

Aboriginal Cultural Heritage in NSW

Summary of submissions report
2018

A proposed new legal framework for the protection and management of
Aboriginal cultural heritage in NSW



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Summary

Public consultation on a proposed new legal framework for the protection and management of Aboriginal cultural heritage (ACH) was open from 11 September 2017 to 20 April 2018. This included the public release of the draft Aboriginal Cultural Heritage Bill 2018 (draft Bill).

In total, 313 submissions were received from a range of stakeholders. This included 130 submissions from public workshops where feedback from each table was counted as one submission. Nearly 700 people attended the workshops and were encouraged to provide honest feedback and not necessarily reach consensus. Where they indicated support or non-support this has been included in the quantitative analysis, however, many provided more general comments only.

Submissions were received from a variety of stakeholder groups including Aboriginal organisations and individuals, industry, heritage consultants, and government organisations including local government. Approximately two-thirds of those who provided feedback identified as Aboriginal.

All stakeholder groups indicated support for the introduction of contemporary standalone legislation that gives Aboriginal people more ownership and control of their cultural heritage, while at the same time providing greater certainty and clarity to proponents around assessment requirements. However, many identified areas for improvement and suggested amendments to the draft Bill.

There was general support for the more contemporary reflection of Aboriginal cultural heritage in legislation. Of those that specifically commented on the definition of Aboriginal cultural heritage, there was four times more positive support than negative (40% compared to 10%). However, most of the feedback suggested improving the definition by more explicitly including other elements such as water, and greater focus on living culture.

A variety of stakeholders supported Aboriginal decision-making, and over half of those that commented expressed support for the proposed new governance structure. There was recognition the proposed ACH Authority and local ACH consultation panels should provide a workable governance structure. It was also widely recognised that these structures need to be set-up and resourced appropriately to have the confidence of the community. There was strong feedback for community-led decision-making. Most Aboriginal stakeholders (60%) supported a new ACH Authority that comprised members with both cultural authority and relevant skills and experience that would enable them to administer the new system.

About a quarter of submissions queried the proposed level of Ministerial oversight when one of the underlying principles of the new legislation is to support self-determination by Aboriginal people. Many submissions called for more decisions to be made by the ACH Authority or for parameters to be placed around what the Minister should consider when making decisions.

Two-thirds of submissions from across all stakeholder groups expressed an interest in better information management. Many recognised the importance of better upfront information about the likely occurrence of cultural heritage to support land use planning, development assessments and land management activities. Submissions widely identified there must be trust among Aboriginal cultural knowledge holders that cultural information will not be owned by government and will be handled securely with appropriate safeguards. There was support for this information to be used as a referral tool, so proponents can engage early with local ACH consultation panels.

Likewise, there was support for broader protection and more strategic conservation of cultural heritage and the establishment of a dedicated ACH Fund. Of those who commented on the conservation tools, twice as many (nearly half) expressed support compared to those who expressed negative comments (less than a quarter). While there was positive feedback

about recognising and protecting intangible ACH, there were concerns about intellectual property and how intangible agreements might work in practice. Aboriginal and non-Aboriginal stakeholders commented that the draft Bill should focus more on protection, conservation and safeguarding of Aboriginal cultural heritage.

Two-thirds of submissions commented on the new regulatory system. All stakeholder groups supported upfront consideration of Aboriginal cultural heritage in the new ACH assessment pathway with very few submissions taking the contrary view. While submissions recognised positive aspects about negotiated ACH management plans, some suggested they focus more on conserving and mitigating against harm. There were also many calls not to exempt state significant projects.

Many also acknowledged the need for effective supporting information and structures. This includes resourcing, capacity building, protocols to guide negotiations between various parties, strong compliance and enforcement, fairer penalties and equal access to appeal rights.

It was widely acknowledged that the proposed new legal framework for Aboriginal cultural heritage will need to be sufficiently resourced with effective transition arrangements. Many submissions noted further consultation will be crucial in raising awareness, developing the regulations and policies and guidelines, and transitioning to the new system. Many stakeholders expressed their desire to continue working with the NSW Government and the new ACH Authority (once formed) to support the development and implementation of the ACH legal framework.

Introduction

Purpose of this report

The NSW Government is reforming the way Aboriginal cultural heritage is conserved and managed in New South Wales. The proposed new legal framework aims to fulfil the Government's commitment to deliver standalone legislation that respects and conserves Aboriginal cultural heritage for current and future generations. It also aims to recognise Aboriginal custodianship and ensure Aboriginal people have the authority to make decisions about their cultural heritage, while providing clear and consistent processes for economic and social development in New South Wales. In 2017–18 the NSW Government consulted on the proposed legal framework.

This report provides a summary of the comments raised in submissions including feedback received through workshops and written and verbal submissions. It is not an exhaustive analysis of every comment received.

The key issues raised in public consultation were sorted into the following categories, which form this report's structure:

- Feedback on the overarching legal framework
- Aim A: Broader recognition of Aboriginal cultural heritage values
- Aim B: Decision-making by Aboriginal people
- Aim C: Better information management
- Aim D: Improved protection, management and conservation of Aboriginal cultural heritage
- Aim E: Greater confidence in the regulatory system
- Feedback on other issues.

Figure 1 below shows the proportion of submissions that commented on each of these categories.

More detail about each of the proposals can be found in the paper, *A proposed new legal framework: Aboriginal cultural heritage in NSW*.¹

This report does not provide the NSW Government's response to the issues raised in submissions.

¹ www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw

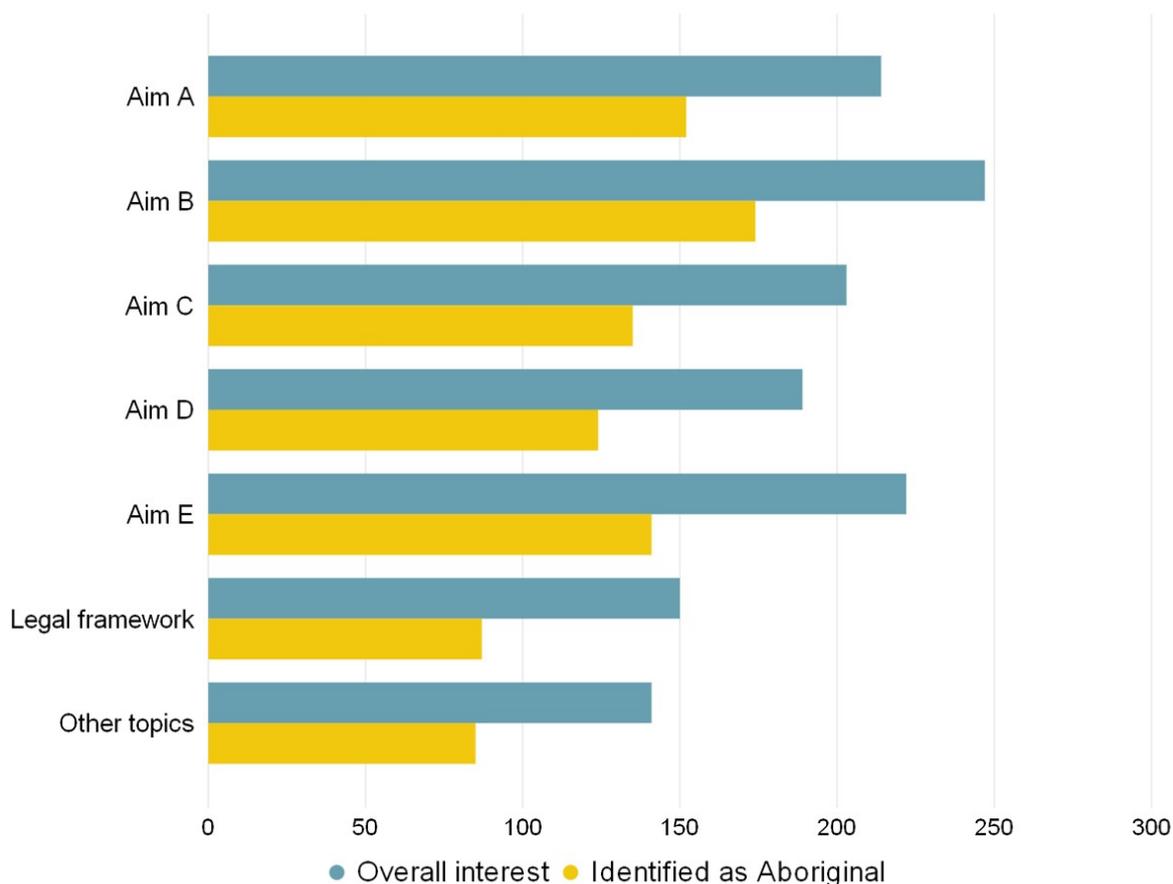


Figure 1 Level of interest in each reform aim

Overview of the public consultation and exhibition process

Since 2011, there have been four phases of public consultation on the Aboriginal cultural heritage reforms. This report covers the current round of public consultation, which was open from 11 September 2017 to 20 April 2018.

A package of material was made available to help people understand the proposed new legal framework and to encourage feedback. This included:

- *A proposed new legal framework: Aboriginal cultural heritage in New South Wales proposals paper* publicly released in September 2017. This paper identified the broad aims of the framework, the key proposals and the benefits to Aboriginal people, industry, government and the community.
- The public consultation draft Aboriginal Cultural Heritage Bill 2018 released on 23 February 2018.
- A Yarn Up handbook, to facilitate group discussions among Aboriginal people, focused on the proposed governance structure.
- Two webinars and a series of short videos.

Public sessions were held across New South Wales which were independently facilitated by Marcia Ella Consulting (MEC).

In September and October 2017, information sessions were held in 19 locations across New South Wales to explain the key proposals and ways to provide feedback. In March to April 2018, workshops were then held in the same 19 locations as well as an additional one in Tamworth. The workshops enabled participants to discuss issues and provide feedback.

Appendix A provides further information about the previous phases of public consultation, the level of participation and representation at the 2017–18 public sessions and evaluation of the public consultation process and design.

How many submissions were received?

In total, 313 submissions were received. This includes:

- 119 written submissions.
- 58 responses to the Have Your Say online survey.
- 6 verbal submissions.
- 130 submissions from workshops, where feedback from each table has been counted as one submission. There were usually 4–6 people per table, and nearly 700 people attended the workshops.

Who made the submissions?

Submissions were received from a variety of stakeholder groups (Figure 2). In some instances, particularly in workshops and the online survey, people identified as representing more than one stakeholder group.

Across all submissions, 69% of contributors identified themselves as Aboriginal. This includes tables at workshops where at least one person identified as Aboriginal. Many stakeholders identifying as Aboriginal also represented other stakeholder groups, such as heritage consultants, government organisations and land managers.

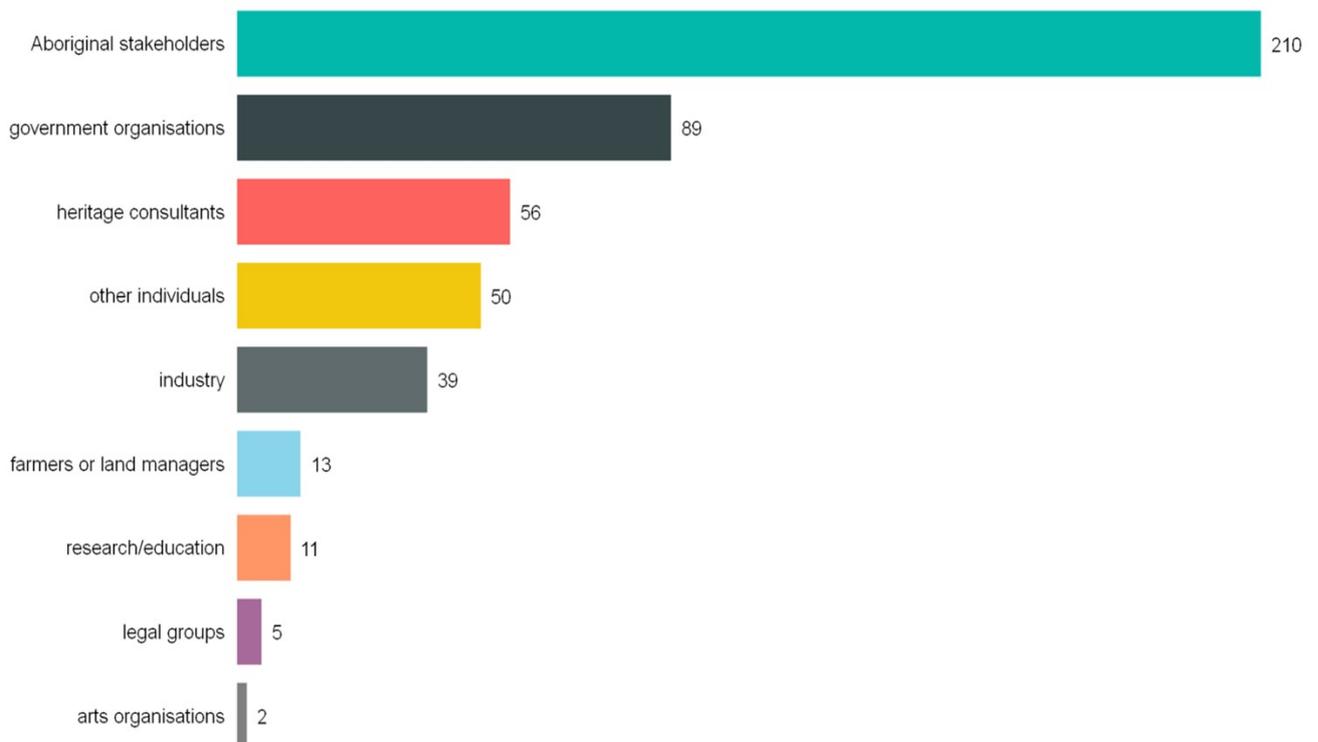


Figure 2 Stakeholder groups that made submissions

How were submissions analysed?

Submissions were analysed according to themes proposed in the new legal framework, as well as key topics raised in the submissions. This report summarises the themes and presents an indication of the level of interest in the proposals.

All submissions were analysed by Office of Environment and Heritage (OEH) staff using data analysis software called NVivo. NVivo assists with organising, storing and retrieving data and allows views expressed in submissions to be coded into themes.

Coding was quality assured, and further quality controlling was conducted prior to analysis. Analysis was conducted based on themes. For some themes, positive and negative sentiment was coded where possible.

To reduce subjectivity, much of the analysis was conducted on level of interest rather than level of support. Level of support is included in the report where it is relatively clear to determine. Across the proposals, submissions usually provided more general comments than comments indicating a level of support. At the workshops, participants were asked to indicate their level of support for each of the aims. These results are not referenced throughout the report because of some participants' concerns about their use; more information is provided in Appendix A.

For workshops, feedback from one table is collectively counted as one submission. Approximately 700 people attended workshops, which is a larger number than those providing feedback through other methods, and about two-thirds of them identified as being Aboriginal. People were encouraged to provide frank and honest feedback and not necessarily reach consensus. For this reason, it is sometimes difficult to determine the level of support.

Twenty Local Aboriginal Land Councils (LALCs) provided written submissions. While some had additional content, 17 of these submissions contained some identical content. Although the report refers to such submissions in a group, they were counted individually in statistical analyses².

The report focuses on key points raised by stakeholders and highlights representative views to show the range of opinion on the reform proposals.

Non-confidential submissions will be made available on the [Office of Environment and Heritage's Aboriginal cultural heritage reforms website](#).

² The LALCs that provided this content and who agreed to be published include Amaroo, Grafton Ngerrie, Griffith, Menindee, Metropolitan, Mindaribba, Narrabri, Walgett, Wanaruah and Worimi. They are quoted in this report as 'submissions from 17 LALCs'.

Comments on the legal framework

Nearly half of submissions received commented on the overarching legal framework. Many supported the development of standalone legislation, and many identified areas for improvement. Many called for further detail and some suggested a statutory review a few years after the legislation is enacted.

A wide variety of positive commentary was received from all stakeholder groups. This ranged from broad statements supporting the reforms' intent, recognition of the potential benefits to business, and comments celebrating the diverse nature of ACH itself.

ACH is for everybody to enjoy and value (feedback from Penrith workshop)

The implementation of a standalone piece of legislation and giving local Aboriginal people more autonomy and ownership over their inherent cultural rights including objects, sites, stories and remains of their ancestors is a good step in the right direction. (Joint Management Custodians of NSW)

NSW Farmers commends this attempt to update the legislation to a workable, contemporary, standalone framework that is clear and practical and works alongside the Aboriginal Languages Act and the Aboriginal Land Rights Act. (NSW Farmers)

Overall, we support a revised legal framework that provides increased certainty and reduces the time and costs to proponents and the community. We believe that this, in turn, results in better outcomes for all stakeholders. (Cement Concrete & Aggregates Australia)

Concerns about the proposed new legal framework came from all stakeholder groups and reflected a variety of perspectives.

