

Aboriginal Cultural Heritage Advisory Committee (ACHAC)

Submission on the NSW Government Review into the NSW Aboriginal Culture and Heritage Legislation (Broad Reform)

Introduction

The ACHAC was established in 2006 and is constituted under Schedule 9 of the *National Parks and Wildlife (NPW) Act 1974*.

The role of ACHAC is to advise the Minister for Environment and the Director General of the Department of Premier and Cabinet on any matter relating to the identification, assessment, management of cultural heritage in NSW and protection approaches and legislative reform.

The Committee members have vast and diverse knowledge and understanding of Aboriginal culture and heritage, which comes from Committee members own experiences of caring for and working on Country within their local communities.

The membership of the Committee is diverse and representative of the Aboriginal population; it has a gender balance and includes members from different geographical locations and cultural area of NSW. The Committee includes individuals that are members of Local Aboriginal Land Councils, registered Native Title Claimants, Registered Aboriginal Owners under the *Aboriginal Land Rights Act 1983* and members of Elders Groups.

This submission was developed by Committee members after much discussion and deliberation and is a consensus view. This submission brings together the different experiences, knowledge and aspirations of each member with a view to informing the creation of a new Aboriginal culture and heritage legislation for NSW.

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

Answer: It is the submission of ACHAC that Aboriginal culture and heritage is important to both Aboriginal and non-Aboriginal people of NSW. It is important to recognise in any future legislative regime that Aboriginal culture and heritage is more than just visible objects and artefacts. Those elements that must be protected include Aboriginal Places, objects of significance and those tangible and intangible elements that are important in the broader landscape that contribute the cultural fabric of Aboriginal people. Those important aspects within the broader landscape include plants, animals and the waters of NSW (Aboriginal people have used these aspects of the landscape for ceremonial activities for generations, including ochres and stones quarries and bush foods).

As indicated, it is important also that in any future legislation that the non tangible elements of Aboriginal culture and heritage is recognised and

protected in any new legislation developed. Non-tangible includes Aboriginal lore and customary knowledge such as the protection of Aboriginal stories and unwritten customs and ceremonies. Those aspects of Aboriginal culture and heritage that cannot be categorised as objects and places must also be protected with appropriate legal mechanism (both civil and criminally) similarly to those intellectual and proprietary rights protected through law such as the *Copyright Act* (Cth), this protection should include important aspects such as spirituality similarly to other non-Aboriginal belief systems.

ACHAC considers all aspects, both tangible and intangible, of Aboriginal cultural heritage must be considered for protection (both civil and criminal) in any future Aboriginal culture and heritage legislation.

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

Answer: ACHAC is adamant that it must be the appropriate Aboriginal Elders or their delegates/nominees making any decisions that affect Aboriginal culture and heritage. These Elders are those whom are culturally entrusted to make decisions based on customary lore that has been bestowed upon them by their communities and individual and respective cultural practices.

It is important to note that ACHAC recognises that with the passage of time and the past practices of governments, there is often difficulty in ascertaining and recognising the most appropriate Elder or representative to make decisions or conveys the views of the community. In such circumstances, it is the view of ACHAC that priority should be given to those members of their respective community, whom have been initiated or another cultural ceremony, which provides them with the cultural authority to speak on behalf of the community and the future management and custodianship of cultural places, objects or intellectual property. ACHAC are also of the view that it is important that Aboriginal women, where culturally appropriate, are provided with recognition of their importance in the community, and Aboriginal culture generally, are provided with the opportunity to have equality in relation to any future representative regimes developed and in accordance with cultural principles such as kinship lore.

Aboriginal people should be responsible for the management and protection of Aboriginal culture and heritage. Aboriginal people need to be guided by the appropriate legislative regime that recognises that Elders, both male and female, whom 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.

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

Answer: It is ACHACs submission that those people identified as Elders, as noted in 2(a) above, form local or regional Elders groups (either in a statutory

or corporate entity) to manage, advocate and decide on matters affecting the culture and heritage within their Country. This structure will then provide into any broader cultural heritage representative structure empowered through any future Aboriginal culture and heritage legislation

Aboriginal Elders within their respective communities are required to be empowered through any future Aboriginal culture and heritage legislation to form local community Elders group to advocate, decide upon, and represent the community views at either a local or regional level.

