legislation.
- Ensure NSW legislation accommodates Native Title legislation.
- New legislation needs to be complementary to the existing National Parks and Wildlife Act.
- New legislation must operate across all facets of government.
- Aboriginal cultural values have to carry the same weight, if not more, than scientific, archaeological views, values and reports.
- Identify how Commonwealth Law will interact with NSW legislation and ensure NSW legislation cannot be over-ridden. One size does not fit all.
- NSW Government could adopt the Kon Voluntary Guidelines adopted by the Convention on Biological Diversity, as a starting point, and modify them as advised by the Aboriginal people of NSW. These voluntary guidelines are for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by Indigenous and local communities.
**Consultation theme:** New legislation is to revisit existing consultation guidelines and regulation processes.

**Comments**
- New legislation to consider better mechanisms for all agencies to communicate with each other especially agencies dealing with land management tasks. This mechanism will also help identify and manage cases, thereby identifying who should be held accountable for the destruction to Country.
- Legislation must ensure decisions are made by those who can speak for culture and heritage.
- Legislation must address the need to ensure adequate Aboriginal community consultation occurs at local, regional and state level as required to ensure communities have control in the decision-making process. Consultation must occur at all stages including survey, site monitoring, salvage and law enforcement.
- Consultation must involve traditional owners of the land who are direct ancestors of the land with the stories and knowledge that members of the Local Aboriginal Land Councils may not have access to.
- Free, prior and informed consent from Aboriginal people has proved to be a useful tool previously in regards to granting permits.
- New legislation to provide the Aboriginal community with the opportunity to ensure mining / mineral councils become more accountable for their actions. There is a perception that mining impacts heavily on Aboriginal culture and heritage. The ‘consent to destroy’ process seems to have little value in lands where mining activities are proposed.
- Review of existing codes of practice and due diligence guidelines and regulations is required once new Aboriginal heritage authority is established under legislation. The deficiencies in the current Due Diligence process needs to be urgently addressed to provide for some form of limited consultation, and assessment that is not based on land disturbance but on site distribution and landscape analysis.
- Consents to destroy register to be maintained and information made available to ensure cumulative impacts are known and accounted for in future decision-making.
- There is no mechanism to know what has been destroyed.
- A defined outline and scale of work compared to management and consultation in order to obtain permits, etc.
- Any regulation process should be clear and not require ‘exemptions’ or ‘defences’.
- New legislation to have clarity of terms and themes.

**Consultation theme:** Funding issues and sources.

**Comments**
- Review and change current penalty revenue allocation. Community should benefit from funding from penalties, fines and enforcement fines for destroying culture.
- Development tax be imposed and funds returned to community.
- The NSW Government should fund the Registrar of the Aboriginal Land Rights Act to add Aboriginal people to the Register of Aboriginal Owners, upon application, rather than limiting this process to parts of the state where an Aboriginal-owned national park is proposed. This is an unfair and inequitable process given the implications of being added to the register in respect to Aboriginal cultural rights, important human rights recognised in international conventions that Australia is a signatory to, and supports.
- Law to enable acquisition fund for purchase of significant cultural material from private collectors and purchase of significant land areas for conservation.
Government needs to be mindful that resources (funds and people) are necessary for the success of the implementation of any new legislation.

Invest funding in communities to increase the capacity of communities to take in returned cultural materials (from museums or other sources), and be adequately resourced to manage these cultural materials and associated keeping places.

Funding for local government to undertake heritage studies in partnership with local Aboriginal communities to inform planning instruments is required.

Funding for a community based site conservation works program is required.

New legislation must address the issue of what is the loss if intangible heritage is impacted? Can penalties be imposed?