While we support the intentions of the proposed legal framework and new model, we recognise that logistically there seems to be a continuing gap between the development appraisal and approval processes and the involvement of Aboriginal people. We remain concerned that the new system will not be able to meld the two competing interests as is the intended and desired outcome. (Blacktown City Council)

This legislation appears to manage the systematic destruction of Aboriginal heritage – there needs to be more focus on conservation and managing change to ACH sites/places etc. and create a more sophisticated system of assessing significance and implementing the outcomes. (feedback from Redfern workshop)

Critically, the current Bill does not provide certainty in relation to the role to be played by Aboriginal Owners, LALCs, native title holders and native title claimants and it is unclear how these rights and interests will be recognised and protected. The critical issue of who speaks for Country will not be settled through the current Bill. (Office of the Registrar, Aboriginal Land Rights Act)

A common theme across all stakeholder groups was frustration that more details about the proposed new legal framework were not available. This is because many of the details on how the system will operate will be developed by the new ACH Authority through regulations and associated policies, tools and guidelines.

A key concern with the reforms is that not all processes have been determined in terms of implementation, making it difficult to fully understand how this process will work and be funded. Without these details, it is difficult to fully assess these reforms and raises concerns with our Aboriginal community. (MidCoast Council)

Dharriwaa Elders Group cannot reconcile the need for empowered, self-determining Aboriginal communities to manage their Country and associated Aboriginal cultural values, with the proposed legislation. It has been rushed, has not been effectively discussed with communities in the short timeframe, and does not yet provide an instrument to support Aboriginal communities to manage their cultural heritage. The big picture remains unclear, with no mention of how this Act is proposed to interact with other Acts. (Dharriwaa Elders Group)

There should be a clear roadmap of the proposed process for regulatory approvals before the final legislation is passed by Parliament rather than leaving some detail until the ACH Authority is established. All aspects of the development and planning process need to be clear and transparent before the legislation is finalised. (Housing Industry Association)

Several submissions called for a mandatory legislative review. The suggested period varied between two and five years.

This draft Bill provides a new way of protecting and promoting ACH in New South Wales. While there is much to learn from the experience of other states, the legislation and/or ACH Authority may require changes after its initial establishment. A review of this legislation three years after its implementation would ensure the system was given enough time to be established, and any gaps or duplications to be understood. (Cement Concrete & Aggregates Australia)

Multiple submissions mentioned the application of the Burra Charter and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) within the draft Bill. While these comments indicated that the UNDRIP was highly relevant, opinion was divided on whether the Burra Charter was appropriate for spiritual culture.

Aim A: Broader recognition of Aboriginal cultural heritage values

Key proposals seeking to achieve this aim are statutory objects to guide interpretation of the draft legislation, a new definition of Aboriginal cultural heritage (ACH), and legal acknowledgement of Aboriginal ownership of cultural heritage.

Almost 70% of submissions commented on an aspect of Aim A.

Statutory objects

The proposed statutory objects recognise Aboriginal cultural heritage belongs to Aboriginal people and assert Aboriginal people's authority over and responsibility for their cultural heritage. The objects also include statements requiring the Bill to establish effective and timely processes for regulating and managing activities that may impact on Aboriginal cultural heritage.

Level of interest

About a quarter of submissions commented on the objects.

Key points raised

General support for statutory objects

Of the comments on the proposed statutory objects, almost 40% indicated support, and about 15% indicated opposition to the objects.

Protection of Aboriginal cultural heritage

Most of the comments on the proposed statutory objects questioned if they adequately establish the aim of protecting Aboriginal cultural heritage.

The proposed new objects are more comprehensive than the current objects outlined in the NPW Act and include recognition that Aboriginal heritage 'belongs' to Aboriginal peoples. However, they could be further strengthened, for example, by including 'protection' of ACH as an object and through better alignment with the United Nations Declaration on the Rights of Indigenous Peoples. (submissions from 17 Local Aboriginal Land Councils (LALCs))

The only "object" that directly alludes to the protection of cultural heritage is object 3(b) ... This is an objective of establishing "processes" in relation to cultural heritage "so as to achieve better outcomes for Aboriginal people and the wider NSW community". The actual outcome of protecting cultural heritage is not explicit. ... In our view, the objectives should include a clear statement that the object of the legislation is to protect Aboriginal cultural heritage, similar to those contained in the Queensland and Victorian legislation. (Law Society of NSW)

Need to refer to decision-making by Aboriginal people and recognise key groups

Other feedback suggested the objects should refer to decision-making by Aboriginal people and should explicitly recognise Traditional Owners and Aboriginal nations for Aboriginal cultural heritage.

Section 3(a) defines the objects of the Bill as being based on the recognition of Aboriginal people and 'establishing a legislative framework that reflects Aboriginal people's responsibility for and authority over Aboriginal cultural heritage'. We submit that the objectives should go

further and contain an objective about the centrality of empowering Aboriginal decision-making. (Lauren Butterly and Lucas Lixinski, University of NSW, Law)

Definition of Aboriginal cultural heritage

The draft Bill proposed a more comprehensive definition of ACH as well as related definitions, including Aboriginal object and ACH significance.

Level of interest

Over 60% of all submissions commented on the definition of Aboriginal cultural heritage.

Key points raised

General support for a revised definition

Of the 60% of submissions that commented on the definition, around 40% indicated support for the proposed definition of Aboriginal cultural heritage. Less than 10% indicated they opposed the definition.

The new Bill recognises Aboriginal culture as a living one. This is intrinsic to the well-being of Aboriginal people. (Greater Blue Mountains World Heritage Area Advisory Committee)³

We particularly commend the broadened definitions of Aboriginal cultural heritage and the emphasis on recognising the primacy of Aboriginal people in decision-making around their heritage. ... GML supports an amended definition of Aboriginal heritage to provide for the protection of a broad range of Aboriginal cultural values, focusing on more than just archaeological objects. (GML Heritage)

Inclusion of other items

Many submissions did not indicate a level of support but provided comment on how the definition could be improved. A common theme was being more specific about including other items such as water, landscapes and languages and greater focus on living culture. There were also calls for spiritual connection, Aboriginal lore and cultural obligations to be specifically included.

We agree that the definition is broad and all-encompassing. However, we would like to include water, marine and minerals. (feedback from Redfern workshop)

It needs to include specific reference to lore and the intrinsic link between lore and customs of Aboriginal peoples (feedback from Ballina workshop)

Application of definition

Some mentioned that while the definition was broad, the enforceable provisions to protect ACH were narrow, covering only Aboriginal objects and Declared ACH.

A broad all-encompassing definition of ACH that captures the tangible and intangible, as well as whole of landscape values is supported. However, the definition must ensure that both tangible and intangible ACH are primary components; ... [and] must be accompanied by enforceable mechanisms to protect ACH. (NSW Aboriginal Land Council)

³ Paraphrasing from EDO NSW's community briefing note.

The Law Society is concerned that although the ACH Bill introduces a broad definition of cultural heritage, it is only a narrow class of heritage that is protected from harm and, in particular, does not contain adequate protection of Aboriginal sites (Law Society of NSW)

Differing views on the term Aboriginal

Some commented on the use of the term 'Aboriginal' and that different nation groups should be acknowledged.

There is no recognition of Traditional Owners and traditional tribal areas. There should be recognition in the definition of the individual tribes (feedback from Wentworth workshop)

Definition of who is Aboriginal or what is Aboriginal – people of differing nations do not necessarily consider themselves as 'Aboriginal' but rather Worimi, Wiradjuri, etc. (feedback from Newcastle workshop)

Other definitions in the draft Bill

Besides the definition of Aboriginal cultural heritage, the draft Bill also included several other definitions such as Aboriginal object, ancestral remains, Aboriginal cultural heritage significance, and intangible Aboriginal cultural heritage. A definition for harm was also provided. Submissions commented on each of these definitions.

Level of interest

Of the submissions that commented on definitions in the draft Bill, about 15% commented on definitions other than 'Aboriginal cultural heritage' and a quarter raised the subject of new definitions to be included.

Key points raised

Ancestral remains

For the definition of ancestral remains, submissions raised concerns that some ancestral remains may be excluded.

Early historical cemeteries and missionary cemeteries which include Aboriginal remains should be included in this. (feedback from Newcastle workshop)

Aboriginal ancestral remains should still be included in the definition regardless if the burial is within a cemetery that also contains non-Aboriginal persons. (Central Coast Council)

ACH significance

Submissions commented on the definition of Aboriginal cultural heritage significance, with some commenting it is appropriate for Aboriginal people to determine significance and others suggesting non-Aboriginal people may also have a connection.

As a broad definition it works, but there needs to be allowance for regional/local variations in the significance of different elements (feedback from Redfern workshop)

I agree that a broader definition of ACH values is required. However, any definition of these values should be inclusive so that it is recognised that non-Aboriginal people also have a connection to many of the values listed in the draft Bill. For example, an archaeologist such as myself also holds that values attached to the environment, landscape, place and objects have significance to me, as well as the Aboriginal community (Stephanie Rusden, archaeologist)

Intangible heritage

There was generally positive feedback on the inclusion of intangible heritage. Some submissions wanted further clarification about intangible heritage. Others commented that a separate definition of intangible heritage was not needed, given the holistic definition of Aboriginal cultural heritage contained in the draft Bill. They said having a separate definition imposes a separation between 'general' Aboriginal heritage and intangible Aboriginal cultural heritage.

Like focus on intangible first, then the tangible (feedback from Redfern workshop)

By separating out intangible heritage at the start of the Bill, it creates the illusion of a dichotomy that is not best practice and not actually reflected in the legislative scheme. (Lauren Butterly and Lucas Lixinski, University of NSW, Law)

Harm

While the definition of harm in the draft Bill includes 'disrespect', several submissions asserted the definition should be more specific and include 'desecration'.

The Bill removes 'desecration' from the definition of harm and does not include a new offence for desecration. NSW Coalition of Aboriginal Regional Alliances (NCARA) believe that this should be changed and that a definition of desecration to be included in the draft Bill. (NSW Coalition of Aboriginal Regional Alliances)

The lack of definition on 'trivial' or 'negligible' in terms of harm provides uncertainty that can be exploited. It is recommended that further consideration on the nature and type of harm that can be prosecuted is considered and/or defined in this part of the Bill. (Extent Heritage)

Further definitions suggested

Other submissions noted definitions should also be included for 'cultural authority' and 'Aboriginal community' because they are significant concepts in the draft Bill.

Ownership

The draft Bill clearly establishes that Aboriginal cultural heritage belongs to Aboriginal people. This will be given effect through the new statutory objects and provisions that transfer ownership of certain Aboriginal objects from the Crown to the new ACH Authority on behalf of all Aboriginal people in New South Wales.

Level of interest

Almost 10% of all submissions commented on this topic.

Key points raised

Support for transferring ownership to Aboriginal people

Of those who commented on the proposals for ownership, nearly half indicated support while others made general comments. Submissions noted the proposal was removing antiquated provisions in the *National Parks and Wildlife Act 1974* (NPW Act).

We strongly support the removal of the false assertion that the Crown owns ACH. It is an improvement that certain ACH will be held by the ACH Authority on behalf of Aboriginal people. (NSW Aboriginal Land Council)

The implementation of a standalone piece of legislation and giving local Aboriginal people more autonomy and ownership over their inherent cultural rights including objects, sites, stories and

remains of their ancestors is a good step in the right direction. (Joint Management Custodians of NSW)

Submissions emphasised while this is a positive step, it needs to be supported and implemented.

GML supports the legal recognition that Aboriginal people are the rightful custodians and managers of their own cultural heritage values. We believe that this recognition is a crucial step in the future management of Aboriginal cultural heritage. It is essential that this recognition is meaningful and fully supported. (GML Heritage)

Of those who commented, about 10% indicated they did not support the proposed ownership arrangements, asserting that cultural heritage should not be owned by the ACH Authority. Submissions raised the idea that Aboriginal cultural heritage should be owned directly by Aboriginal communities, and some put forward Traditional Owners in particular.

Objects need to be owned by the people, not an authority. (feedback from Muswellbrook workshop)

Protection of cultural heritage belongs to Traditional Owners. Jurisdiction needs to be given to Traditional Owners. (feedback from Bourke workshop)

Aim B: Decision-making by Aboriginal people

Aim B is to create a new governance structure that gives Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage. The proposed governance structure consists of:

- a new statewide body with decision-making powers called the Aboriginal Cultural Heritage Authority
- local consultation panels made up of people with recognised cultural knowledge and authority to speak for Country
- local coordination and support bodies
- Ministerial strategic oversight.

Governance structure

Level of interest

Almost 80% of submissions commented on the governance structure.

Key points raised

Support for the proposed governance structure

Of those that commented on the proposed governance structure per se, more than half supported the establishment of the new structure. All stakeholder groups supported Aboriginal people having a decision-making role and there were many positive comments about the governance structure.

The ACH Authority and local consultation panels have the potential to increase Aboriginal representation and responsibility in positive and ground-breaking ways. (EDO NSW)

The NSW Aboriginal Land Council supports Aboriginal controlled decision-making and administrative structures in the new laws. (NSW Aboriginal Land Council)

However, some suggested that more authority should be devolved to local people, there should be a regional layer in the structure or better representation of existing groups.

Some were concerned the governance structure is not sufficiently independent from government or representative of all Aboriginal people.

Where are the Traditional Owners who actually hold important cultural knowledge? There's no mention here of how our voice is important and is strong. (Chris Narran, Aboriginal individual)

It is not acceptable for Aboriginal people from any community, to take collective responsibility for the property of Aboriginal families and communities that they do not belong to, and cannot speak for. This is why the power in the Act will need to be working from the ground up. (Aboriginal Culture, Heritage & Arts Association)

ACH Authority

The proposed ACH Authority will be a new statewide body administered by a board of Aboriginal people. It will administer the new legal framework and make key decisions about Aboriginal cultural heritage. It is important that Aboriginal people have confidence in the Authority's decisions, so Board members need to be selected through an Aboriginal community-driven process. For this reason, most of the analysis on the ACH Authority is drawn from submissions where one or more participants identified as Aboriginal.

Level of interest

Nearly 70% of submissions commented on the proposed ACH Authority. Of these, three-quarters were from people who identified as Aboriginal.

Key points raised

General support for ACH Authority

There was general support for an independent group of Aboriginal people who have decision-making responsibility for cultural heritage.

NCARA believe it is essential that the ACH Authority is a state level, genuinely independent Aboriginal controlled body which undertakes all ACH functions that currently sit within government agencies... As the ACH Authority is the key governance and decision-making body under the new Bill, the legitimacy and authority of Aboriginal people on the Authority is critical. (NSW Coalition of Aboriginal Regional Alliances)

Skills, experience and cultural authority of Board members

Nearly 70% of submissions from people who identified as Aboriginal commented on the membership and eligibility of the Board. Of these:

- 40% indicated support for Board members to be selected based on skills and experience
- 34% indicated support for Board members to be selected based on cultural authority for an area of New South Wales
- 58% supported a combination.

The above categories are not mutually exclusive.

Those who supported Board members to have specific skills and experience also suggested additional skills such as communication and knowledge of community and Country.

Important role needs to be done properly. Need to see both sides of an issue, therefore needs experience. Good communication skills to pass on information. (feedback from Queanbeyan workshop)

Needs to function as a Board, so skills are important (feedback from Newcastle workshop)

Submissions expressing support for Board membership to be based on cultural authority for an area of New South Wales sought geographical representation and observed that specific skills could be learned or outsourced.

Each region needs to be represented, e.g. North Sydney to Newcastle, Sandstone Country, River boundaries. (feedback from Gosford workshop)

Many of these skills can be outsourced. (feedback from Penrith workshop)

However, most Aboriginal stakeholder feedback suggested a need for both.

'ACH Authority' members may ONLY be recognised cultural knowledge holders, and ought to also have some of the skills listed. (Atalanta Lloyd-Haynes and Porky (Kevin) Ballangarry)

Individuals don't need both but both sets of knowledge must be represented. (feedback from Penrith workshop)

Submissions supported the requirement that all Board members be Aboriginal, while some provided feedback on how Aboriginality should be determined.

Genealogy plus practice of ancestors continuing within the community – Native Title claiming is more rigorous test of cultural authority. (feedback from Newcastle workshop)

Representation from Aboriginal organisations

The draft Bill included a NSW Aboriginal Land Council (NSWALC) representative on the Board. Few submissions specifically commented on this. Of those that did, most supported it. Some also called for other groups or organisations to have dedicated representation.