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

Answer: ACHAC is of the opinion that any future Aboriginal culture and heritage legislation recognises the important role Aboriginal people and their culture has both historically and contemporary, that makes up the fabric of NSW. Any future Aboriginal culture and heritage legislation must also ensure that it is legislatively recognised that Aboriginal culture and heritage is traditionally owned and managed by Aboriginal people and such responsibility continues today in many communities throughout NSW. See response to question 1 in relation to what aspects must be protected under any future Aboriginal cultural heritage laws in NSW.

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?

Answer: Please see response provided at question 1 above. Aboriginal cultural heritage ownership must reside in those people and communities empowered to have such a responsibility in accordance with cultural practices and Aboriginal lore for those respective people. Ownership needs to be recognised as part of cultural custodianship and that the ownership and authority should also be legally recognised in any future Aboriginal culture and heritage legislation that is developed. Elders, or their delegates, must have the cultural authority to undertake any role in the management, custodianship or decision making that relates only to their traditional ownership and connection or association with Country.

Ownership must be clearly defined in any future legislation to differentiate the contemporary and legal proprietary rights associated with the definition of ownership and reconcile that understanding and definition with the cultural and customary lore, expectations and responsibilities associated with ownership from an Aboriginal understanding and perspective. Ownership from both a customary and customary perspective must include the legal right (authority) to make decisions in the management of both tangible and intangible aspects of Aboriginal culture and heritage.

Clear recognition of Aboriginal people and their culture is required in any future Aboriginal culture and heritage legislation. Ownership and

custodianship of Aboriginal culture and heritage also needs to be clearly defined with the legislation to take into consideration traditional customs and practices by Aboriginal people and the reconciling of contemporary understanding and practices of ownership.

Question 4 (a): What are your views about “Who speaks for Country”?

Answer: See answer to question 1 above. ACHACs submission is that the most appropriate people to speak for Country are the culturally recognised Elders or their delegates recognised as such by their respective communities and in accordance with lore and associated cultural practices and beliefs.

A legislative process is required that outlines how the most appropriate people are recognised as those with the authority to speak for Country. It is the view of ACHAC that a mechanism similar to that of the Aboriginal Owners Register, pursuant to the Registrars functions under the *Aboriginal Land Rights Act (NSW)* (ALRA), is embedded in the future legislative regime to ensure that there is consistency and transparency in the process of recognising those Elders with cultural authority to speak for Country. This registration must be rigorous and be arbitrated and mediated by an independent statutorily appointed Registrar similar to the role and functions as that already in existence within the ALRA.

It is important to note that it is ACHACs position that prior to any independent mediation or arbitration in relation to the registration process of Aboriginal Elders or Knowledge Holders, that Aboriginal communities are empowered with the appropriate legal mechanism to undertake their own process to determine the most appropriate representatives in accordance with traditional customs, lore's and practices. If there are any further conflicts in the community process, the community are then able to request the assistance and ultimate determination by an independent Registrar.

Elders and Traditional Knowledge Holders can only speak for Country if they meet a number of key criteria in their application for registration, including the following:

1. The nominees are of Aboriginal decent.
2. The nominee is from Country via a process of demonstrating their family history and cultural genealogy;
3. The nominee is recognised as a community Elders or Traditional Knowledge Holders;
4. The nominees can demonstrate active involvement in Aboriginal culture and heritage; and/or
5. The nominees are Aboriginal people with a contemporary association and connection to their Country, and have the cultural authority to speak and care for that Country with the authorisation of the relevant Elders.

Those nominees whom fulfil both the legal and cultural recognition requirements are then entered on a Schedule of the respective Aboriginal culture and heritage legislation by the Registrar. It is then the responsibility of

the Registrar to maintain and ensure the accuracy and confidentiality of that Elders Register.

The representative structure for any future Aboriginal cultural heritage legislation must ensure that local and regional communities are empowered to speak for Country and have the legal authority to make decisions affecting Aboriginal culture and heritage within their traditional Country boundaries.