**Consultation theme:** Employment and education opportunities.

**Comments**

- Aboriginal community want to enhance their ability to have the skills needed to have full ownership and management of their culture and heritage.
- The new legislation should empower the Aboriginal community by providing education and employment opportunities.
- Resource community to provide local government with training to work in partnership with Local Aboriginal Land Councils and like organisations.
- Broad public community education needs to ‘value’ local cultural resources.
- Protect Aboriginal people employment in Aboriginal heritage business on Country by ensuring such employment is ‘identified’.
- Provide training, appropriate education and employment. More funding targeted at Aboriginal heritage specialists, i.e. archaeologists and historians.
- Education about legal systems to Aboriginal communities.
- New legislation should provide the opportunity for the broader community to recognise and understand that as Australians Aboriginal culture and heritage is everybody’s, so as to reduce any fear and an ‘us and them’ situation.
- New legislation should be promoted as a celebration of Australian culture and be a key part of our education.
- Ensure that all stakeholders are kept informed of the Act and their obligations.
Further information

Further information on the reform process can be found in the following documents and websites.

Aboriginal heritage legislation in NSW: Aboriginal culture and heritage reform Phase 1 consultations – Summary of feedback, Office of Environment and Heritage, Sydney

Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works, Office of Environment and Heritage, Sydney

Aboriginal heritage legislation in NSW: Comparing the NSW Aboriginal heritage system with other Australian systems, Office of Environment and Heritage, Sydney

Regional Aboriginal community workshop reports and Roundtable forum reports (Phase 1)

Aboriginal Heritage Legislation in NSW: Public consultation on issues for reform, Office of Environment and Heritage, Sydney


Office of Environment and Heritage website
www.environment.nsw.gov.au
The Aboriginal Culture and Heritage Reform Working Party (the Reform Working Party) has been established by the Minister for the Environment, the Minister for Heritage and the Minister for Aboriginal Affairs to provide advice on options for legislation to protect and manage Aboriginal culture and heritage.

Membership

Members of the Aboriginal Culture and Heritage Reform Working Party have been appointed by the Minister for the Environment, the Minister for Heritage and the Minister for Aboriginal Affairs. The Reform Working Party is comprised of individuals with industry, legal, planning and heritage expertise.

<table>
<thead>
<tr>
<th>Name</th>
<th>Position/Expertise</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr Danny Gilbert</td>
<td>Chair, expert in community engagement with a broad understanding of cultural and social issues affecting Aboriginal people of NSW</td>
</tr>
<tr>
<td>Mr Norman Laing</td>
<td>Office of Environment and Heritage – ex-officio member</td>
</tr>
<tr>
<td>Mr Jason Ardler</td>
<td>Aboriginal Affairs NSW – ex-officio member</td>
</tr>
<tr>
<td>Ms Constance Chatfield</td>
<td>An expert in land management and the issues affecting Aboriginal cultural heritage</td>
</tr>
<tr>
<td>Mr Stephen Ryan</td>
<td>An expert in land management and the issues affecting Aboriginal cultural heritage</td>
</tr>
<tr>
<td>Mr Brad Welsh</td>
<td>An expert in land management and the issues affecting Aboriginal cultural heritage</td>
</tr>
<tr>
<td>Ms Megan Mebberson</td>
<td>An Aboriginal culture and heritage legal expert</td>
</tr>
<tr>
<td>Dr Sandra Wallace</td>
<td>An expert in Aboriginal culture and heritage conservation</td>
</tr>
<tr>
<td>Ms Briana Casey</td>
<td>An expert from industry or business with experience in issues relating to Aboriginal culture and heritage</td>
</tr>
<tr>
<td>Mr Robert Wilcher</td>
<td>An expert from industry or business with experience in issues relating to Aboriginal culture and heritage</td>
</tr>
</tbody>
</table>

Terms of reference

The Aboriginal Culture and Heritage Reform Working Party will provide advice to government on options for the management and protection of Aboriginal culture and heritage in NSW. The Reform Working Party will particularly focus on (but not be limited to) the following:

- review of the existing provisions in NSW legislation that concern the protection of Aboriginal cultural heritage
- review of the laws and policies of other jurisdictions that concern the protection and conservation of Aboriginal cultural heritage
- those existing provisions that should be included in any new legislation
- the roles of Aboriginal people regarding their cultural heritage
- processes to identify significant Aboriginal cultural heritage items, places and landscape values
- the possible use of negotiated outcomes as well as, or as alternatives to, regulation as mechanisms to protect Aboriginal culture and heritage
- dispute resolution and mediation processes
- linking of Aboriginal cultural heritage processes with environmental planning, development control and natural resource management processes
- NSW agency responsibilities.
## Appendix B: Locations of Phase 2 community feedback forums

<table>
<thead>
<tr>
<th>Date</th>
<th>Place</th>
<th>Venue</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 5</td>
<td>Rooty Hill</td>
<td>Rooty Hill RSL 55 Sherbrooke Street</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>June 7</td>
<td>Garden Suburb</td>
<td>Yamuloong 71 Prospect Road</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>June 13</td>
<td>Nowra</td>
<td>Nowra School of Arts 12 Berry Street</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>June 15</td>
<td>Queanbeyan</td>
<td>The RB Smith Centre 262 Crawford Street</td>
<td>10:30 – 12:30</td>
</tr>
<tr>
<td>June 26</td>
<td>Tamworth</td>
<td>Coledale Community Centre 2b Kenny Drive</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>June 28</td>
<td>Coffs Harbour</td>
<td>Ex Servicemen’s Club Vernon Street</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>July 10</td>
<td>Dubbo</td>
<td>RSL Club Corner of Brisbane and Wingewarra Streets</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>July 12</td>
<td>Walgett</td>
<td>Walgett District Sporting Club Montkeila Street</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>July 17</td>
<td>Griffith</td>
<td>Griffith Ex Servicemen’s Club Jondaryan Avenue</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>July 19</td>
<td>Bourke</td>
<td>Bourke PCYC Club Wilson Street</td>
<td>1:30 – 3:30</td>
</tr>
<tr>
<td>July 26</td>
<td>Broken Hill</td>
<td>Broken Hill Musicians Club 276 Crystal Street</td>
<td>1:30 – 3:30</td>
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</tbody>
</table>
Appendix C: Phase 1 submissions, regional workshops and roundtable forums

Written submissions received
Aboriginal Cultural Heritage Advisory Committee
Archaeological and Heritage Management Solutions
Australian Association of Consulting Archaeologists
Australian Museum
Ballina Environment Society
Balranald Local Aboriginal Land Council
Birpai Local Aboriginal Land Council
Cessnock City Council
Darkinjung Local Aboriginal Land Council
Dorrigo Local Aboriginal Land Council
Duncan, L
Eastern Region Local Government Aboriginal & Torres Strait Islander Forum
Environment Protection Authority
Environmental Defenders’ Office
Eurobodalla Shire Council
Foley, Cliff
Garigal Aboriginal Community
Gimbay Gatigaan Aboriginal Corporation
Grafton Ngerrie Local Aboriginal Land Council
Greater Blue Mountains World Heritage Area Advisory Committee
Greens NSW
Hayward, Brett
Hunt, Janet
John Cook Foundation and Numbahging Traditional Owners Group
Karuah Local Aboriginal Land Council
La Perouse Local Aboriginal Land Council
Leeton Local Aboriginal Land Council
Mid-Western Regional Council
Moombahlene Local Aboriginal Land Council
Ngambri Local Aboriginal Land Council
NSW Aboriginal Land Council and NTSCORP
NSW Minerals Council
Organ, Michael
Regional Aboriginal community workshops
Regional Aboriginal community workshops were held in November and December 2011 in the following locations.
Albury, Balranald, Bathurst, Bourke, Broken Hill, Coffs Harbour, Dubbo, Grafton, Griffith, Ivanhoe, Kempsey, Merimbula, Moree, Mount Druitt, Narooma, Newcastle, Nowra, Queanbeyan, Redfern, Singleton, Tamworth, Tweed Heads, Wagga Wagga, Walgett, Wollongong

Roundtable forums
Roundtable meetings were held in Coffs Harbour, Dubbo, Newcastle, Nowra and Sydney.