The ACH Authority Board should be composed of 13 members including one NSWALC representative plus four representatives from each of the following: Aboriginal Land Councils, Aboriginal Owners, registered under the *Aboriginal Land Rights Act 1983* (NSW), Native Title holders / Prescribed Body Corporates. (submissions from 17 LALCs)

Through Native Title Holder claims. Seven claim groups in the State – 80% of State. (feedback from Newcastle workshop)

The Aboriginal Board of Management for National Parks should be represented on behalf of the Local Aboriginal Cultural Heritage Council members. (Graham Avery, Aboriginal individual)

There were also strong calls for age and gender representation on the ACH Authority Board.

Forming the Board of the ACH Authority

Fifty-seven per cent of submissions from participants who identified as Aboriginal commented on nomination processes for forming the Board. Table 1 outlines support for each of the examples provided. These categories are not mutually exclusive. Over half of submissions called for an alternative option or a combination of methods.

Table 1 Support for processes to form the Board of the ACH Authority

Process example	Percentage who indicated support	Percentage who indicated disagreement
A state agency asks Aboriginal groups (including native title holders and registered claimants, LALCs, Aboriginal Owners, Elders groups and other groups) to put forward the names of proposed Board members	10%	14%
An independent panel of Aboriginal people (established to convene the Authority) asks Aboriginal groups to put forward the names of proposed Board members	23%	7%
An open election process	32%	9%

Nearly half of submissions provided more general feedback such as the need to have confidence in the Board, a desire for an open and transparent process, suggestions for an interim board, and calls for the Board not to be Sydney based.

Although some thought it could be impartial, much feedback on the example of a state agency asking Aboriginal groups to put forward names, questioned whether Aboriginal people would see this as a legitimate process.

Authority would not be seen as legitimate by the Aboriginal community (feedback from Penrith workshop)

Most comments on the independent panel of Aboriginal people questioned the process for selecting panel members.

Preferred. Due to local knowledge, integrity, achievable to community (feedback from Redfern workshop)

How is 'independent' determined? (feedback from Gosford workshop)

Some submissions on the open election process example stated it would be the most open and transparent process; however, others suggested it would be too focused on well-known personalities rather than appropriate selection criteria. Much of the feedback was about the need for clarity on boundaries, nomination processes and resourcing.

Allows equal opportunity to nominate and elect representatives. Obvious concern around getting involvement and trust with the wider Aboriginal community (feedback from Newcastle workshop)

Shouldn't be a popularity contest (feedback from Bathurst workshop)

The submissions that suggested alternative options included combinations of the provided examples, regional selection processes, or representation from selected groups only.

Election after vetted EOI (expression of interest) is made (feedback from Tamworth workshop)

If the process is established from the bottom up, i.e. from the consultation panels up, the Authority would have more relevance and ownership. (feedback from Dubbo workshop)

Ministerial appointment of ACH Authority Board members

A small number of submissions commented on the process of Ministerial appointment of the ACH Authority. Some supported this for the privileges and protections it affords the Board, whereas others expressed concern that it could reduce the Board's independence. Of those that mentioned it, all disagreed with the Minister's ability to remove members without further safeguards.

We also support the Ministerial appointment of members because it allows the Authority to secure the privileges of a NSW Government agency. We do not support the proposal to allow the Minister to remove a Chairperson, Deputy or other member at any time, without consultation or reason. This arbitrary power unnecessarily expands the usual Ministerial power to remove members for impropriety, bankruptcy, incapacity or the conviction of a criminal offence. It also allows the Minister to control the Authority by removing members with contrary views. This undermines the protection against Ministerial control assured by Section 7(1). (Laurie Perry and Kylie Lingard)

It is understood the Minister has the final say regarding appointment of members to the ACH Authority. This causes concern and provides a lack of confidence for Aboriginal people. Members should be and be approved by grassroots people. (Neville Merritt, Aboriginal individual)

Functions and name of the ACH Authority

Very few submissions commented on the functions of the ACH Authority as listed in clause 12 of the draft Bill, apart from calls to ensure good governance and access to appropriate skills to ensure financial accountability. There were some suggestions for the ACH Authority to do more to involve Aboriginal communities including working with land councils and building the capacity of the communities to be involved in the new system. There were suggestions the functions of the Authority should not be limited to those listed in the draft Bill.

Encouraging and undertaking capacity building among Aboriginal people to enable more people to participate in decision-making roles (ACH Authority and local ACH panels) must be acknowledged as a priority role of the Authority and must be funded. (Dianne Mackey, community member)

Only a few submissions specifically commented on the name of the statewide body. Approximately 5% explicitly stated they agreed with the proposed name 'ACH Authority' compared to 11% that disagreed with the name. Many of those who disagreed did not make alternative suggestions although some proposed 'Management Board', 'Body', 'Agency', 'Commission' or 'Council'.

We have a concern that the word authority presents an inaccurate context as it infers superiority rather than inclusiveness. (Darug Tribal Aboriginal Corporation)

It should have an agreed national Aboriginal language name. (Sally Jones, Aboriginal individual)

Delegations and subcommittees

A small number of submissions commented on the ability to appoint committees or to delegate functions to other organisations. Some industry or heritage stakeholders supported the ACH Authority being able to bring in extra expertise via subcommittees.

The ACH Authority should have the broadest range of skills. The authority should be supported with resources and mechanisms available to seek expert advice on values assessment and governance issues where it feels it requires further expert input. (GML Heritage)

Some local councils expressed concern they could have functions delegated to them and some other stakeholders questioned the scope of activities that could be delegated.

This section and the associated notes seems to foreshadow the delegation of functions such as 'enforcement and compliance' and 'administration of the ACH Fund' to other existing bodies. Such an outcome would be unacceptable – it would facilitate non-Aboriginal involvement in arguably the most vital parts of the framework i.e. its implementation. (Greens NSW)

It is unclear from the detail within the draft Bill as to who will be regulating the legislation and undertaking compliance. It is Central Coast Council's view that compliance and regulation will be an important aspect of the legislative reforms and should, therefore, be resourced appropriately. Central Coast Council currently does not have the capacity or suitably qualified officers to undertake this compliance role. (Central Coast Council)

Local ACH consultation panels

Local ACH consultation panels will be made up of Aboriginal people recognised by their communities as having the authority to speak for Country. Their role will be to provide advice to the ACH Authority on how best to manage and conserve Aboriginal cultural heritage on that Country.

The draft Bill does not set out how these panels will be formed or who should sit on panels as this will be determined by the ACH Authority based on further consultation with Aboriginal people. Because the membership and formation of the panels will be determined by Aboriginal people, this analysis primarily focuses on feedback provided by those who identify as Aboriginal.

Level of interest

Two-thirds of submissions commented on the local ACH consultation panels.

Key points raised

General support for the role and operation of panels

In general, there was support for the panels and their role. There was clear recognition of the need for the panels to represent the local community, noting the need for flexibility in approach to account for differences within communities.

This is about recommending to Board, so it is important that panel has exceptional and extensive **local** cultural knowledge and authority. (feedback from Dubbo workshop)

Community trust is critical to the appointment of panels. (Dirawong Reserve Trust)

Support for a single point of contact

Industry stakeholders appreciated the proposed single point of contact proposed by the draft Bill to provide clearer consultation processes.

Sydney Water proposes that in addition to local ACH consultation panels, it would be useful to convene an ACH Consultation panel dedicated to public authority matters where activities span multiple local boundaries. This would provide consistency across local areas and enable particular “aspects” of Aboriginal cultural heritage to be considered at a strategic and regional level, respectfully and collaboratively. (Sydney Water)

CCAA supports the establishment of local ACH consultations panels that act as a one-stop-shop for consultation with the Aboriginal community. Having a singular point of contact provides certainty for both the Aboriginal community and the proponent in exercising due diligence to ensure that ACH is considered in development proposals. (Cement Concrete & Aggregates Australia)

Greater decision-making role

There were some calls for panels to have more decision-making responsibility.

The Bill’s local consultation panels will need to be truly local (i.e. not regional) according to boundaries defined and negotiated between Aboriginal communities. They should be the decision-making authority regarding that Country, not merely “consulted”. (Aboriginal Culture, Heritage & Arts Association)

Ongoing consultation with the community

Aboriginal stakeholders, as well as people who would need to engage with panels such as proponents, strongly supported the panel’s role in representing the local community’s views and suggested that ongoing consultation with the community is crucial.

There are no provisions under clause 16 requiring the local panel to consult with the community and traditional custodians over the existence and management of ACH. Although local panels may have the skills and expertise to exercise their functions without consultation, there will be a loss in public confidence if there are no legislated and legally enforceable functions to consult with the Aboriginal community. Insert subclause under (2) to give local panels the function to consult with their local Aboriginal community. (Ngalaya Aboriginal Corporation)

Transparency and accountability

Some submissions noted the need for panels to be transparent and accountable.

nbn is supportive of the panel proposal whereby people with cultural heritage authority are making heritage decisions. The challenge for the ACH Bill is to ensure that this decision-making happens within a transparent structure and within timeframes that are workable for proponents as well as the relevant panel. (National Broadband Network)

We note that local ACH consultation panels will be set-up by the ACH Authority. However, it is of concern that the procedures for establishment of these panels as well as their membership and operation is to be left to the Aboriginal Cultural Heritage Authority (ACHA). Perhaps guidance will be provided in the regulations about processes associated with these matters. The Trust has the view that the success or failure of the new legislation could rise or fall on how well these processes are put in place. (Dirawong Reserve Trust)

Resourcing and capacity building

All stakeholder groups noted that panels will need to be adequately supported to undertake their role, including the need for capacity building.

The success of the Act will rest on the quality of the operations, and capacity of the local ACH panels. (Dharriwaa Elders Group)

The proposed structure and operation of the ACH Authority requires local consultation panels to play a key role. Resourcing of the panels needs to be clarified and resolved as a priority. Well-resourced local consultation panels could fully participate in management plan negotiations, informed by technical knowledge as required. Local consultation panels must have sufficient time, staff and expertise to independently conduct their roles. (Hunter Joint Organisation of Councils)

Membership of panels

Of those who commented on the membership of panels and how cultural authority should be recognised:

- 36% agreed that it was important that a person's community recognise them as having cultural authority
- 17% agreed that LALC recognition of cultural authority was important
- 45% agreed that panel members should belong to a particular Aboriginal group such as being a native title holder, an Aboriginal Owner, a LALC member or a recognised Elder or Traditional Owner.

These categories are not mutually exclusive and about 40% indicated that cultural authority could be determined through a combination of methods. In addition, many submissions called for additional criteria such as ensuring no conflicts of interest or suggesting other required skills and experience including negotiation skills and ability to represent community.

We would see a successful panel applicant to be a person who not only fills the relevant criteria, but who is also accepted by and connected to local grassroots community which would offer further avenues to consult with all stakeholders in those communities. (Darug Tribal Aboriginal Corporation)

Cultural knowledge. There is no validity to the panel without it. (feedback from Redfern workshop)

Submissions that called for community recognition of cultural authority emphasised the need for the panel members to be representative of, and have good relationships with, the community.

Primary criterion. However, the process for 'recognising' cultural authority will be critical and hard to develop a transparent and equitable process (feedback from Queanbeyan workshop)

Some submissions supported LALC recognition of cultural authority.

A valuable part of the process but should not be the single criterion (feedback from Queanbeyan workshop)

Many submissions noted that people already had cultural authority from being recognised as a member of a formal organisation or part of an existing group.

Ensure spread of all community, e.g. TO [Traditional Owners]/LALCs/Elders/community (feedback from Dubbo workshop)

Many submissions suggested using a combination of approaches or provided other criteria that should also be considered alongside cultural authority such as proven experience working with Aboriginal cultural heritage. Some submissions suggested membership of specific groups.

Member preference should be based on understanding of ACH and engagement with traditional custodians (Ngalaya Aboriginal Corporation)

LALC representation should be included on local ACH consultation panels in order to promote a well-functioning local ACH panel and in recognition of LALC's existing ACH roles. (NSW Aboriginal Land Council)

Selection process and panel composition

There were very few comments on the process for selecting panel members but there was strong support for communities making their own decisions.

Give the responsibility back to the communities, to nominate then elect individuals whom they think will serve the authority in a proper manner. They must be recognised and accepted in the wider Aboriginal community as being of Aboriginal descent (Robert Mumbler, Aboriginal individual)

In recognition of the right to self-determination, the structure and membership of the local ACH consultation panels should be flexible enough to adapt to the needs and customary laws of each Aboriginal community. These differences may be reflected in the membership of each local ACH consultation panel, the decision makers and the decision-making processes and procedures used (UTS Indigenous Knowledge Forum)

There were strong calls for panels to have age and gender representation. More submissions (33%) supported people being able to sit on more than one panel, compared with those that disagreed (15%).

Numbers and boundaries of panels

Twenty-two per cent of all Aboriginal identified submissions commented on the boundaries of panels. Of these, 60% expressed support for using existing boundary areas – either local government area (LGA), LALC or no preference. Local councils tended to be more supportive of using LGA boundaries, while land councils and other stakeholder groups preferred to use LALC boundaries. A similar number suggested using cultural or nation boundaries.

Several submissions suggested more flexibility, such as combining different boundary areas as appropriate, combining the use of existing boundaries with workload pressures, or calling for further consultation in this area.

The Illawarra local Aboriginal community representatives consulted by Council generally felt that local Traditional Owners and elders were best placed to define boundaries of ACH panels. It was also considered that there should be flexibility to apply different models to suit local circumstances and situations depending on the nature of the community, the local community politics and existing groups, structures and frameworks. It was also felt that the boundaries that are eventually decided upon will have a major impact on the Aboriginal community's confidence in the reforms and ultimately the success of the new legislation. (Wollongong City Council)

Local coordination and support bodies

Local coordination and support bodies will support the local ACH consultation panels to perform their roles. The draft Bill proposes that Local Aboriginal Land Councils (LALCs) or other Aboriginal organisations can perform this role.

Level of interest

Almost a third of submissions commented on the proposed coordination and support role, and just over 70% of these were from individuals and organisations that identified as Aboriginal.

Key points raised

Local Aboriginal Land Councils

Of the submissions commenting on this topic:

- 33% supported LALCs providing coordination and support to local ACH consultation panels, compared to 23% who did not support LALCs taking this role. These figures

were 30% and 21% respectively for submissions received from individuals/organisations that identified as Aboriginal.

- 58% supported other Aboriginal organisations providing coordination and support, compared to 16% that did not. These figures were 45% and 11% respectively for submissions received from individuals/organisations that identified as Aboriginal.

The above categories are not mutually exclusive. For example, some submissions that supported LALCs also supported other organisations.

Comments about LALCs performing this role included a focus on governance and administration skills, community networks and capacity.

TBLALC already have the management and administration framework to perform this function. There are no reasons why the necessary skills can't be developed and applied locally by LALCs. (Tweed Byron Local Aboriginal Land Council)

Other Aboriginal organisations

Feedback included suggestions for other organisations including Native Title Prescribed Bodies Corporate, Traditional Owner organisations and other Aboriginal organisations registered through the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Some submissions focused on capacity, including LALCs who suggested that other organisations could take on the role temporarily, while LALCs developed their capacity. A few submissions suggested consultation panels should choose their own coordination and support bodies.

The legislation should ensure any other body proposed to become accredited instead of a LALC should be as an interim measure (time-limited) only until such time as the relevant LALC is able to take on those functions. Any accreditation process must genuinely promote capacity. LALCs must be supported to take on additional roles if they choose. (NSW Aboriginal Land Council)

We do not support resources being used to establish new organisations that essentially would compete with LALCs. (Birpai Local Aboriginal Land Council)

Ministers and agencies

The draft Bill proposes a strategic oversight role for the Minister, with the ACH Authority making most of the day-to-day decisions. It does not propose a role for other government agencies except to enable the ACH Authority to delegate some of its functions to agencies should it choose.

Level of interest

While about a quarter of submissions commented on the Minister's role, much of the feedback related to the Minister's role in specific processes and is captured under discussion of those processes (such as approving Declared ACH).

Key points raised

Ministerial oversight

Of the submissions that commented on Ministerial oversight, approximately 20% (from both Aboriginal and non-Aboriginal participants) stated the Minister generally had too much discretion, compared to less than 5% (primarily industry stakeholders) who stated the Minister had the right amount or not enough oversight. Many comments called for more decisions to be made by the ACH Authority, or for parameters to be placed around what the Minister should consider when making decisions.