NSW must undertake a registration process within Aboriginal communities to assist in the composition of up to 12 Regional Cultural Councils. Each of the 12 Regional Councils will then provide a single nominee to form an overarching State-based Aboriginal Culture and Heritage Council/Commission.

This Council/Commission must have statutory independence to make decisions affecting Aboriginal culture and heritage and be supported by a Secretariat that consists of administrative, policy, research and financial support structures. It is important also that such a body has an independent oversight and assistance through the appointment of an Aboriginal Culture and Heritage Act Registrar to assist in the interpretation of any future legislation as well as provide governance oversight and mediate and resolve any conflicts that may arise from time to time.

ACHAC submit that it is essential that the members of the overarching State-based Aboriginal Culture and Heritage Council/Commission meet essential skill based and experience criteria that is relevant to making business and administrative decisions in addition to the cultural criteria above.

ACHAC feel that this additional criterion is critical to the success of any new legislation and separate body as it will a decision making body.

Certainty for all members of the wider community is required in relation to who speaks for Country relating to issues affecting Aboriginal culture and heritage. ACHAC submit that in any future legislation, clear guidance is provided for the registration and recognition process of Aboriginal Elders which takes into consideration those traditional cultural practices and customary lore undertaken by Aboriginal people and their communities. ACHAC submit that the Elders representatives are gender balanced and is reflective of all Aboriginal communities throughout NSW. It is fundamental that the future representative body is also supported by a Secretariat which includes policy, research and administrative support. 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 and mediate between conflicting parties.

Question 4(b) What do you think are the best ways to ensure that the appropriate people speak for Country in public process, including who resolves conflicts?

Answer: Please see submission above at question 4 (a). As submitted previously, there is a requirement for a Registration process to be undertaken by the Aboriginal communities themselves and an independently-appointed Aboriginal Cultural Heritage Registrar.

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

Answer: It is ACHACs submission that the representative structure must be incorporated in any future Aboriginal culture and heritage legislation. It is also important to note that ACHAC submits that any representative and support structures that are empowered in any future legislation can, and should, be funded through the development application process undertaken by proponents to supplement any government provided budget.

ACHAC also submits that there must also be a legislative mechanism whereby not only the support and representative structures are funded in part by development applications but also community projects and initiatives that will assist in providing mutually beneficial social, economic and cultural outcomes for all stakeholders.

ACHAC submits that a clear outline of the criterion and process is provided in any future Aboriginal culture and heritage legislation that provides certainty to all members of the community, government and other stakeholders.

ACHAC submit that the NSW Government provide for a recurrent budget to any future Aboriginal Culture and Heritage Council/Committee to ensure that it successfully fulfils its statutory responsibilities. ACHAC also submit that the recurrent budget is supplemented through a minor levy attached to development applications to assist the future Aboriginal representative body in providing for projects and initiatives that support social, economic and cultural outcomes for all members of the community.

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

Answer: ACHAC understands the planning processes and the inter-relationship with current legal obligations of local authorities and proponents, including the requirements of consultation and approvals to destroy or disturb Aboriginal objects and places pursuant to the *National Park and Wildlife Act (NSW)*. However, ACHAC submits that more needs to be undertaken by local government authorities and NSW government agencies in relation to community and stakeholder education for all parties to better understand all rights, obligations and expectations relating to Aboriginal culture and heritage and various planning instruments and NSW statutes.

Question 5 (b): How could Aboriginal heritage be better protected through land use plans and other planning instruments?

Answer: ACHAC submits that Local Government Local Environmental Plans (LEPs) are in urgent need of review and updating and that all Aboriginal culture and heritage is incorporated into them. ACHAC submits that all LEPs must have a mandatory Aboriginal cultural and landscape assessment undertaken to assist and be incorporated into any future LEP.

Local governments must be required to undertake Aboriginal cultural and landscape assessments and develop an Aboriginal cultural and heritage Plan of Management for their respective Local Government Area (LGA).