There can still be appropriate oversight without the Minister making these key decisions. At a minimum, any Ministerial decisions must be guided by clear parameters and criteria to safeguard against unfettered, discretionary decision-making. Ministerial decisions should be based on the recommendations of Aboriginal people. (submissions from 17 LALCs)

We are concerned that important decisions under the proposed Bill will be reserved for the Minister responsible, making them essentially political decisions, rather than community ones, and at the limited appeal mechanisms for Aboriginal people that wish to preserve heritage. (Lock the Gate Alliance)

Others called for strengthened Ministerial oversight.

The LRMA's (Lightning Ridge Miners' Association) major concern is that there appears to be little, if any, checks and balances on the activities of the ACH Authority or the local consultation panels, not even Ministerial oversight. The Bill grants enormous powers and the LRMA believes there needs to be mechanisms in the legislation to avert or deal with conflicts of interest and the potential for corruption. (Lightning Ridge Miners' Association)

The ACH Authority needs to be subject to Ministerial control, to ensure its functions are carried out in a transparent and appropriate manner, particularly given that it possesses legal powers, such as arrest, being able to prosecute (Julian Richards, community member)

Agencies

Very few submissions commented on the role of agencies, and where they did, comments were generally calling for clarification.

The Government should provide clarity with regard to what assistance OEH will provide the ACH Authority and for what timeframe. (NSW Minerals Council)

Aim C: Better information management

Aim C is to improve outcomes for Aboriginal cultural heritage through new information management systems and processes that are overseen by Aboriginal people. Key proposals that seek to achieve this aim are the ACH Information System, ACH mapping products and processes, ACH strategic plans, and monitoring and reporting.

About 65% of submissions commented on an aspect of Aim C. Few explicitly expressed their support or disapproval of the overall proposals for better information management. Of those that did, about a quarter expressed support and less than 10% did not. Most of the submissions provided general comments.

ACH Information System

The draft Bill provides for the ACH Authority to establish, own and administer an ACH Information System that consists of:

- a restricted access database – for operational day-to-day use by authorised database administrators to support decision-making
- a public online portal – to allow public access to a subset of the information contained in the database, limited to information that is not culturally sensitive and is appropriate to share more widely.

Level of interest

Almost 50% of submissions commented on the ACH Information System.

Key points raised

Support for proposed structure

Several submissions supported the structure of different layers of access to information.

NSW Farmers supports the development of a government database to catalogue declared ACH sites, providing that this is never to become publicly available. With the development of this new platform, we urge Government to consider additional functions to make sure landholders have sufficient access to information. (NSW Farmers)

The inclusion of both a restricted access database and a public online portal for public sharing of information will promote public participation. Particularly positive is the ability for there to be a restricted access database and a tightly controlled public online portal. This will go some way to alleviating the concerns of community members... However, it will take time, and demonstration of the security of the system, before these concerns will be entirely alleviated (if they ever will be) ... (NSW Young Lawyers)

Confidence in the information system

Crucial to the success of the proposal is confidence that the information will be handled securely, through safeguards, information management and access protocols, and by building trust.

Trust in the system will rely on good information security, audit and access rules. (EDO NSW)

Its security and accuracy must be well established so that Aboriginal communities feel culturally safe about sharing the location of their heritage. (Hunter Joint Organisation of Councils)

This requirement was coupled with concerns about intellectual property.

Current intellectual property rights do not provide sufficient legal protection for the contents of a database or register. ... While addressing the issue of protecting the contents of databases is a matter for the Commonwealth and therefore beyond the scope of this consultation, the NSW Government should be aware of the weaknesses associated with the current system and the potential impact this may have on the operation of the ACH Information System. (UTS Indigenous Knowledge Forum)

For Aboriginal community members to be confident in the new system, some submissions talked about the need to ensure that the information is protected into the future and that community members continue to have access to the information.

In my experience as an Aboriginal technologist, few of our people are adequately trained to understand the full impacts of the digitalisation of our cultural knowledge systems and artefacts. I feel there should be a trigger for Aboriginal people to consult with technology experts when it comes to the proposed ACH Information System and its contents. ... Our platforms should also respect the rights of our future descendants to access this information in a format. (Mikaela Jade, CEO and founder of Indigital)

What happens to this information should this process change in the future? What protection is there for knowledge given? (feedback from Muswellbrook workshop)

Noting insufficiencies and inaccuracies in the current Aboriginal Heritage Information Management System (AHIMS), some submissions discussed the need for a lot of additional work to ensure the new system has accurate data.

The existing AHIMS database should be fully reviewed and audited for accuracy. (Central Coast Council)

We have doubts about the volume of work that needs to be done for the system to work. (Alan Cole, Hume Forests)

Restricted access database

Some submissions provided examples of what the restricted access database should contain, such as information about 'cultural practices, ceremonial areas and gendered areas' (Ngalaya Aboriginal Corporation). Others nominated that it should include any culturally sensitive information as determined by the relevant cultural owners or knowledge holders.

Anything that community identifies as wanting to be on these. Recognise that some things will never be on a database, restricted or otherwise (feedback from Penrith workshop)

Each consultation panel should make this decision with their community (feedback from Dubbo workshop)

Some feedback stated that the restricted access database should be exempt from Government Information (Public Access) (GIPA) and subpoena requests.

The contents of the databases, in particular the restricted access register, must be exempted from the operation of Freedom of Information legislation. This is necessary to maintain the cultural legitimacy of the ACH Information System and ensure that information is kept confidential. This is particularly important for intangible Aboriginal cultural heritage which may be sacred or should otherwise be protected from public disclosure (for example, in order to preserve options in relation to applications for intellectual property rights such as patent protection). (UTS Indigenous Knowledge Forum)

Many submissions from Aboriginal organisations and individuals were firm that only Aboriginal people or the cultural knowledge holders should have access to the restricted information.

Sensitive information relating to cultural protocols, practices and traditions that should not be disclosed to persons other than that of the appropriate nation (feedback from Bourke workshop)

Info retained in the new restricted database should be determined by the knowledge holders and its release and distribution should always come after knowledge holder approval. (feedback from Albury workshop)

However, several local government organisations, heritage consultants and industry stakeholders provided reasons why they thought it was important for them to have access, provided they had appropriate procedures and cultural training. One Council's submission acknowledged this difference in perspective about access to restricted information.

It is essential that councils have open access to all information for free – public and restricted information – subject to agreed protocols to undertake their planning and heritage functions. This would also include alerting applicants to relevant information where appropriate. (Local Government NSW)

Council has for a long time presented the view to our local Aboriginal community that if Council does not hold information in relation to local Aboriginal heritage sites then there is potentially no trigger for prompting consideration of this issue as part of the development assessment process. Despite this, the Illawarra Aboriginal community, and particularly the Illawarra LALC have held the strong view that Aboriginal knowledge is best held by the local Aboriginal community, and not by 'white' government institutions. ... Council recommends that local Aboriginal communities and consultation panels be consulted about the development of control mechanisms for the use of the ACH Information System to ensure that the community's fears are addressed... (Wollongong City Council)

Public online portal

Many submissions said that content in the public online portal should be non-specific and community-approved. There were many suggestions for buffer zones, only the inclusion of sites already widely known or information in the public domain, and information about who to contact.

It is also agreed that sensitive information needs to be protected/disguised but generally referenced so that the public can rely on the portal as providing complete data. (Shellharbour City Council)

The only details that should be made publicly available (outside general overview) is information that the community consents to have disclosed. (feedback from Redfern workshop)

Others noted that the portal should include sufficient details for better decision-making and public awareness.

Beneficial to have as much information as possible made available – helps inform decision-making and also awareness (feedback from Newcastle workshop)

As much as possible to enable industry, developers other proponents to avoid sites and places, or not inadvertently harm, e.g. middens, scar trees, scatters (feedback from Dubbo workshop)

Some workshop participants saw value in the public online portal as an educational tool.

Should include educational information for landholders, e.g. about Native Title, to dispel myths about people's lands being taken if they reveal there are cultural sites (feedback from Muswellbrook workshop)

Educational level suitable for kids as to how ubiquitous ACH actually is – absolutely everywhere (feedback from Queanbeyan workshop)

Mapping products and processes

The draft Bill proposed to require the ACH Authority to prepare and publish a NSW Aboriginal Cultural Heritage Map that identifies land with known and likely presence of ACH values, but which does not publicly identify specific locations or details about those values. The purpose of the map is to guide proponents about ACH assessment requirements.

Level of interest

About 40% of submissions commented on mapping products and processes.

Key points raised

Support for spatial information

Many submissions recognised that mapping is a critical element of the proposed new legal framework. They supported the empowerment of Aboriginal people in this process.

The new mapping system is an integral part of the reforms. Its security and accuracy must be well established so that Aboriginal communities feel culturally safe about sharing the location of their heritage. (Hunter Joint Organisation of Councils)

TBLALC agree that mapping is vital, but it must be the Aboriginal people's mapping. (Tweed Byron Local Aboriginal Land Council)

Developers, local councils and other stakeholders also considered mapping to be useful for proponents.

NCARA supports cultural mapping as it will provide greater certainty for proponents about when ACH assessments and investigations are required, by highlighting land with known or likely ACH values in a culturally appropriate way that protects confidential knowledge. Better upfront mapping will also be key to ensuring improved conservation outcomes for Aboriginal communities. (NSW Coalition of Aboriginal Regional Alliances)

The introduction of ACH maps containing spatial data about ACH is supported. Industry welcomes the development of new technology which will improve the current availability of information about ACH. It is important that landowners, developers and other industry professionals can get detailed information about Aboriginal objects and other ACH for an area they are considering undertaking development activity. (Housing Industry of Australia)

Some submissions questioned the reliability of the maps and wanted it to be clear that the map would be one of many reference tools.

NSW Farmers appreciates the government's intention to map ACH sites across New South Wales, however, we are somewhat sceptical about the reliability of these maps. (NSW Farmers)

Any registers and maps developed as part of the new Act should be used as a guidance 'tool' for proponents only and must not be used as the sole decision-making tool. (Tamworth Local Aboriginal Land Council)

Preparation of the map

Many submissions commented that the mapping is a critical element of the proposed new legal framework, but it will be difficult to determine the right scale, level of accuracy, methods for preparing the map, ownership of information and cultural protocols. Several submissions mentioned that this mapping should be conducted by Aboriginal communities, and that they will need sufficient skills and technical support to do so. These details are important for creating a product that everyone can have confidence in.

We acknowledge that the mapping is critical and essential, however ground-truthing will take time. It may be best to undertake priority areas, for example in identified government growth areas or identified new land release areas in regional areas, to ensure certainty and implementation process in those areas. (Planning Institute of Australia)

Council is fully supportive of the Aboriginal community having the lead role in the mapping of Aboriginal cultural heritage. This is appropriate given the knowledge belongs to Aboriginal people. Notwithstanding, there are a range of skills required to undertake the mapping to a level suitable to be effectively used and integrated within the broader planning framework. From our experience, the success of the mapping element lies in relationship building, mutual respect, skills transfer, education around the legislative framework and requirements, and ongoing support for the Aboriginal community. (Tweed Shire Council)

The proposal inspired a lot of questions about how the maps will be prepared, including the breadth of the proposed ACH definition, including intangible ACH, and what will happen for areas of the map that have missing or secret information.

Mapping areas of potential ACH seems highly problematic – how could any area not have potential for cultural heritage, given the broad definition? (feedback from Queanbeyan workshop)

I am particularly worried that a blank area on NSW cultural heritage map or a blank area on a local cultural heritage map would allow fast-track development on the assumption that no harm will be done. The blank space may be the result of colonisation and past harm including exclusion, lack of access and fragmentation of knowledge. (Peter Thompson, researcher for Western Heritage Group)

Various stakeholders requested opportunities to give further input for the preparation of maps.

Local Councils should be involved in the preparation of the ACH maps as this will have a significant impact upon local development. (Central Coast Council)

Telstra submits that ACH maps should be the subject of public consultation before being approved by the Minister, so that interested persons have the opportunity to comment on them before they are formalised. (Telstra)

Updating the map through locally-sourced information

Many submissions recognised the importance of ground-truthing and surveying for ACH and having processes which allow the map to be updated dynamically. Submissions also called for consistent and thorough approaches to local mapping.

Maps only represent a 'single point in time'. Culture is living and breathing, so values with the landscape may change. The map will need to be updated to reflect changes in the cultural values of Aboriginal communities. (feedback from Redfern workshop)

While it is recognised that a mapping system is an attempt to offer certainty to the proponents of projects, the use of maps needs to be flexible to allow new information to be considered as it becomes available. The local knowledge-base for ACH is dynamic and evolves as further research and assessments are undertaken. In order to maintain a reasonable level of certainty for proponents, any new knowledge should be reflected in the maps through periodic and timely reviews. (Eurobodalla Shire Council)

Ministerial oversight of mapping processes

A few submissions commented on the proposed Ministerial oversight of the ACH map. While some supported the proposal, others asserted that the ACH Authority should be responsible, or that the Minister's powers should be confined to the mapping methodology rather than the product.

It may also be reasonable that the Minister approve the mapping method on the ACH Authority's recommendation. However, it does not seem necessary that the Minister also approve the ACH map itself, as well as the method. (EDO NSW)

The ACH Authority will be a NSW Government agency with special expertise in cultural heritage and will be the agency best placed to prepare the ACH maps. ... If there is to be a power for the Minister to disapprove the ACH maps, the Minister should only be able to refuse to approve if he is satisfied that it has not been accordance with the mapping methodology which would have otherwise been approved. The Minister should otherwise only be able to amend or replace an ACH map on the recommendation of the ACH Authority. (GML Heritage)

Strategic plans

Local consultation panels with their support bodies are proposed to develop ACH strategic plans which will proactively identify conservation priorities within local areas. These are intended to influence and inform government agencies and public authorities.

Level of interest

Less than 10% of submissions commented on strategic plans.

Key points raised

Support for strategic plans

About half of the submissions that commented on strategic plans expressed their support for the proposal, and half provided general comments.

ACH strategic plans would enable more coordinated planning for conserving and celebrating heritage. ... This would be a positive development, provided the obligation is sufficiently clear and properly integrated into the NSW Planning Act assessment procedures (e.g. agencies would need to demonstrate how they have considered a plan where relevant). (EDO NSW)

It is critical that the mapping and strategic plans provide guidance on the ACH management requirements for different areas to enable proponents of activities to understand the likely constraints relevant to different areas; particularly for intangible aspects of cultural heritage. (Umwelt Australia)

Aboriginal organisations, public authorities and local councils asserted that local panels should receive appropriate resources and conduct further consultation when preparing their strategic plans.

Consultation with Aboriginal people must also be undertaken during ... the development of any strategic planning documents. (Tamworth Local Aboriginal Land Council)

Sydney Water supports development of ACH strategic plans and requests to be consulted and included in the development of these specific to our area of operations. Sydney Water also supports the provision for discretion by public authorities. (Sydney Water)

Some submissions suggested potential priorities for strategic plans, including raising public awareness about Aboriginal cultural heritage and reviving lost practices.

Monitoring and reporting

The draft Bill establishes arrangements to monitor and report on Aboriginal cultural heritage in New South Wales and the performance of the new ACH framework. In addition to its annual reporting, the ACH Authority will report on the state of ACH in New South Wales every three years.

Level of interest

About 10% of submissions commented on monitoring and reporting.

Key points raised

Support for monitoring and reporting

Aboriginal, local government and industry stakeholders welcomed clear and transparent monitoring and reporting for ACH outcomes.

NSWALC supports increased monitoring and reporting on ACH. This can assist to build an evidence base to support the protection of ACH. Monitoring and reporting should include cumulative impacts on ACH. (NSW Aboriginal Land Council)

Telstra strongly supports the development of an improved evidence base for decisions by government or others relating to Aboriginal cultural heritage and improvements to the quality of information provided to the public about actions to conserve Aboriginal cultural heritage. (Telstra)

Aboriginal groups could see value in the state of ACH Report for raising awareness and recognising trends over time.

We applaud the requirement for “state of Aboriginal Cultural Heritage Reports” and in particular, the requirement for tabling in both houses of Parliament. We support the inclusion of matters impacting ACH such as cumulative impacts, and analyses of costs and benefits of conserving ACH, including with respect to Aboriginal people and communities. This requirement, if undertaken correctly, will provide much evidence to governments to justify the considerable investments that will be required for the improved management of ACH. ... It should include estimates of destruction in the past as well, so impacts can be measured against a realistic baseline. (Dharriwaa Elders Group)

Aboriginal community should also be more aware of what ACH is potentially impacted; now or in the future, therefore better lead in time to negotiate alternative approach. (feedback from Dubbo workshop)

Calls for inclusive and frequent reporting

For greater transparency and accountability, a few submissions suggested that feedback from other stakeholders is built into the report.

We consider it is appropriate that the ACH Authority perform this role, but it may enhance accountability by either: requiring public submissions, appointing an arms-length panel, or clarifying that reviews of the ACH Authority’s performance would be dealt with separately. (EDO NSW)

The development of a monitoring mechanism such as a state of ACH Report is supported as a means of providing for accountability through the new ACH system. This report should detail practical outcomes and measure Aboriginal community and development community satisfaction with the system, and not just focus on numbers and timeframes of approvals and project agreements. (Wollongong City Council)

One submission suggested that an initial ACH Report should be prepared sooner (Central Coast Council) while another proposed that they are prepared every two years ‘to ensure recommendations are considered in a timely manner and that the assessment of ACH and review of programs occurs frequently’ (NSW Young Lawyers).

Aim D: Improved protection, management and conservation of Aboriginal cultural heritage

Aim D is to provide broader protection and more strategic conservation of Aboriginal cultural heritage values. Key proposals that seek to achieve this aim are conservation tools, repatriation, and funding for ACH conservation.

Conserving and protecting

Level of interest

About 60% of submissions commented on ACH conservation and the new set of proposed tools.

Key points raised

Support for reform to the way Aboriginal cultural heritage is protected and managed

Many submissions recognised that the proposals to improve protection, management and conservation were an improvement on the current system. Some archaeologists highlighted the need for reform in this area.

The current process is all about removing Aboriginal sites from the landscape not conserving them. (Giles Hamm, archaeologist)

At the moment there is no distinction between major site development (destroying large areas) and a 1x1 metre research dig completed by university academics or PhD students. An AHIP [Aboriginal Heritage Impact Permit] is required for both... (Duncan Wright, archaeologist)

Several submissions from Aboriginal stakeholders strongly expressed that the legislation needs to enable Aboriginal people to have better access to land for conserving and protecting Aboriginal cultural heritage.

The legislation needs to include additional mechanisms to protect ACH, including allowing the ACH Authority to acquire or purchase property to protect ACH. (submissions from 17 LALCs)

For living practices to be sustained, Aboriginal people must have access to Country. The Bill does not currently ensure this, but the Act must. (Aboriginal Culture, Heritage & Arts Association)

Conservation tools

The proposals improve existing conservation tools and introduce new tools to support Aboriginal people to continue practising their culture. These include Declared ACH, ACH conservation agreements, intangible ACH agreements and changes to State Heritage Register listings.

Level of interest

Almost 50% of submissions commented on at least one of the proposed conservation tools.

Key pointed raised

Support for proposed set of conservation tools

Of the submissions that commented on conservation tools, almost half indicated support for at least one of the new conservation measures, while about 20% expressed negative comments. Others provided general comments.

New tools will protect a broader scope of items tangible and intangible (feedback from Newcastle workshop)

Declared ACH

Declared ACH is a new tool that will replace and expand upon Aboriginal places established under the NPW Act.

This tool gives a broader and more significant approach to better protect and ensure that knowledge and information are maintained (feedback from Bourke workshop)

Not broad enough but a start. (feedback from Muswellbrook workshop)

Submissions suggested further considerations for the development of Declared ACH.

Any declared ACH needs to be well thought out and executed (robust management plans should step out what can and can't be done – e.g. maintenance may not cause harm to the values and is often supported by the TOs). (feedback from Redfern workshop)

The declaration of an Aboriginal place also requires the ACH Authority to fully consider the cultural significance of the area. However, many of these Aboriginal places are known and can only be known by certain genders. Therefore, it would be culturally inappropriate for some ACH Authority members to assess these areas without cultural permission. (Ngalaya Aboriginal Corporation)

There was strong support for the ACH Authority rather than the Minister to determine Declared ACH.

Generally, we believe that it should be an Aboriginal body determining what is a 'declared' area, landscape, etc., rather than the Minister. If this is not to be the case, we recommend binding criteria for the Minister. (Community Legal Centres NSW)

...the ACH Authority should have the power to make this decision, not Minister. It should be noted that other bodies such as local government have powers to make decisions that have ramifications for planning and development without requiring approval of the Minister. (NSW Aboriginal Land Council)

Councils and industry stakeholders particularly noted the importance of developing clear guidelines for declarations of ACH.

It is suggested that clear guidelines and associated forms be developed for declared ACH of both intangible and tangible ACH. (Northern Beaches Council)

At minimum, we suggest that any such guidelines should specify that portions of the landscape/place where existing infrastructure is present do not form part of the identified Aboriginal cultural heritage landscape/place such that maintenance and management of these assets can be undertaken without triggering a requirement for an ACH management plan. (Hunter Water)

ACH conservation agreements

ACH conservation agreements were proposed as voluntary agreements that may provide permanent protection for ACH on either private or public land. There was considerable interest in ACH conservation agreements.

The Committee submits that Division 2 of Part 4 of the Draft Bill is a very positive development. It is particularly noteworthy that the agreements may overcome the major obstacle of access to land by Aboriginal people seeking to protect and preserve cultural heritage sites and to continue or revive traditional practices on Country. (NSW Young Lawyers)

Understanding that Country is sacred to Aboriginal people whether they are tangible or intangible. Only the Aboriginal people can put a value on all sites and objects. (feedback from Narrabri workshop)

Submissions especially supported that ACH conservation agreements run with the land, suggesting that this makes the agreements more robust and effective.

ACH conservation agreements are a positive step as they provide landholders with a unique opportunity to protect and recognise the ACH on their land. Although voluntary to enter into, the Agreements are binding once made so they can provide strong protection for ACH (EDO NSW)

The Committee submits that Division 2 of Part 4 of the Draft Bill is a very positive development. It is particularly noteworthy that the agreements may overcome the major obstacle of access to land by Aboriginal people seeking to protect and preserve cultural heritage sites and to continue or revive traditional practices on Country. (NSW Young Lawyers)

There was concern expressed at the Minister's ability to consent to development on land subject to ACH conservation agreements and to have discretion about varying or terminating agreements.

We have serious concerns regarding the scope of Ministerial power to permit public authorities to develop land subject to a conservation agreement. The draft Bill requires public authorities to obtain Ministerial consent to carry out development on land subject to a conservation agreement. The Minister may consent if of the opinion that 'there is no practical alternative' to that development. It is unclear what this means. What is clear is that such development does not have to be for 'an essential public purpose or purpose of special significance to the State'. (Laurie Penny and Kylie Lingard)

Various submissions also expressed concern that mining and petroleum activities are exempt from ACH conservation agreements.

Of specific concern to the Registrar is the veto power to direct the ACH Authority to vary or terminate an ACH conservation agreement in relation to a mining or petroleum authority or a proposal by public authorities. (Office of the Registrar, Aboriginal Land Rights Act)

Similarly, the proposed section 35 of the Bill effectively renders it impossible to protect Aboriginal cultural heritage from mining or petroleum extraction by means of an Aboriginal cultural heritage conservation agreement. This provision must be removed. (Lock the Gate Alliance)

Others also expressed concern about the possibility for corruption with this tool.

No different. Care should be taken that these voluntary agreements are not entered into by the landholder to stymie other types of development, e.g. mining rather than to protect and manage ACH. (feedback from Dubbo workshop)

Concerns that there is room for corruption, especially if landholders are business and corporates. (feedback from Redfern workshop)

Intangible ACH agreements

New intangible ACH agreements were proposed to protect intangible cultural heritage not connected to a place or object, including songs, traditional knowledge and ceremonies.

The majority of submissions supported better protection of intangible cultural heritage.

Ensures that all aspects including spiritual/songlines song and dance and storytelling will be protected for all nations and not just from a 'stones and bones' perspective (feedback from Bourke workshop)

Supported generally – it's about time the intangible values are incorporated into policy and documentation. (feedback from Newcastle workshop)

However, submissions raised concerns about the ownership of information, how intellectual property rights would intersect with intangible agreements and how they would work in practice.

CLCNSW opposes the proposed system of registering intangible ACH. That is, a community's right to maintain, control, protect and develop their cultural heritage should not be determined by whether their ACH is registered or not. In practice, it would be difficult to register existing Aboriginal cultural heritage given that it encompasses 60,000+ years of cultural heritage. (Community Legal Centres NSW)

There are several reasons why a community may choose not to register intangible Aboriginal cultural heritage such as lack of trust in the ACH Authority, lack of trust in databases or technology, the perception that databases facilitate exploitation and misappropriation of intangible Aboriginal cultural heritage, inability to meet registration requirements, or other technical impediments. (UTS Indigenous Knowledge Forum)

The devil will be in the detail, definitions and practical processes of protection. (feedback from Queanbeyan workshop)

Submissions recognised that their concerns included how national legislation might interact with intangible agreements.

From the definition proposed, Arts Law considers intangible ACH to be the same concept as Indigenous Cultural and Intellectual Property (ICIP). It is Arts Law's view that the protection of such traditional knowledge is more appropriately addressed within the intellectual property framework and requires the establishment of a comprehensive *sui generis* legal framework at a national level designed to recognise and protect Indigenous cultural heritage. (Arts Law)

As such, we understand that the proposals outlined in the draft Bill are intended to fill a gap. However, we encourage the NSW Government to work with the Federal Government to develop a coherent national framework to support Aboriginal people's intangible heritage and cultural and intellectual property rights. (submissions from 17 LALCs)

State Heritage Register listings and approvals

There was limited feedback on interactions between ACH conservation and State Heritage Register listings and approvals. Those that commented were supportive.

We support the ACH Authority taking over functions from (and cooperating with) the Heritage Council where relevant to ACH listings on the State Heritage Register. (EDO NSW)

Repatriation

The proposed new legal framework includes shifting the role of authorising repatriation to the ACH Authority.

Level of interest

About a quarter of submissions commented on the proposed repatriation processes. Most of these submissions were from people identifying as Aboriginal.

Key points raised

Support for Aboriginal decision-making for repatriation

Overall, about 40% of submissions expressed support and less than 5% of submissions did not support this proposal, while most of the submissions provided general comments.

The ACH Authority will be required to develop and comply with a detailed policy and guideline for repatriating Aboriginal objects and remains to communities. NCARA believe that this should be a priority for the Authority given the importance of repatriation to Aboriginal communities and the need for its continuation. (NSW Coalition of Aboriginal Regional Alliances)

Where possible, the descendants should always be the first point of call for repatriations – particularly ancestral remains. Management by descendants should also include the area for the repatriation. (feedback from Gosford workshop)

Submissions strongly supported Aboriginal decision-making for the repatriation of Aboriginal objects and ancestral remains. They also highlighted that there needs to be consultation with the local community and relevant persons.

A better approach through the use of the ACH Authority. This empowers Aboriginal people to protect local content and return ancestors to traditional grounds (feedback from Newcastle workshop)

Repatriation must come from the appointed local committee and provided to the ACH Authority. The appointed local committee must be consulted through the whole repatriation process and have a big involvement in the repatriation of the remains. (feedback from Bourke workshop)

There was also some interest in government-supported repatriation from other jurisdictions.

NSW Government must increase and provide active support for inter-state and overseas repatriation. Local coordination and support bodies (LALCs) should also be notified and consulted where appropriate. (NSW Aboriginal Land Council)

ACH Authority should play a strong role in repatriating objects from overseas entities to bring back to NSW to local museums or local group. (feedback from Dubbo workshop)

Funding for ACH conservation

The proposed new legal framework establishes an ACH Fund. The purpose of the fund is to consolidate funding from a variety of sources and deliver it more strategically for ACH conservation outcomes.

Level of interest

Just over a quarter of submissions commented on funding for ACH conservation.

Key points raised

General support for improved ACH funding

Almost a third of these comments supported the proposal and very few did not support it, while most provided general comments.

NSWALC support the inclusion of an ACH Fund and proposals to support spending on ACH conservation. (NSW Aboriginal Land Council)

Submissions wanted funding to remain committed and sustainable.

It is undeniable that protection of ACH requires a greater commitment to funding. (Tweed Byron Local Aboriginal Land Council)

The fund needs to fund maintenance, evaluation and support into the far future so anything that is set-up is sustainable and appropriate. (feedback from Queanbeyan workshop)

Some of the submissions talked about what funding priorities for the ACH Fund should be.

The Cultural Heritage fund should address funding of destruction of Aboriginal landscapes, Native Wildlife habitat, artefacts and all other sites important for their inherent value to traditional people and the Aboriginal and non-indigenous community who make up a number of

Landcare and wetland groups and funding should be available to map underwater Aboriginal sites. (Carol Ridgeway-Bissett, Aboriginal individual)

There should be business-as-usual monies so that things like Rock Art get maintained and protected as they used to. (feedback from Queanbeyan workshop)

Concerns over certain types of contributions to the ACH Fund

While there was widespread support for the ACH Fund, there was also some concern about proponents making contributions to the ACH Fund, and the potential for the fund to be misused and mismanaged. Submissions called for good management and transparency.

Although I support improved protection, management and conservation of ACH, I have concern about the use and function of the ACH Fund. While the objectives of such a fund could have the right outcomes, it should not be a method to circumvent the assessment and study of Aboriginal cultural heritage in a particular development area. (Jodie Benton, archaeologist)

The proposed Part 6 ACH Fund is a good idea in principle but there seems to be a real danger that if the entire Aboriginal heritage structure depends on this fund and this fund depends partly on money from developers, the entire structure could become captured by the developers it is attempting to regulate. (Peter Thompson, researcher for Western Heritage Group)

Aim E: Greater confidence in the regulatory system

Aim E is to provide better upfront information to support assessments, clearer consultation processes and timeframes, and regulatory tools that can adapt to different types of projects in the context of land use planning, development assessment and land management activities. Key proposals that seek to achieve this aim are a new assessment pathway, ACH management plans (ACHMPs), integration with development assessment, dispute resolution, appeals and reviews, and compliance and enforcement.

Assessment process

Level of interest

About 70% of submissions commented on an aspect of Aim E, and approximately half of the submissions commented on the new assessment process.

Key points raised

Better outcomes for all stakeholders

Some submissions suggested that revising the legal framework will improve outcomes for all stakeholders.

Overall, we support a revised legal framework that provides increased certainty and reduces the time and costs to proponents and the community. We believe that this, in turn, results in better outcomes for all stakeholders. (Cement Concrete & Aggregates Australia)

Reliant on further details

There was a strong sentiment from all stakeholder groups that improved outcomes for Aboriginal cultural heritage will be reliant on details that are yet to be developed or applied.

While it is understood that the new framework will be developed over time as part of a collaborative process, much more clarity is needed regarding the proposed new ACH mapping and information systems; how (or whether) it will intersect with Council's mapping systems; how the overall system will be managed (Sutherland Shire Council)

Not total confidence. Depends on supporting systems. Maps must be accurate. Penalty system must be robustly applied. How will the assessments work? (feedback from Redfern workshop)

New assessment pathway

The ACH assessment pathway is a four-stage process to consistently determine ACH assessment requirements including whether a proponent needs to obtain an ACHMP before undertaking a proposed activity. Tailored assessment pathways will respond to different levels of risk. Certain activities will be exempt from the assessment pathway, although there will be processes for unexpected discovery of Aboriginal cultural heritage.

Level of interest

Approximately half of the submissions provided specific feedback on the proposed assessment pathway.

Key points raised

Support for upfront assessment

The upfront assessment approach was positively welcomed across stakeholder groups. Of those submissions that commented on Aim E, all stakeholder groups supported upfront consideration of Aboriginal cultural heritage, with very few stakeholders disagreeing. Stakeholders believed this process would provide more certainty for proponents, would streamline the assessment and consultation processes, and would result in better heritage outcomes by bringing consideration of Aboriginal cultural heritage earlier in the process. There were no negative responses to the proposal of upfront assessment.

Early consultation and mapping may help trigger assessment that may otherwise be missed in the due diligence process (feedback from Redfern workshop)

If the initial set-up work is completed well, we consider the reforms should streamline the assessment process and make the assessment process in relation to ACH simpler. (Urban Development Institute of Australia)

The proposed assessment pathway has the potential to increase the voice of Aboriginal stakeholders and ensure the key issues are brought forward before major development occurs. (feedback from Penrith workshop)

Support for tiered assessment

Local councils provided positive feedback about the proposed three-tiered structure of ACH assessment in particular.

The proposed three-tier (Basic | Standard | Complex) assessment pathway system in the reforms based upon project scale and type, is a significant improvement to the current process and more adequately recognises the varying levels of potential to impact Aboriginal cultural heritage. (City of Parramatta Council)

Assessment pathway stages

Some submissions provided specific comment on the four proposed stages of the assessment pathway. Most of the comments were about the map review stage and questioning the robustness of ACH assessments where maps had insufficient or incomplete information; however, industry stakeholders were generally supportive of the use of maps.