Aboriginal culture and heritage must be identified and accepted at the local government planning stage to ensure that local government planning is better informed and considered as part of a mandatory checklist for local governments in any planning, development or budgetary deliberations and decisions.

As an example, LGAs develop their respective LEP that incorporates Aboriginal culture and heritage (including both the tangible and non-tangible components) which is then provided to the local community representatives (Local Elders Group in accordance with their inclusion on the schedule as representatives for Country under any future Aboriginal heritage legislation) for consideration and endorsement. Once an LEP has been endorsed by the local community representatives and provided to the LGA, this LEP is then provided to the Minister for approval (ensuring that the mandatory Aboriginal cultural heritage assessment and endorsement has been complied with).

ACHAC further submits that Aboriginal cultural heritage, the role of communities and its importance, is to be promoted through local governments as part of that local government areas community and stakeholder educational responsibilities.

ACHAC submit that all LEPs are to be reviewed with the passage of any future legislation to ensure that Aboriginal culture and heritage is incorporated into any Local and State planning instruments and planning processes. ACHAC submit that all planning instruments and development applications are required to have undertaken mandatory Aboriginal cultural heritage and landscape assessments. These applications and draft LEPs are then 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.

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

Answer: ACHAC submits that the current NRM processes do not help protect Aboriginal culture and heritage due to the lack of education and clarity in relation to the respective roles and responsibilities of various government agencies and lack of consistency in any protective approach.

Question 6 (b): How could Aboriginal cultural values and knowledge be better incorporated in NRM processes?

Answer: ACHAC submits that in improving relationships and understanding between the Aboriginal and non-Aboriginal communities, landholders, government agencies (including the Catchment Management Authorities (CMAs), any future legislative regime must include clear rights, obligations and expectations of all parties. The future legislation must also include a mandatory requirement for CMAs and landholders to undertake Aboriginal cultural heritage and landscape assessments in the development of Catchment Action Plans and PVPs. These statutory instruments must be considered and endorsed by the scheduled list of Aboriginal Elders within that respective land boundary for them to take legal effect.

ACHAC submits that there is currently confusion in the broader community in relation to specific roles, responsibilities and rights in relation Aboriginal culture and heritage and NRM. Therefore, it is important that education and community consultations are undertaken in the future to ensure that there is clarity and certainty for the Aboriginal communities and broader stakeholders.

As noted with the local government planning processes, ACHAC submit that all CAPs and PVPs are 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 that take legal effect.

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

Answer: **ACHAC submits that there must be separate Aboriginal cultural heritage legislation in NSW. This legislation must provide for the creation of a separate community Elder representative Aboriginal Culture and Heritage Council or Commission. This statutory body must be fully resourced and funded from the recurrent NSW Budget and have a strong statutory governance and accountability framework. The body must be provided with the legislative authority to make recommendations and decisions that affect the future regulation and protection of Aboriginal culture and heritage.**

The independent statutory body Aboriginal cultural heritage body must be regulated and audited in accordance with other statutory bodies in NSW. The membership of the body must only be appointed based on their respective and individual skills and expertise of the nominees. It is important to note that ACHAC submits that the members of such a body are not to be elected or nominated by their community, but meet the criteria as determined by the future Act and overseen by an independent Aboriginal Culture and Heritage Registrar.

ACHAC submits that it is vitally important that any future legislation is developed respectfully so that all Aboriginal people embrace it and value its importance, including their particular role in the future management and custodianship of their culture and heritage.

ACHAC further submit that the future Aboriginal cultural heritage legislation be strong and effective in relation to any regulatory and penalty regime that is included. It is important that a respectful balance is determined in the legislation that provides for clear understanding of roles and responsibilities, strong deterrence and penalty regime, protection and conservation of Aboriginal culture and heritage as well as beneficial social and economic outcomes for the Aboriginal community.

Finally, ACHAC submit that it is essential that there be a sustained focus on educating and informing people (general public/communities etc) in relation to any new legislation. It is important that the education campaign is continuous for the representatives from local communities as well as stakeholders and Aboriginal community members generally in order for the Act and its objectives to be fully appreciated and understood and, importantly, to be effectively implemented.