Stages 1 and 2 of the ACH Assessment Pathway both make significant assumptions that Aboriginal heritage of a given area is well understood both in the ACH maps (which have yet to be developed) and/or by the local ACH panel in question. As heritage professionals, we can advise that frequently both the tangible and intangible Aboriginal cultural heritage of an area is not identified nor well understood... It is recommended that in both of these stages, additional conditions are included that where uncertainty to the nature, composition or spatial extent of Aboriginal heritage is evident that progression to next stage is automatically undertaken. (Australian Archaeological Association)

Optus will always make every effort to minimise the potential for harm to Aboriginal cultural heritage and we consider the maps to be prepared under the draft Bill will greatly assist in our planning and design process. (Optus)

Submissions supported the concept of having one representative panel to consult within the consultation and scoping stages.

CCAA supports the creation of local ACH consultation panels as a means of providing a single point of contact for consulting with the local Aboriginal community. Having a singular point of contact provides certainty for both the Aboriginal community and the proponent in exercising due diligence to ensure the views of the Aboriginal community are considered and that ACH values at a site are taken into account. (Cement Concrete & Aggregates Australia)

Submissions sought further clarity on the processes attached to each of the assessment stages, documentation and linkages to ACHMP negotiations. Industry stakeholders were concerned about cost and time implications and wanted greater certainty around assessment times and processes.

Telstra also submits that appropriate timeframes be included either in these provisions or in the ACHAP Code of Practice for each stage of assessment to assist with efficient project scheduling and ensure consistency with timeframes applicable under other approval processes (Telstra)

Assessment reports

There were contrasting views on the process of preparing the assessment reports. Some submissions stated that local ACH consultation panels should have a legislated role in the assessment report review stage, and others asserted that assessors should be required to be independent and to be accredited in their practice.

Clarification is required regarding who can undertake a significance assessment and cultural heritage investigations. (GML Heritage)

There is no requirement that ACH assessment be independent of the proponent (which presents risks and perceptions of bias) and no requirement for consultants to be qualified... The draft Bill should establish a mandatory registration and professional development scheme for any non-Aboriginal experts that may prepare ACH impact assessments. (EDO NSW)

Exemptions

Many submissions commented on the scope of activities subject to the ACH assessment pathway. While there was support from industry stakeholders, there was significant concern over proposed exemptions to the assessment pathway, particularly state significant development, state significant infrastructure and complying development.

While there were many general comments, almost all of the sentiment expressed from submissions that commented on the proposed exempt activities was negative.

There should be zero tolerance for **any** impact on undisturbed 'Country'. (Dominic Wy Kanak, Aboriginal individual)

Many comments suggested all activities should be required to follow the proposed assessment pathway. In addition, many local councils identified the need for planning proposals to be included in the assessment pathway process, similar to that for development applications.

A small number of submissions specifically commented on the list of low impact activities that would be exempt from completing the assessment pathway. Some industry groups suggested exemptions should include telecommunications, emergency works and certain plantation and farming activities. Some suggested retaining the existing low impact activities in the National Parks and Wildlife Regulation 2009.

Hunter Water will periodically experience a failure across the infrastructure network that will require an immediate, emergency response... If emergency works are not undertaken immediately, these failures can result in substantial risks to public health and safety, the environment and property and infrastructure. In these situations, it is critical that Hunter Water act immediately, which is not in keeping with the timeframes required to complete Aboriginal cultural heritage assessments nor to manage any Aboriginal cultural heritage that may be present in the vicinity of the failure. (Hunter Water)

Some plantation activities should be grouped alongside "farming" as exempt. (Alan Cole, Hume Forests)

Some suggested tightening the exemptions.

I understand that many of the low impact activities are aimed at farming and mining industries and feel that the low impact activities should be maintained to allow these industries to continue

without fear of prosecution. However, I feel the definition of 'disturbed land' needs to be strengthened. I disagree that ploughing, for example, excludes any possibility of intact ACH below the plough zone and if 'clearing of vegetation' constitutes 'disturbed land' then most of New South Wales is precluded from further assessment. (Ben Churcher, heritage consultant)

Assessment requirements

A few stakeholders were concerned about an increase in their assessment requirements.

There are some concerns about the impact of the proposed framework on Council as a proponent... [and] on Council's ability to deliver practical and affordable infrastructure to the Eurobodalla community in a timely manner. (Eurobodalla Shire Council)

Telstra submits that further drafting consideration be given to the application of these requirements in a manner which ensures processes are not duplicated with those of the consent authority considering impacts of proposed development under the *Environmental Planning and Assessment Act 1979* (NSW). (Telstra)

Unexpected discovery of Aboriginal cultural heritage

All stakeholder groups requested clearer provisions on unexpected finds of Aboriginal cultural heritage.

While the Bill does provide for mechanisms and protections to manage unexpected finds, there does not seem to be one clear process or pathway in the Bill, and greater clarity for the unexpected finds process is needed. (NSW Coalition of Aboriginal Regional Alliances)

Code of practice

Many stakeholders agreed that the code of practice will be critical to the assessment process, and that further consultation will be important for this to be embedded in practice. There were suggestions that if there are to be Ministerial amendments to the code, these amendments should only occur with the approval of the ACH Authority.

I would hope that the proposed ACH Assessment Pathway Code of Practice includes supplementary requirements that heritage professionals would be required to adhere to their respective codes of professional practice. (Richard Sharp, heritage consultant)

The ACHAP Code of Practice should be determined by the ACH Authority. If the Minister is to retain final decision-making power, then the ACH Bill needs to provide relevant considerations including that it must be recommended by the ACH Authority, and that any proposed amendments must be agreed to by the ACH Authority. (Lauren Butterly and Lucas Lixinski, University of NSW, Law)

ACH management plans

The draft Bill establishes provisions that require a proponent to negotiate an ACHMP with a local ACH consultation panel when a proposed activity will cause harm to ACH values. ACHMPs are intended to capture management actions including conservation, protection and mitigation, and to authorise harm where appropriate.

Level of interest

About 40% of submissions provided feedback on the proposed ACHMPs and the negotiation process.

Key points raised

Support for Aboriginal involvement in ACHMPs

Many stakeholders supported Aboriginal involvement in developing ACHMPs.

Councils support the ACH Authority and local consultation panels undertaking the review and approval of ACH management plans, as Councils are unlikely to have the required skills, experience or cultural standing to make such determinations. (Hunter Joint Organisation of Councils)

Planning Institute of Australia (PIA) strongly supports the reform aims to empower Aboriginal communities to determine heritage impacts and tailor land management responses to proposed development. Having Aboriginal 'ownership' of the means by which an Aboriginal Heritage Cultural Management Plan (ACHMP) is prepared and governs future use of a site, is a very positive step. (Planning Institute of Australia)

Scope and content of ACHMPs

Some submissions suggested that ACHMPs placed too much emphasis on authorising harm, as opposed to focusing on protection, conservation and minimisation of harm as a priority.

An ACH management plan should be a plan that focuses on conservation and mitigation. Where mitigation is not feasible, then the removal of harm to ACH could be considered. Proponents need to be educated to move away from the current expectation that they will be allowed to remove or destroy ACH, towards a focus on conserving and supporting in situ. (Liverpool City Council)

The purpose and nature of ACH management plans should be to 'protect, conserve and minimise harm'. (NSW Aboriginal Land Council)

Other submissions wanted clearer guidance on the content of ACHMPs.

The ACHMPs must be transparent, consistent and align with guidelines agreed by industry, the Authority and local panels. The proponent and the public must be able to see a clear nexus between what has been agreed within a ACHMP and outcomes for Aboriginal cultural heritage including any conservation agreements or funding contributions. (Property Council of Australia)

Upfront negotiation

Many stakeholder groups supported ACHMPs being negotiated prior to a proponent submitting a development application (DA).

Proponents should not be allowed to make development applications without an agreed ACH management plan (submissions from 17 LALCs)

The ACHMP should be approved by the Authority prior to lodging a DA with Council, and Council should be legally able to refuse to accept DA's without the appropriate documentation attached, e.g. ACHMP (feedback from Newcastle workshop)

However, industry stakeholders said that an ACHMP should only be required after the lodging or approval of a DA, to reduce unnecessary time and cost burdens.

Requiring proponents to wait to lodge a DA until the ACHMP process is finalised could undermine the feasibility of projects. (Property Council of Australia)

CCAA does not support this approach as it can create unnecessary time and resourcing costs for the proponent and the Aboriginal community in circumstances where the project is refused due to another environmental or social issue. (Cement Concrete & Aggregates Australia)

Negotiation process

A significant amount of the feedback about ACHMPs related to the negotiation process. There was strong feedback among Aboriginal and legal organisations that criteria for negotiations should be more prescriptive in protecting Aboriginal cultural heritage. This includes assessing cumulative impacts, intergenerational access and compensation.

We support the reference to the Objects of the Act and good faith negotiations in cl. 48. We also recommend: inserting harm avoidance and minimisation as an additional basis of negotiation under cl. 48(2); and that negotiations are conducted so as to ensure intergenerational equity for access to heritage (EDO NSW)

Proper criteria and consultation processes must be developed and must include provisions for assessing cumulative impacts and compensating Aboriginal people for the destruction of Aboriginal heritage (Tamworth Local Aboriginal Land Council)

Many stakeholder groups strongly advocated for giving local ACH consultation panels a 'level playing field' and 'rights of refusal' in situations where they may not want to proceed in negotiating an ACHMP. This includes stringent requirements for proponents to act in good faith.

There needs to be more power in decision-making given to local panels. Local panels should be empowered legally to say no to 'harm' and no to continuing process to ACHMP (feedback from Ballina workshop)

I also wonder whether the local ACH consultation panels will have the skills to withstand a determined proponent who may try to 'bully' their way to an outcome favourable to them. (Stephanie Rusden, archaeologist)

Many comments cautioned against potential conflicts of interest where financial compensation is provided in exchange for negotiated harm to Aboriginal cultural heritage.

There seems to be a danger that local negotiations and heritage management plans will in effect result in a developer 'buying' the destruction of cultural heritage by funding keeping places and local projects in return for agreement for heritage to be destroyed. The statewide body needs to set standards that will avoid this, otherwise cultural activists in the community will be in conflict with the local consultation panel. (Peter Thompson, researcher for Western Heritage Group)

Section 48(2)(d) of the ACH Bill should be deleted. It provides that negotiations on the terms of a proposed ACH management plan are to ensure that "the Aboriginal persons whose cultural heritage is to be impacted will benefit from the obligations of the proponent". (NSW Minerals Council)

Reviewing and determining ACHMPs

The ACHMP review and determination stage starts once the ACH Authority has received either an agreed draft ACHMP, or advice from the local ACH consultation panel that it does not support the draft ACHMP. Some industry stakeholders welcomed the idea of more defined determination criteria.

The reference in section 49(4) of the ACH to the public interest should be removed as the ACH Authority should not have to have regard to it in making a determination to approve a draft ACH management plan. Instead, reference should be made to compliance with the ACHAP Code of Practice. (NSW Minerals Council)

Rather than considering impacts to proponents and the public interest, many submissions thought that determinations should be based on the objects of the new Act.

Provisions that direct the Authority to accord equal priority to proponent interests are contrary to the proposed Objects of the Act. Such provisions weaken the independence of the Authority and strengthen the merits review case of proponents. A direction that the Authority consider the actual Objects of the Act is sufficient to protect proponent interests that correspond with the public interest. (Laurie Perry and Kylie Lingard)

Remove “the proponent of approving or not approving a plan and the public interest” and replace with considerations regarding practical measures that protect and conserve the Aboriginal cultural heritage; whether the development is crucial for the community. (Ngalaya Aboriginal Corporation)

Negotiation and determination timeframes

There was significant overall feedback on proposed negotiation timeframes for the three different tiers of ACHMPs – basic, standard and complex. The majority thought the timeframes were inappropriate for adequate consultation with the relevant Aboriginal communities, particularly the proposed 15-day turnaround for a basic ACHMP. There was strong feedback that timeframes need to be culturally appropriate and cognisant of ‘sorry business’ and other cultural events.

Any mandatory timeframes must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities (e.g. Sorry business). Certain times of the year should also be excluded e.g. Christmas and New Year, NAIDOC week (submissions from 17 LALCs)

Timeframes are not feasible if there is cultural business or celebrations and other community events (feedback from Muswellbrook workshop)

On the other hand, some submissions thought the timeframes to be appropriate or indeed too long. Industry stakeholders welcomed setting mandatory timeframes.

CCAA also welcomes the establishment of mandatory timeframes and maximum review periods for negotiating ACHMPs...CCAA does, however, recommend reducing the mandatory negotiating timeframe for complex ACHMPs from 75 to 60 business days as we foresee there will still be a number of large-scale, medium risk projects that fall into this category that do not warrant such a long timeframe. (Cement Concrete & Aggregates Australia)

Telstra submits it is therefore imperative that the relevant negotiation period and determination period prescribed by regulations must allow for timely outcomes so that matters are not inappropriately delayed, and the timeframes should be consistent with and proportionate to the time periods for assessment of development applications under the *Environmental Planning and Assessment Act 1979* (Telstra)

In contrast to the proposed negotiation periods, many submissions either supported the timeframes for the review and determination of ACHMPs by the ACH Authority or had neutral sentiment. Submissions reflected that the ability for the local ACH consultation panels and the ACH Authority to meet these timeframes will depend on adequate resourcing and support, and such timeframes should be reviewed over time.

Some local ACH consultation panels will be potentially very busy which may make these time frames difficult to achieve; On commencement of the ACH Act, there may be the need for recognition that agreement on the early plans may not be achievable in the prescribed statutory period. (NSW Minerals Council)

Timeframes within the Bill or regulations will need to be reviewed to accurately reflect the time it will take to arrange meetings, review assessments and negotiate outcomes. (Lake Macquarie City Council)

Integration with development assessment and other approvals

To support upfront assessment and to link decisions about ACH management to the DA process, ACHMPs will generally need to be submitted with DAs and relevant land management approvals.

Level of interest

Almost 20% of submissions made comments about integration with development assessment, providing broad support for the proposal.

Key issues raised

Support for integration with development assessment

Of those that commented, most were supportive.

Any new laws relating to Aboriginal culture and heritage must integrate with and complement planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning and development assessment processes. (Tamworth Local Aboriginal Land Council)

Some submissions called for additional guidance to ensure that integration is implemented successfully.

ACH provisions are intrinsically linked to broader NSW planning processes and it is recommended that all agencies responsible for reviewing planning approval applications are provided with clear guidelines to ensure consistency of application of the Bill. (Umwelt Australia)

Agree that the integrated development pathway offers the best means of linking the obligations to fulfil an Aboriginal Cultural Heritage Management Plan with conditions of consent issued under Environmental Planning and Assessment Act. The legal means and wording of any consent condition to give effect to relevant obligations arising from an ACHMP are not yet clear. PIA urge OEH to consider preparing guidance on a model condition of consent for this purpose, as imposing non-standard conditions that repeat the specific obligations of a ACHMP should be avoided. (Planning Institute of Australia)

Role of planning authorities

Local councils supported moving decision-making for Aboriginal cultural heritage to Aboriginal people but sought further clarity around councils' obligations in the development approval process and suggested early consultation would be necessary.

It is unclear whether the planning authority should reject or refuse a development application when an ACHMP has not been sought or been successfully obtained prior to lodging the development application to Council? (Northern Beaches Council)

A proposal submitted for a development application with an ACH management plan, which is found to be inconsistent with the planning policies, can result in continual back and forth negotiations and conflict between the developer, local government and the ACH Authority...An alternative would be to allow for the submission of a Draft ACH management plan to Council with the development application. The final authorisation of the plan would occur as a part of the IDA [integrated development assessment] process. (Liverpool City Council)

Dispute resolution

The draft Bill establishes formal procedures for resolving disputes that arise during the negotiation of ACHMPs, with the aim of resolving issues in a fair, equitable and timely manner.

Level of interest

Approximately 15% of submissions commented on the approach to dispute resolution.

Key issues raised

Support for dispute resolution processes

Overall, much of the feedback was supportive of having a process to resolve disputes outside of the traditional court system.

A robust dispute resolution framework would provide the foundation needed to deliver an efficient and effective system. We support the right to appeal to the Land and Environment Court, but this should be considered a final port of call. (Property Council of Australia)

Disputes and conflict resolutions can be complex and ongoing in some circumstances, especially in regard to Cultural and Heritage issues. Communities can be divided over heritage, but this proposal does have the platform to deal with these issues and provide resolutions. Implementation should be fair and unbiased. (Troy Anderson, Aboriginal individual)

Numerous submissions suggested that a similar dispute resolution framework should be applied to other aspects of the draft Bill.

There should be further dispute resolution processes put in place to facilitate between a range of stakeholders, including the local Aboriginal community, who may raise disputes with the local ACH panel and as an avenue for local government to pursue. (Wollongong City Council)

Potential increase or decrease in disputes

Of the submissions that commented on dispute resolution, around 40% thought disputes were likely to increase under the new framework and 25% thought they were likely to decrease. Submissions that indicated disputes are likely to increase had several reasons, including an adjustment period while everyone was getting used to the new system, insufficient time for negotiation, or simply increased identification of Aboriginal cultural heritage. Multiple submissions thought disputes might increase within Aboriginal communities over the best way to protect Aboriginal cultural heritage.

Increase in disputes due to the greater scope and involvement of multiple groups and positions in the process. (feedback from Queanbeyan workshop)

More sites being inspected for ACH so more disputes may occur – not necessarily a bad thing. (feedback from Gosford workshop)

Other submissions thought that disputes are likely to decrease due to the upfront nature of the new assessment pathway.

Front loading of assessments increases the potential to avoid sites reducing disputes. (feedback from Penrith workshop)

Mandatory ACH assessment pathway will reduce disputes between Council and Developers about the content requirements of the due diligence process. (feedback from Gosford workshop)

Some submissions felt there was unlikely to be a change or there was not enough information to make an informed judgement.

It is likely that the number of disputes will not change but the point of dispute will change. (feedback from Penrith workshop)

Unlikely to change where there is a fundamental difference in the desired outcome – site conserved vs site destroyed. (feedback from Newcastle workshop)

Mediation

Several submissions provided feedback on the use of mediation services.

It would be more equitable for the ACH Authority and the proponent to agree on an independent mediator and if it cannot agree then an appropriate third party should appoint the mediator. (Lightning Ridge Miners' Association)

Consideration should also be given to requiring the ACH Authority to keep a list of independently accredited mediators that meet minimum standards. Requirements could also be included specifying that any proposed mediator should not be an employee or former employee of the proponent or similar company, that the mediator is free of any conflicts of interest, and that clear processes are established to address any concerns raised by Aboriginal community members. (NSW Aboriginal Land Council)

Appeals and reviews

The draft Bill provides proponents a right of merits review in the Land and Environment Court if the ACH Authority refuses to approve an agreed draft ACHMP, or it is deemed to be refused. This is in addition to administrative decision-making powers of the ACH Authority and the Minister being challenged through judicial review.

Level of interest

Sixteen per cent of submissions commented on the appeals and reviews proposed in the draft Bill.

Key issues raised

Support for equitable access

Seventy-five per cent of submissions that commented on appeals noted that merits appeal rights were not equally available to all interested parties and requested that it be extended to Aboriginal people in general or a relevant subset, such as the local ACH consultation panels.

It is unfair and unjustified that Aboriginal groups have fewer rights than development proponents under the draft Bill, protecting cultural heritage should have at least the same priority as development interests. (Hunter Joint Organisation of Councils)

In our view, the imbalance of appeal rights is one of the most concerning aspects of the draft Bill. It entrenches the systemic power of developers and private landholders over Aboriginal voices in decision-making and erects barriers to Aboriginal access to justice that are contrary to the objects of the draft Bill. (EDO NSW)

There were also calls for access to merits review to be widened for more decisions, such as for Declared ACH.

Amend Section 18 [declarations of Aboriginal cultural heritage] to allow any relevant party to seek merits review of a Ministerial decision to refuse/approve a recommendation (Laurie Perry and Kylie Lingard)

Limiting access to appeals and reviews

Some submissions suggested that appeal rights should be limited in certain circumstances or only available once other avenues of dispute resolution have been tried.

One of the reasons why the local ACH panel and the ACH Authority may have not approved a Cultural Heritage Plan may be a failure for the proponent to follow the appropriate procedures set out in the relevant guidelines. The ACH Bill should be amended to make clear that a proponent is not entitled to a merits appeal unless it has complied with the relevant guidelines and codes put in place for consultation by the ACH Authority. (Law Society of NSW)

Mediation should be mandatory prior to any review or appeal. (NSW Aboriginal Land Council)

Resourcing required for legal challenges

Some submissions were concerned about the high costs associated with legal challenges, including whether the ACH Authority or local ACH consultation panels will be resourced well enough to take on multiple or extensive legal challenges.

Another consequence of lopsided appeal rights relates to systemic outcomes. The ACH Authority may be reluctant to take a strong stance on protection because they don't want to be taken to Court by a well-resourced developer. Yet there is no similar concern of being taken to Court by Aboriginal representatives. This imbalance creates a risk that decisions determining ACH management plans may favour the development proponent. (EDO NSW)

The potential for merits appeals also highlights the need for proper resourcing of local ACH panels. If there is significant heritage which may justify an appeal not proceeding, then it will be necessary for the position of the local ACH panel to be carefully documented to enable any decision not to approve a plan to be defended. It may need to be supplemented by expert advice. Depending on the nature of the project, there may need to be expertise other than in relation to cultural heritage to identify how a project may impact on the heritage. (Law Society of NSW)

Access to information and knowledge

There were some concerns about the use of and access to sensitive information in legal challenges.

Where restricted information is used to make a decision, a process must be in place to manage this information if the decision is judicially challenged. The proponent should be entitled to understand and have access to the information. (NSW Minerals Council)

ACH knowledge holders must have rights to join an appeal, so that the Court has the full benefit of ACH knowledge in order to make its determinations. The Act will need to ensure Aboriginal people will have third party rights to join a Land and Environment Court appeal brought on by a developer so they can present evidence on the merits of the decision, and not just on whether the process was conducted properly, which is how the Bill provides now. (Aboriginal Culture, Heritage & Arts Association)

A few submissions suggested that any legal challenge should be heard by a judicial officer with specialist expertise in Aboriginal cultural heritage.

The Law Society considers that the ACH Bill should make amendments to s 12(2) of the *Land and Environment Court Act 1979* to allow for appointment of commissioners with special expertise in Aboriginal cultural heritage and require that any appeal should be heard by a judge sitting with a commissioner with special expertise in Aboriginal cultural heritage in a similar manner to how appeals under s 36(5) of the *Aboriginal Land Rights Act 1983* (NSW) are conducted. (Law Society of NSW)

Compliance and enforcement

The draft Bill sets out key aspects for how the Act will be enforced, including a regime of offences and penalties, compliance orders and investigation powers.

Level of interest

Twenty-seven per cent of submissions commented on compliance and enforcement issues.

Key issues raised

Support for compliance

Submissions showed broad support for an improved, robust and functional compliance and enforcement scheme. Many provided negative feedback on the current system and questioned whether the situation would be improved under the new framework.

Whatever arrangements for compliance and enforcement is put in place, NCARA believe that the integrity of the new ACH system including community confidence and support, is totally dependent on a well-resourced and rigorous system of compliance and enforcement, including pursuit of offences and penalties as appropriate. (NSW Coalition of Aboriginal Regional Alliances)

The current legal framework is sufficient; it just 'sits' in the wrong place (the NPWS Act) and it has no 'teeth'. Standalone ACH legislation may be beneficial however the main point is that the law needs an applied local focus upon protection supported by swiftly applied local penalties for causing harm. (Tweed Byron Local Aboriginal Land Council)

Resourcing requirements

A key concern from submissions was whether the ACH Authority or other delegate bodies would be adequately resourced to fulfil the new compliance and enforcement responsibilities.

...the integrity of the new ACH system including community confidence and support, is totally dependent on a well-resourced and rigorous system of compliance and enforcement, including pursuit of offences and penalties as appropriate. (NSW Coalition of Aboriginal Regional Alliances)

Investigative powers may be delegated to a government department or Council. There are concerns on this possibility as Council compliance officers are not trained or resourced to perform such duties. (Eurobodalla Shire Council)

Timeframes

Several submissions commented on the suggested time limit for commencement of proceedings for an offence.

Subsections 122(1) and (2) of the ACH Bill should be amended to provide that proceedings may be commenced no later than 1 year after the date on which the offence is alleged to have been committed or the date on which evidence of the alleged offence first came to the attention of any relevant investigating officer. (NSW Minerals Council)

We believe that the two-year statute of limitations on investigation and prosecution outlined in this section is too short. A typical development can take this length of time, if not longer. We have several examples where more than this time has passed before impacts to Aboriginal heritage have been identified. We would recommend that this period is changed to 10 years. (Extent Heritage)

Investigation powers

A small number of submissions were concerned that the investigation powers in the draft Bill were too extensive.

We understand that comprehensive investigatory powers and severe penalties are designed to deter people from committing offences; however, we argue that a less heavy-handed approach would better achieve everyone's desired outcomes. In order to locate and protect ACH, it is necessary for landholders to identify potential sites. This will not happen if they mistrust the agency administering compliance and fear negative consequences of sites being declared on

their property. The model of compliance OEH has used in the native vegetation sphere has irrevocably damaged the agency's relationship with landholders. (NSW Farmers)

Presumably, the motive for such excessive regulatory powers in a heritage act, rather than just using the police and their powers where necessary, is to act as a strong deterrent. The risk is that it will be counter-productive, and have a negative effect resulting in resistance and cover-ups. Where are the carrots to balance the stick? There should be serious thought to including incentives to encourage greater awareness of Aboriginal cultural heritage, and benefits to landholders, local government and developers to take positive action to protect and conserve it. Where is the grant program for heritage protection projects? (Jeannette Hope, community member)

However, other submissions felt the investigation powers were suitable, provided authorised officers had adequate training.

Investigation powers must not be weakened under any circumstances. (NSW Aboriginal Land Council)

It is critical that the proposed ACH scheme is provided with sufficient resourcing. In particular, sufficient funding to support ... training and resources for authorised officers to conduct investigations, noting the significant challenges to prosecutions. (Office of the Registrar, Aboriginal Land Rights Act)

Offences

The draft Bill establishes two new offences for harming Aboriginal cultural heritage, a knowing offence and a strict liability offence. It is proposed that it will be an offence to harm Aboriginal objects, Aboriginal ancestral remains or other Declared Aboriginal cultural heritage.

Many submissions felt that the offences relating to harm were too limited, and that greater efforts should be made to protect all Aboriginal cultural heritage.

The Trust supports the proposal to give legal meaning to ACH, however, it appears that the 'protective' measures of the draft Bill do not seem to apply to everything that falls under the ACH definition. (Dirawong Reserve Trust)

The framing of the definitions and protections in the draft Bill mean that, if ACH is not an Aboriginal object or Aboriginal ancestral remains, it must be declared or registered before it attracts legal protection. Harm offences will only be effective in protecting ACH if timely declarations are made, as the proposed offences apply only to objects, remains or declared ACH. (EDO NSW)

Some submissions felt that the offences should be reconsidered for various reasons.

Further, extra elements of 'recklessly or intentionally' have been added to the 'knowing' offence that will make them harder to prove. These elements, along with the proposed exception of 'trivial or negligible' harm, should be removed. (NSW Aboriginal Land Council)

Council supports the inclusion of these penalties and offences, however, suggests that they be reviewed to ensure consistency with non-Aboriginal heritage and the amounts of the penalties fit with the importance of the offence. (Lake Macquarie City Council)

Several submissions suggested additional offences be included in the new Act.

The legislation should include offences and penalties for unauthorised access and use of information. (submissions from 17 LALCs)

Defences

The draft Bill provides defences to harming Aboriginal cultural heritage if an action was in accordance with an approved ACHMP, if the action was authorised in the regulations, or if a person can show they exercised due diligence to avoid harm. The draft Bill also identifies

certain activities that will be exempt from a harm offence, such as emergency fire-fighting or traditional cultural activities carried out by Aboriginal persons.

Submissions from Aboriginal and legal organisations thought that the proposed defences were too broad and provided too many opportunities for harm to occur without consequence.

The draft Bill proposes to retain broad defences that will be available to proponents if ACH is harmed. We do not support the range of broad defences under the current laws which are replicated in the draft Bill. (submissions from 17 LALCs)

Still too many defences and loopholes that will allow proponents to proceed. (feedback from Penrith workshop)

Submissions from various industry stakeholders suggested there should be other circumstances where defences could apply, such as when their actions were based on information from the ACH Information System.

Sydney Water requests that low environmental impact actions including activities in areas previously disturbed (for example, by public authorities for purposes of constructing public infrastructure) should also be excluded in the new regulations, as they are in the current regulations. (Sydney Water)

...we strongly recommend that additional conditions are included that indicate where works are carried out under, and in accordance with, an approved agreement/plan, they cannot be considered an offence even in the event the agreement/plan is subsequently modified or terminated. (Australian Archaeological Association)

Penalties

Almost half of the submissions that commented on penalties were concerned that penalties need to be a true deterrent.

Penalties should not be tokenistic. Must have impact. (feedback from Wentworth workshop)

Have a Register on those who continuously break law or destroy sites and make it available to government when they are tendering projects (feedback from Bega workshop)

Some submissions suggested Aboriginal communities should have a role in making penalty decisions. Some suggested that money collected through penalties should go into the ACH Fund or directly to the Aboriginal communities where the harm to ACH occurred, to help rehabilitate and protect other sites in the area.

Local Aboriginal communities should have key roles in determining penalties for individuals or organisations that have damaged or destroyed Aboriginal heritage. (Jocelyn Ullman, planner)

Any fines should be directed to the local Aboriginal community where the offence occurred. (Tamworth Local Aboriginal Land Council)

A few submissions suggested that some type of education program or restorative justice step could be part of the broader compliance and enforcement system.

The Act should provide a process in which the offender is brought together with those offended against, in a safe place by an independent arbitrator to help mediate between offender and victims, if the local panel believes this may assist. It may provide a wonderful opportunity to educate the offenders of the harms that they are causing. (Dharriwaa Elders Group)

The Committee supports the scope of the additional orders a Court may make in s.142, particularly the inclusion of restorative justice activities. (NSW Young Lawyers)

Emergency measures

The draft Bill provides for emergency measures to prevent or minimise potential harm to Aboriginal cultural heritage. These include interim protection orders, stop work orders and remediation directions.

Most submissions supported the proposed power of the ACH Authority to issue stop work orders although a number thought that this should be extended to issuing interim protection orders as well, instead of this power sitting with the Minister.

The ACH Authority should have the powers to make interim protection orders, rather than the Minister. This is so that the orders can be made quickly and efficiently in circumstances where the land is at risk. (Central Coast Council)

We support that the ACH Authority will be able to issue stop work orders, including that orders may be issued verbally. Stop work orders should be able to be made for all development and land use activities. The ACH Authority should have the power to make interim protection orders, not the Minister. (submissions from 17 LALCs)

A few submissions from industry stakeholders felt that it would be more appropriate for the Minister to have oversight of all emergency measures and some others also recognised the potential impact of such an order.

Stop work orders pose the potential for significant consequences for persons subject to them, in terms of project downtime and mandated actions, and may apply for up to 40 days which is extendable by further order. Given the gravity of these consequences, Telstra submits it would be more appropriate that stop work orders be within the power of the Minister, not the ACH Authority. (Telstra)

The impact on approved developments of stop work orders is a concern, as is any Council compliance requirements for those developments. (Lake Macquarie City Council)

A couple of submissions requested an additional emergency measure to allow for the emergency salvage of a site.

...needs to be a system of rapid permits for salvage projects to be able to impact cultural sites that are inevitably going to be destroyed (e.g. through natural processes like wave action, climate change, etc.). (feedback from Queanbeyan workshop)

A small number of submissions also wanted more information on how orders would be managed.

We question how the stop work orders will be communicated to the party needing to be stopped. It will need to be explained properly on Country. How will this process be resourced and undertaken? (Dharriwaa Elders Group)

Councils of the region seek confirmation of exactly how these orders will be managed, and what process will be undertaken to ensure local planning authorities are made aware of such orders when they are not the development proponent. (Hunter Joint Organisation of Councils)

Feedback on other Aboriginal cultural heritage reform issues

Apart from comments on the key proposals of the new legal framework, submissions also provided feedback on how it will integrate with other legislation; funding and resourcing requirements for implementation; transitioning to the new legal framework and the public consultation process.

Integration with state and federal legislation

Level of interest

About 15% of submissions commented on how the new legal framework might integrate with other state and federal legislation.

Key issues raised

Some submissions commented on how the new Aboriginal cultural heritage legislation will align with other legislation that governs similar areas. This includes the *Aboriginal Languages Act 2017*, the *Aboriginal Land Rights Act 1983*, *Heritage Act 1977* and the *Commonwealth Native Title Act 1993* and *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

It was also suggested that ACH protection measures, introduced by the framework, must be embedded in other state and federal legislation and applied effectively. Some asked for a clearer picture of how amendments to other Acts will be applied.

Must be embedded in other government agencies' needs/legislation, and influence other government legislation (feedback from Queanbeyan workshop)

With the NSW Government now considering reforms to the Aboriginal culture and heritage laws in New South Wales, it is important for the role of Land Rights and Aboriginal Land Councils to be considered in the context of such reforms. (Narrabri Local Aboriginal Land Council)

Submissions commented on how the proposed legal framework is intended to interact with other specific legislation, especially the *Environmental Planning and Assessment Act 1979* (EP&A Act). Most of the feedback suggested that clearer links between the proposals and the EP&A Act need to be established to ensure that proponents and planning authorities know their obligations and that ACH is appropriately considered in the planning processes.

The *Environmental Planning and Assessment Act 1979* should be amended to allow Councils to reject applications where a required ACH management plan has not been submitted. (Liverpool City Council)

Funding and resourcing

Level of interest

Over a quarter of submissions made comments about funding and resourcing of the new system. For the proposed system to operate effectively, there was wide agreement that each function needs to be adequately funded and resourced.

Key issues raised

Funding all aspects of the legal framework

Submissions noted the importance of properly resourcing the new governance structure including the ACH Authority and local consultation panels.

Additional safeguards are needed to ensure that the ACH Authority is not undermined by a lack of resourcing, or that there are not perverse incentives created through the new regime; for example, pressure to approve ACHMPs to receive funding and pressure to utilise ACHMP funds to pay for operational expenses. (NSW Aboriginal Land Council)

Adequate funding is essential for the ACH Authority and local ACH consultation panels to perform their functions. This includes fully funding administrative costs in relation to the ACH Authority such as employing appropriate staff, engaging experts where necessary, establishing and maintaining offices, as well as funding the building and maintenance of the ACH Information System. (UTS Indigenous Knowledge Forum)

The proposed structure and operation of the ACH Authority requires local consultation panels to play a key role. Resourcing of the panels needs to be clarified and resolved as a priority. Well-resourced local consultation panels could fully participate in management plan negotiations, informed by technical knowledge as required. Local consultation panels must have sufficient time, staff and expertise to independently conduct their roles. (Hunter Joint Organisation of Councils)

Many submissions also made it clear that the new information system will require significant funding and resourcing to be effective.

Adequate resourcing of the online system will be crucial to maintain the currency of the information so that both councils, developers and communities have confidence in the new system. (Local Government NSW)

The resource requirements for the information management system will need to be carefully considered and funding allocated to support the development of base information layers, through research, community engagement, feedback and ground-truthing. (GML Heritage)

ACH conservation and management was another area where submissions highlighted the need for resourcing and capacity building.

ACH conservation agreements are likely to require the ACH Authority to provide financial, technical or other assistance to the owner of the land, so the scheme will need to be adequately funded. (EDO NSW)

The Act must first enable and resource the local ACH panels to undertake surveys, identification and collecting activities so that they can nominate its areas and places of ACH value for declaration. (Dharriwaa Elders Group)

Several submissions also expressed that the ACH Authority and local ACH consultation panels will need adequate resourcing to fulfil their compliance and enforcement roles.

NSWALC supports the inclusion of civil proceedings. However, we note that this can be costly for Aboriginal people and groups. Resourcing for this should be provided. (NSW Aboriginal Land Council)

Costs to proponents

Some heritage consultants and proponents expressed the need for greater certainty around the payment of fees for organisations proposing activities that may impact Aboriginal cultural heritage, and that these reflect the administrative costs of undertaking this work.

Adequate support for the operation of the new legislative framework should be enshrined in the legislation or associated regulations to allow for the collection of fees as well as the allocation of public monies. (GML Heritage)

Section 19(7) of the draft Bill indicates that the regulations may make provision for granting access and any fees payable for accessing such information. The imposition of a fee for this database would appear to be contrary to the current move to provide greater accessibility to planning and other development related information. Any fee imposed should be kept to a minimum and cover any administrative costs associated with providing access to the information. (Housing Industry Association)

Some submissions noted that costs associated with one area could result in further costs or savings in other areas.

It is critical that the new system created by the proposed reforms is adequately resourced. If, for example, the mapping is not done thoroughly and consistently, there will be issues during negotiations from the outset. (NSW Minerals Council)

Transitioning to the new framework

Because of the significant changes, it is anticipated that it will take a few years to transition from the current system under the NPW Act to the new system.

Just over 10% of submissions commented on this, presenting some different viewpoints on what they considered to be important for the transition period.

Industry stakeholders were most concerned about the need for clear guidance and certainty for projects during the transitional arrangements.

It will also be important to ensure there are sensible transition arrangements in place as we move into the new legislative framework. ... Further, it is critical that all Aboriginal Heritage Impact Permits (AHIP) and other approvals provided for under the previous system remain in place until they expire. (Cement Concrete & Aggregates Australia)

Project proponents in New South Wales who have commenced processes under the existing Aboriginal cultural heritage regime are likely to be concerned as to the altered or additional compliance requirements that may apply to them under the new regime. This raises the spectre of significant project risk (including potential delay and expense implications). Such proponents should be given appropriate reassurances at the earliest possible stage in relation to these matters. (Telstra)

Other stakeholders called for measures to support staged transition with effective awareness-raising to ensure the ongoing protection and conservation of Aboriginal cultural heritage.

NSWALC strongly recommends that education and awareness strategies are developed and implemented urgently to address misconceptions and misinformation about the reform proposals. We are extremely concerned that misunderstandings about the reforms may lead to increased destruction of our heritage. (NSW Aboriginal Land Council)

In our view, significant ACH which is unregistered or not Declared could fall through the cracks while it is being catalogued or assessed for formal recognition. The Trust wonders if interim measures might be put in place to recognise and protect such items and to accommodate the transition to the new Bill and its operation. (Dirawong Reserve Trust)

Feedback on public consultation

Key issues raised

Feedback on consultation

Feedback from workshop participants about the 2017–18 consultation process was largely positive. See Appendix A for further details.

Feedback received through other submissions (approximately 30% of all submissions) was more mixed, with many focusing on short consultation timeframes or lack of detailed information available. Many expressed a desire to remain involved in future public consultation on the regulations, policies and guidelines.

Positive sentiments expressed included:

We also commend the long and considered consultation process and the presence of informative resources such as the videos made available online. (NSW Farmers)

LGNSW appreciates the early and continued engagement that the Office of Environment and Heritage has offered the local government sector during the consultation process. (Local Government NSW)

Negative feedback focused on delays in the release of the draft Bill, insufficient notice of workshops, and that workshops did not cover enough detail or should have been targeted to Aboriginal people only.

Need more time to digest the information. Everything in the process is feeling rushed. (feedback from Bathurst workshop)

Workshops should have been smaller sessions and longer than a few hours to ensure we don't miss any important information. (feedback from Penrith workshop)

Ongoing engagement

There was a strong desire identified in submissions for further consultation to be held with the public and key stakeholders on the regulations, policies and procedures which will be developed in the future to support the draft Bill.

As the ACH Authority will develop policy that will likely directly affect the AM's operations and resources, the AM needs to have a mandated role in the consultation and implementation of policy that affects it. (The Australian Museum)

Consultation must occur with peak Aboriginal organisations on all supporting regulations, policies, minimum standards and other supporting documents as they are developed to support the new Act. (Tamworth Local Aboriginal Land Council)

Appendix A Participation, evaluation and further consultation

Public consultation process held over four phases

Since 2011, there have been four phases of public consultation on the ACH reforms:

Phase 1 (2011) – involved seeking feedback on issues and concerns with the current system

Phase 2 (2012) – the results of Phase 1 were presented to the public for feedback

Phase 3 (2013–14) – the Government’s proposed model for new legislation, based on recommendations from an Independent Aboriginal Cultural Heritage Reform Working Party was presented to the public for feedback

Phase 4 (2017–18) – the release of a proposed new legal framework and draft Aboriginal Cultural Heritage Bill, which built on the feedback already provided.

The current (Phase 4) public consultation design involved a two-stage process. This involved information sessions for people to find out about the proposals, followed by workshops where people could provide feedback once the draft Bill was released. This approach was adopted due to feedback from Aboriginal people during previous phases identifying that they needed to first digest the key changes and discuss with their communities before providing feedback.

Independent Aboriginal facilitators, provided by Marcia Ella Consulting, were used to assist with the design, and manage the registration and facilitation of the information sessions and workshops. Key principles used in the consultation, based on feedback from previous phases included:

- the need for regular and timely engagement
- the need for Aboriginal people to feel culturally safe
- provision of information in different formats
- ability for people to provide feedback through a variety of mechanisms
- ability for people to provide feedback on topics of most interest to them.

Information sessions held in 2017

An estimated 560 people attended the public information sessions held in September and October 2017, across 19 various locations throughout New South Wales. These sessions were positively received with 96% of participants identifying that the sessions were helpful in increasing their understanding of the proposed new legal framework. Approximately 80% also indicated they were either very confident or confident that they would be able to discuss the proposals with others.

Workshops held in 2018

In March and April 2018, a series of workshops were held in the same 19 locations as the information sessions as well as an additional one in Tamworth. Approximately 700 people attended the workshops to discuss and provide feedback.

Approximately two-thirds of participants identified themselves as Aboriginal. The following sections provide further detail on the demographics of participants along with the outcomes

of participants' evaluation forms. The evaluation forms indicate that the workshops were generally positively received.

Phase 4 webinars

An online webinar was held which targeted those people that could not attend an information session in person. A second online webinar was held following release of the draft Bill which focused on the regulatory system (Aim E). This webinar targeted regular users of the system including local government and heritage consultants.

Approximately 110 people attended these webinars and a copy of the webinars were made available on the OEH website.

Participation and representation at public sessions

The public sessions were well attended with approximately 565 people attending the information sessions and 697 people attending the workshops (Table 2). Penrith and Redfern were the most popular locations followed by Nowra, Newcastle, Gosford and Albury.

About two-thirds of the people who attended the workshops identified as Aboriginal. There were some people attending the workshops who did not provide personal information or formally participate in the workshop submissions. Of the 616 participants who provided this information, 411 (66%) identified as Aboriginal.

Workshop participant numbers increased by approximately 20% compared with the information sessions; however, it should be noted that not everyone who attended a workshop had previously attended an information session and vice versa.

Table 2 Number of attendees at the information sessions and workshops per location

Location	Information session	Workshop
Albury	13	50
Ballina	47	40
Bathurst	26	26
Bega	29	18
Bourke	14	30
Broken Hill	19	27
Coffs Harbour	30	39
Dubbo	32	40
Gosford	51	39
Griffith	29	29
Muswellbrook	16	15
Narrabri	46	26
Newcastle	30	53
Nowra	27	54
Penrith	51	65
Port Macquarie	9	16
Queanbeyan	23	28
Redfern	51	67

Location	Information session	Workshop
Tamworth	–	24
Wentworth	22	11
Totals	565	697

Evaluation of public consultation process and design

People attending sessions were asked to evaluate the public consultation process and design following completion of each information session and workshop. Each participant was provided with an evaluation form and asked to complete a series of evaluation questions. Most attendees completed this form.

Some members of the public also provided feedback on the public consultation process and design as part of their submission.

Evaluation outcomes from information sessions and workshops

Both the information sessions and workshops were positively received with the majority of participants who commented identifying they either ‘strongly agreed’ or ‘agreed’ with all the statements posed in the evaluation forms. Table 3 identifies the statements common to both the information sessions and workshops.

Table 3 Percentage of participants that indicated they either agreed or strongly agreed with evaluation statements

Common statements*	Information session	Workshop
The session was helpful in increasing my understanding	93%	78%
I felt culturally safe	91%	83%
I felt safe to ask questions or express an opinion	87%	72%–78%
I found the information provided at the sessions useful and easy to understand	95%	77%

* These statements have been modified slightly because the framing of the statements was different in the evaluation forms for the information sessions and the workshops. The statements included here are those that were similar for both sessions.

At the information sessions, there was some frustration expressed by participants that the draft Bill was not available. For both the information sessions and the workshops, some participants raised concerns about the limited notice given to attend sessions.

Only 64% of workshop participants indicated they had attended an information session or had previously been engaged in discussions about the ACH reforms prior to attending a workshop.

Individual pulse checks on the ACH reform aims

At the end of the workshop activity sessions, participants were asked to provide a pulse check on their level of support for the proposals discussed under each ACH reform aim. This enabled participants to provide individual responses. All other feedback was provided as group feedback from their table – although all participants were encouraged to share their views and were not required to reach a consensus.

Figure 3 summarises the pulse check outcomes across the five ACH reform aims. Most participants indicated either 'strongly support' or 'support' for the reform aims and their proposals; however, some workshop participants felt very strongly it was not possible or appropriate to provide a single indication of support across a whole proposal or aim.

The greatest percentage of support received was on Aim D's repatriation and conservation tools. Aim E received the lowest level of support although more individuals supported than did not support it.

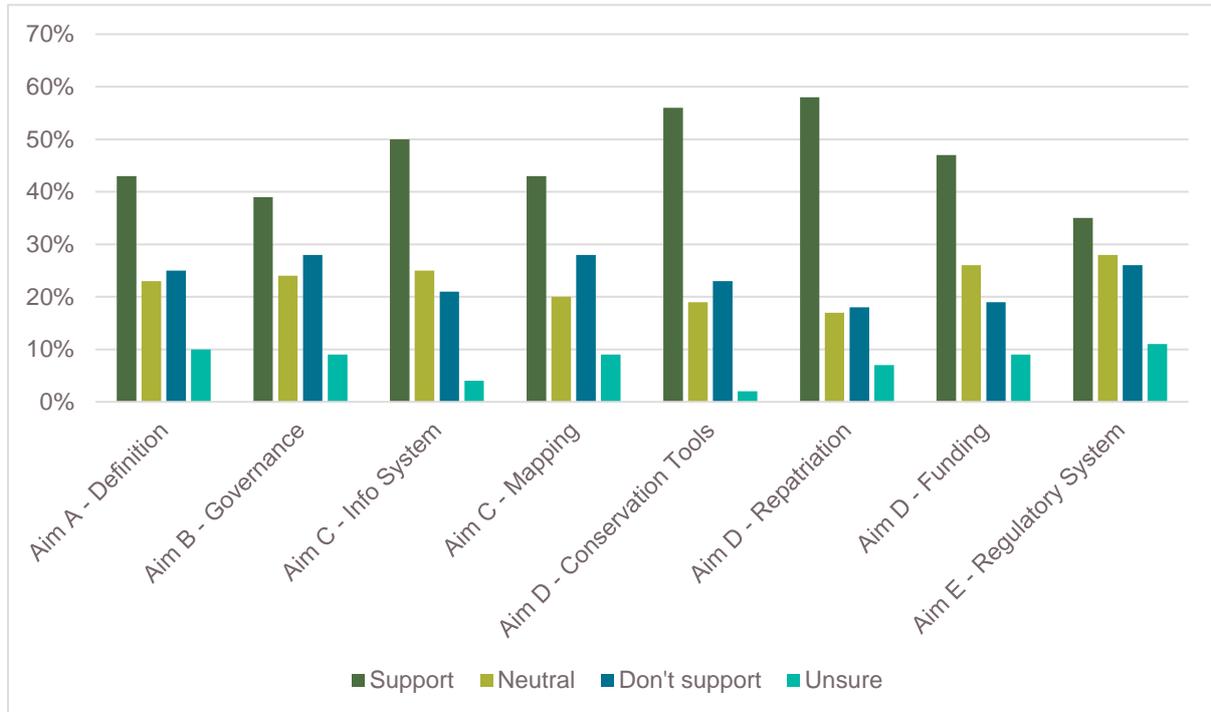


Figure 3 Workshop participants' level of support for ACH reform aims

Appendix B Table of acronyms and abbreviations

Term	Definition
ACH	Aboriginal cultural heritage
ACHAP	Aboriginal Cultural Heritage Assessment Pathway
ACHMP	Aboriginal cultural heritage management plan
AHIP	Aboriginal Heritage Impact Permit
DA	development application
EP&A Act	<i>Environmental Planning & Assessment Act 1979</i>
GIPA	Government Information (Public Access)
LALC	Local Aboriginal Land Council
LGA	local government area
MEC	Marcia Ella Consulting
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NSW	New South Wales
OEH	Office of Environment and Heritage
the draft Bill	the draft Aboriginal Cultural Heritage Bill 2018
TO	Traditional Owner
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples