THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission on the Draft Aboriginal Cultural Heritage Bill 2018

20 April 2018

NSW Office of Environment and Heritage
PO Box A290
Sydney South, NSW 1232

Email *ACH.reform@environment.nsw.gov.au*

Contact: **David Turner**
President, NSW Young Lawyers

Alistair Knox
Chair, NSW Young Lawyers Environment and Planning Law Committee

Contributors: Ross Mackay, Ruby Pandolfi and Caitlin Polo

Coordinators: Katharine Huxley and Laura Waterford

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The NSW Young Lawyers Environment and Planning Law Committee makes the following submission in response to the Draft Aboriginal Cultural Heritage Bill 2018.

NSW Young Lawyers

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The NSW Young Lawyers Environment and Planning Law Committee (Committee) comprises of a group of approximately 50 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Glossary of Abbreviations

Aboriginal Place – as per s 84 of *National Parks and Wildlife Act 1974* (NSW)

ACHAC – Aboriginal Cultural Heritage Advisory Committee (as per s 27 NPW Act)

ACHMP – ACH Management Plan (as per s 46)

AHIMS – Aboriginal Heritage Information Management System (under the current model)

ALR Act – *Aboriginal Land Rights Act 1983* (NSW)

Declared ACH – cultural heritage the subject of a declaration under s 18

Draft Bill – *Aboriginal Cultural Heritage Bill 2018* (NSW)

EPA Act - *Environmental Planning and Assessment Act 1979* (NSW)

EPA Reg - *Environmental Planning and Assessment Regulation 2000* (NSW)

ILUA – Indigenous Land Use Agreement

LALC – Local Aboriginal Land Council

Local ACH Consultation Panel – as per s 14

NPW Act – *National Parks and Wildlife Act 1974* (NSW)

NTA – *Native Title Act 1993* (Cth)

OEH – Office of Environment & Heritage

PBCs – Prescribed bodies corporate

Proposal Paper – *A proposed new legal framework Aboriginal cultural heritage in NSW* (consultation document)

RAP – Registered Aboriginal Party

SEARs – Secretary's Environmental Assessment Requirements

SSD – State Significant Development (as per s 4.36 of EPA Act)

SSI – State Significant Infrastructure (as per s 5.12 of EPA Act)

Summary of Recommendations

1. The proposed objects of the Draft Bill should be amended to closer reflect Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples.
2. A definition of 'desecration' should be included in the Draft Bill.
3. Section 18 of the Draft Bill should be amended to provide that the ACH Authority, rather than the Minister, has the power to make declarations of Aboriginal cultural heritage.
4. Section 20(5) should be amended such that the ACH Authority, rather than the Minister, has the responsibility of giving final approval to ACH Maps.
5. Section 34(1) should be amended to provide that the ACH Authority, rather than the Minister, has the power to consent to development on land subject to and ACH conservation agreement.
6. Clause 5(2) of Sch 1 should be amended to restrain the powers of the Minister to remove a member of the ACH Authority, to permit removal in only limited circumstances (eg. misconduct).
7. Clause 7(2) of Sch 1 should be amended to restrain the powers of the Minister to remove a Chairperson or Deputy Chairperson of the ACH Authority, to permit removal in only limited circumstances (eg. misconduct).
8. The ACH Authority should be properly resourced by the government to carry out its functions, and not be forced to rely on operational support from government agencies (such as OEH).
9. Provisions should be inserted into Div 3 of Pt 2 which require that only Aboriginal persons may be appointed as members of Local ACH Consultation Panels.
10. Provisions should be inserted into Div 3 of Pt 2 which detail the process for appointment of Local ACH Consultation Panels, once consultation on this process has been completed.
11. Local ACH Consultation Panels should be adequately resourced by government to carry out their functions, and not be forced to rely on support organisations for assistance.
12. Regulations made under section 13 should permit the ACH Authority to delegate the functions of co-ordinating the establishment and supporting the operation of Local ACH Consultation Panels to the organisation they consider best suited to the role on a case-by-case basis, whether that be a LALC or other organisation.
13. Regulations made under section 13 should provide that, in so delegating those functions, the ACH Authority must consult each Local ACH Consultation Panel as to the appropriate support organisation, and, where a preference is given by the Local ACH Consultation Panel, follow that

preference.

14. Organisations taking on support roles of Local ACH Consultation panels should be specifically and adequately resourced by government for that support role.

15. A deadline for making a decision on whether to approve Declared ACH should be included in section 18.

16. A different structure or strategy should be considered and included to facilitate interaction between the ACH authority and private land or object owners to minimise conflict and ensure ACH is protected.

17. Section 18 should specify the mandatory considerations of the Minister when determining a Declared ACH nomination.

18. Section 22(1)(b) be amended to require the preparation of a state of ARH report every two years.

19. Provisions vesting or confirming ownership of ACH lies with Aboriginal people should be included in section 24 of the Draft Bill.

20. The Local ACH Consultation Panel should be the body that is notified of the location of tangible cultural heritage, rather than the ACH Authority.

21. The requirement to notify the Panel of the location of tangible cultural heritage should be sensitive to the existence of cultural protocols around the retention and limited transfer of knowledge around ACH.

22. The defence of belief that the ACH Authority is already aware of the location of tangible ACH in section 27(2) should be subject to a test of reasonableness.

23. The ACH Authority should be required to consult with the Local ACH Consultation Panel before varying or terminating an agreement.

24. The power of the Minister to direct the ACH Authority to vary or terminate a conservation agreement in the event a mining or petroleum authority has been granted should be removed, as should the accompanying exemption for mining and petroleum activities contained in section 35.

25. The power to consent to development by public authorities on land subject to an ACH conservation agreement should rest with the ACH Authority, rather than the Minister.

26. There should be extensive public consultation undertaken in relation to additional 'low impact defences' to be created under section 43, prior to the drafting of any regulations creating such defences.

27. There should be extensive public consultation undertaken in relation to the ACHAP Code of

Practice, before it is finalised.

28. Provisions should be inserted into section 44 which provide that, if the assessment process of Div 4 of Part 5 has been carried out by a proponent and the ACH Authority, on review of the assessment provided, forms the view that cultural heritage will be harmed by the proposed action, the section 44 defence will not available in respect of the action. This should also be reflected in the ACHAP Code of Practice.

29. The definition of 'negotiation period' in section 50 should be redrafted, to clarify whether it includes the assessment process.

30. Further consultation should be undertaken in relation to the duration of the negotiation period, before it is prescribed in regulations pursuant to section 50.

31. A public register of ACHMPs should be created and maintained by the ACH Authority. ACHMPs appearing on the register should be redacted as necessary to maintain cultural integrity.

32. If the three-tiered ACHMP proposal is adopted within the ACHAP Code of Practice, the Code must include:

    a. a clear process for determining which tier of ACHMP should be used; and

    b. a dispute resolution process in circumstances where the proponent and the Local ACH Consultation Panel disagree as to which tier of ACHMP should be used.

33. Section 52 should be amended to provide that merits appeals regarding ACHMPs are also available to Local ACH Consultation Panels and persons who have an interest in the cultural heritage being impacted by that ACHMP.

34. Section 56(2) should be redrafted to provide that the Local ACH Consultation Panel must determine, after Stage 2 of the assessment process, whether an ACHMP may still be required.

35. Section 57(2) should be redrafted to provide that the Local ACH Consultation Panel must determine, after Stage 2 of the assessment process, whether an ACHMP may still be required.

36. An additional provision should be added to section 58(2) which requires the proponent to provide, with the assessment report, a copy of any determination/s received from the Local ACH Consultation Panel as to whether an ACHMP may be required.

37. Provisions should be drafted linking the assessment process to the negotiation period defined in section 50. The Committee's recommended provision is that the proponent may request ACHMP negotiations with the Local ACH Consultation panel at any point in time after stage 3 of the

assessment process has been completed.

38. Section 59(3) should be removed and replaced with provisions permitting the ACH Authority to continue to require further assessments be undertaken if they continue to consider the assessment report provided does not meet the assessment requirements. These provisions should also enable the ACH Authority, after one or more further assessments have been provided, to advise the proponent that their assessment report is not compliant.

39. Section 59(2)(b) should be removed, and replaced with provisions providing that, if an ACH Authority does not provide advice to the proponent within 10 business days (or longer, as per the following recommendation), the ACH Authority is deemed to have determined the assessment report is not compliant with assessment requirements.

40. Provisions should be inserted into section 59 which allow the ACH Authority to extend the 10 day review period if required.

41. After the legislation has commenced, the 10 day review period within section 59(2)(a) should be the subject of a review to determine whether it is a workable and appropriate timeframe in practice.

42. The standardised unexpected finds policy should be developed after a specific consultation process. The policy, once developed, should be drafted into the legislation.

43. In addition to the provisions suggested in the Proposal Paper, the ACHAP Code of Practice should include the following:

    a. A minimum standard for cultural heritage assessment;

    b. A requirement for field surveys to be conducted and for local knowledge holders (as put forward by the Local ACH Consultation Panel) to be present for field surveys conducted;

    c. A mechanism to allow Local ACH Consultation Panels to publicly call for interested parties to come forward to be involved in the assessment process, where they deem it necessary; and

    d. A mechanism to deal with differences of opinion as to whether an ACHMP is required.

44. Provisions should be inserted into Div 5 of Pt 5 (or in Regulations following) that the ACH Authority must consult with the Local ACH Consultation Panel before providing terms of approval to a consent authority.

45. The proposed amendments to ss 4.41 and 5.23 of the EPA Act should be replaced by amendments

removing references to Aboriginal cultural heritage approvals from the SSD and SSI provisions of the EPA Act entirely. An alternative, less preferred by the Committee, would be move the references to Aboriginal cultural heritage approvals to ss 4.42 and 5.24.

46. Funding for the administration of the ACH Authority to properly administer the new framework should be as per normal governmental funding arrangements, and should be separate from the ACH Fund.

47. Sections 78 - 81 should be amended to provide that the ACH Authority can make and give notice of interim protection orders.

48. Section 133(1) should be amended to allow any person to take proceedings to enforce an ACH Conservation Agreement or ACHMP.

49. Section 133(1)(b) should be amended to allow civil enforcement proceedings in respect of a breach of any provision of an ACHMP. In the alternative (and less preferred by the Committee) section 133(1)(b) should be amended to provide that proceedings can be taken to prevent harm to cultural heritage occasioned by an ACHMP in advance of that harm occurring.

50. Clarity should be provided as to how and by whom the staged implementation process will be administered.

51. Measures should be developed to avoid proponents from side-stepping the requirement to negotiating an ACHMP by unnecessarily applying for AHIPs well in advance of the activity to which the AHIP applies. A suggested measure is to introduce guidelines instructing OEH not to grant AHIPs unless the application demonstrates that they genuinely require the AHIP in advance of the new approval regime commencing.

52. Measures should be considered to facilitate regular consultation between the ACH Authority and the Minister administering the NPW Act during the interim period between the formation of the ACH Authority and the complete commencement of the new regime.

53. Provisions should be drafted around the interaction of the new cultural heritage framework and native title rights and interests, including interactions with:

    a. native title rights to protect cultural heritage;

    b. alternate procedures created under ILUAs; and

    c. the rights and processes for negotiation under the NTA.

Introduction

The Committee welcomes the opportunity to comment on the Draft Aboriginal Cultural Heritage Bill 2018

(**Draft Bill**).

On balance, the Committee supports the Draft Bill and notes that the Draft Bill takes a number of important steps towards ensuring that decision-making, administrative and governing powers under the new Aboriginal cultural heritage regime rest with Aboriginal people.

However, the Committee notes that there are a number of sections in which the Draft Bill falls short in reaching this goal and could be improved upon to strengthen the framework for conserving ACH and ensure the Act operates to achieve its objectives.

Part 1 – Objects and expanded definition of Aboriginal cultural heritage

The Committee supports the proposed objects of the Act, however the Committee submits that it would be preferable to make reference to the practice and revitalisation of cultural traditions and customs, and to manifestation, practice, development and teaching of spiritual and religious traditions, customs and ceremonies to better align with Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples.[1]

> ***Recommendation 1: That the proposed objects of the Draft Bill be amended to closer reflect Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples.***

The Committee supports the expanded definition of Aboriginal cultural heritage in section 4 of the Draft Bill. The definition appears to better reflect the reality of the term 'cultural' heritage' for Aboriginal people, including the expansion of the definition to encompass intangible heritage.

The Committee notes that 'desecration' has not been defined within the Draft Bill. The Proposal Paper, foreshadowed that a new definition of 'desecration' would be included in the Draft Bill.[2] The second limb of the definition of 'harm' in section 40 of the Draft Bill is expanded to include acts which demonstrate disrespect for the significance of the cultural heritage in question, from which the concept of desecration as sitting within the definition of 'harm' can be inferred. This concept of demonstrating disrespect would seem to impart a requirement of intent into this second limb of the definition, despite the provision in section 41(1) that the offence of harming cultural heritage is a strict liability offence.

> ***Recommendation 2: A definition of 'desecration' be included in the Draft Bill.***

Part 2 – Decision Making Structures

[1] *United Nations Declaration on the Rights of Indigenous Peoples 2007* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

[2] *A proposed new legal framework, Aboriginal cultural heritage in NSW* at page 48

Some of the roles of the Minister within the Draft Bill are at odds with the stated objective that decision-making powers rest with Aboriginal people. Particularly, the Committee submits that the rationale is not made out in the Proposal Paper for the Minister, rather than the ACH Authority, being the approval authority for Declared ACH (s 18) and the NSW ACH Map (s 20(4)), and having the power to consent to development within an ACH conservation agreement area (s 34(1)).

Recommendations 3 – 5:

- ***Section 18 should be amended to provide that the ACH Authority, rather than the Minister, has the power to make declarations of Aboriginal cultural heritage.***
- ***Section 20(5) should be amended such that the ACH Authority, rather than the Minister, has the responsibility of giving final approval to ACH Maps.***
- ***Section 34(1) should be amended to provide that the ACH Authority, rather than the Minister, has the power to consent to development on land subject to and ACH conservation agreement.***

ACH Authority

The Committee commends the creation of the ACH Authority, consisting of Aboriginal persons, as the ultimate decision-making, administrative and governing body under the new Aboriginal cultural heritage regime. The breadth of powers and functions given to the ACH Authority in s 11, and the accompanying limitations on delegations in s 13, are appropriate, and will assist in ensuring that control of Aboriginal cultural heritage in NSW is in the hands of Aboriginal people.

It is critical to the success of the new regime in achieving this objective that the ACH Authority be properly representative of Aboriginal people, and to achieve legitimacy in the Aboriginal community. It is imperative that the process for appointment of the ACH Authority Board is one which is acceptable and which has the confidence of Aboriginal people. The Committee welcomes the proposal to consult further on this, on the proviso that this consultation process will be transparent and genuine. This appointment process is critical to ensure the Aboriginal community has faith in the independence of the ACH Authority and to ensure it has the legitimacy of a proper mandate given by Aboriginal people.

The Committee does not consider it is appropriate to provide an opinion on the various proposals presented in the Proposal Paper on the appointment process to be employed for the ACH Authority (targeted questions B2 and B3). This decision is one which must rest in the hands of Aboriginal people.

The Committee notes that clause 5(2) of Sch 1 proposes to allow the Minister to remove a member from office at any time. The Committee is concerned this provision creates a risk (or at least the perception of a risk) that the Minister may politicise the ACH Authority. Such a risk, whether perceived or actual, has the potential to undermine genuine Aboriginal control of the ACH Authority. It may cause members to feel that

the threat of dismissal hangs over their heads, which may prevent them from acting on direction from the Aboriginal community where it conflicts with unofficial direction from the Minister or Government generally. Likewise for the equivalent provisions relating to the Chair and Deputy Chairperson (cl 7(2)).

Recommendations 6 – 7:

- ***Clause 5(2) of Sch 1 should be amended to restrain the powers of the Minister to remove a member of the ACH Authority, to permit removal in only limited circumstances (eg. misconduct).***
- ***Clause 7(2) of Sch 1 should be amended to restrain the powers of the Minister to remove a Chairperson or Deputy Chairperson of the ACH Authority, to permit removal in only limited circumstances (eg. misconduct).***

The Committee submits that the provisions around ACH Authority procedures in Part 3 of Sch 1 are sound.

The stated ongoing role for Government agencies in providing operational support flags a concern that the ACH Authority will not be properly resourced to carry out their roles in the framework (or at least the majority of their roles) independently. Any reliance on government agencies undermines the ability of the proposed framework to actually enable decision-making to be controlled by Aboriginal people, particularly noting the entrenched and long-standing concerns the Aboriginal community has with the current administration of the Aboriginal cultural heritage system by OEH.

Recommendation 8: The ACH Authority should be properly resourced by the government to carry out its functions, and not be forced to rely on operational support from government agencies (such as OEH).

Local ACH Consultation panels

The Committee strongly supports the proposal to create Local ACH Consultation Panels and give them the primary role in negotiating ACHMPs (as set out in section 16), and considers it a positive development towards placing control of cultural heritage assessment and management in the hands of local Aboriginal communities. However, proper constitution, operation and resourcing of those Panels is key to ensuring this aim is actually delivered.

In the provisions around membership of the Panels in Div 3 of Pt 2, no detail is given on whether there will be a requirement for members to be Aboriginal (and on what safeguards there will be to ensure this takes place). This requirement is, quite appropriately, included in the provisions regarding membership of the ACH Authority (s 8(2)). It is unclear whether the failure to include this requirement in Div 3 of Pt 2 is an oversight or intentional. The Committee submits that it should be likewise included in relation to membership of the Local ACH Consultation Panels

Recommendation 9: Provisions should be inserted into Div 3 of Pt 2 which require that only

Aboriginal persons may be appointed as members of Local ACH Consultation Panels.

The Committee does not consider it is appropriate to provide a concluded opinion on the various proposals presented in the Proposal Paper on the appointment process to be employed for the Local ACH Consultation Panels, or the proposed boundaries of those panels (targeted questions B4-B7). However, the Committee considers it appropriate to nevertheless provide comment on the five examples presented in targeted question B6 for membership of the Local ACH Consultation Panels. The Committee notes that the general experience under the current legislative scheme is that there are a multiplicity of views across local Aboriginal communities and between different Aboriginal people, families and organisations, and no single existing body can be said to adequately represent the views of all stakeholders in a particular cultural heritage assessment and management process (there are numerous case studies to support this example). With this in mind, the Committee makes the following comments on the examples given in targeted question B6:

Examples 2 and 5 effectively identify 'winners' from the various stakeholder organisations, and will not lead to adequate representation of the multiplicity of Aboriginal perspectives in local communities;

Example 4 will also likely do the same, unless the 'groups' are specifically identified in each ACH Panel area – a 'one-size fits all' approach which prescribes the same 'groups' for each Panel across the State will not ensure each Panel is properly representative;

It is difficult to comment on example 3 without knowing who will be entitled to participate in the secret ballot;

Example 1 will only ensure adequate representation if the numbers of people nominated are relatively small. The proposed safeguard that a reference must be obtained from an appropriate organisation will likely be a politicised process; to avoid getting drawn into these politics, organisations may provide references for many nominees. Where there are a large number of nominees (it is not impossible to conceive over 200 nominees in a relatively small area), appointment from this large pool by the centralised ACH Authority will undermine the ownership local communities have over the appointment process.

The Committee notes that the guidelines managing the establishment and operation of the Local ACH Consultation Panels will be critically important, particularly in ensuring those Local ACH Consultation Panels are properly representative of and are considered legitimate by their respective Aboriginal communities. Section 17 provides that these guidelines will be developed by the ACH Authority in consultation with the Aboriginal community. It is imperative that this consultation is extensive and transparent – if those guidelines are not robust then local control of decision-making will not be guaranteed. It is appropriate particularly that the guidelines governing appointment of Local ACH Consultation Panels should be incorporated into legislation, because adequate and appropriate representation on the Panels is critical to ensuring the framework achieves a local decision-making process that is properly representative of the wishes of local

Aboriginal communities (particularly noting the number of different and often disparate Aboriginal persons, groups and perspectives on cultural heritage at the local level). Among other advantages, this would mean that amendments to these key provisions could only occur through Parliamentary processes (which would presumably, and hopefully, only take place after extensive consultation). The reason given in the Proposal Paper (on p18) for the failure to include provisions around constitution of the Local ACH Consultation Panel in the legislation is that further consultation is needed to determine the membership criteria. If this is the case, the legislation should not commence until this consultation is completed and incorporated therein.

> ***Recommendation 10: Provisions should be inserted into Div 3 of Pt 2 which detail the process for appointment of Local ACH Consultation Panels, once consultation on this process has been completed.***

On pp 19-20 of the Proposal Paper (and inferred in the Consultation Note to s 13 of the Draft Bill) it is indicated that the Local ACH Consultation Panels will need to source outside administrative and other support necessary to allow them to operate. The rationale for this unclear. Given the central Local ACH Consultation Panels play in day-to-day negotiation of cultural heritage assessment and management processes, it is appropriate that they be directly resourced by government to put in place the administrative structures and staffing to carry out this role. Whether they choose to also draw on existing organisations to support them should be a choice they make, with the comfort that if they choose not to do so, they will still be able to carry out the role that they have been entrusted by their communities to do. This is particularly important in areas where the choice of any particular local support organisation would be divisive.

The fact that the resourcing requirements are not yet finalised (as per the discussion on p 13 of the Proposal Paper) is concerning. Given that these Panels will be required to the bulk of the day-to-day work in coordinating and negotiation cultural heritage assessment and management within the framework, failure to sufficiently resource the Panels will render the framework unworkable, and it will not deliver on the promise of local decision-making. Therefore, any support for the framework given in the consultation process can only ever be conditional on an assumption that resourcing to Local ACH Consultation Panels will in fact be sufficient.

> ***Recommendation 11: Local ACH Consultation Panels should be adequately resourced by government to carry out their functions, and not be forced to rely on support organisations for assistance.***

Further, the suggestion in the Proposal Paper and the Consultation Note to s 13 that the ACH Authority may delegate the functions of establishing and supporting Local ACH Consultation Panels to a LALC to coordinate the formation of a Local ACH Consultation Panel is problematic. It states that that delegation to another organisation is only permitted where the LALC chooses not to exercise or does not have the capacity to exercise that function. The justification for this is that LALCs have certain roles under the ALR Act

in relation to cultural heritage protection.

However, this proposal arbitrarily selects LALCs as the appropriate bodies to take on this role, regardless of the existence, in particular communities, of other bodies who may be better equipped to take on this role (native title PBCs, elders groups, Joint Management Committees etc.), or of circumstances in which the LALC taking on this role would likely be divisive. Whilst in many communities the LALC has the backing of all or most of the Aboriginal community in relation to cultural heritage matters, this is not the case in all communities – the experience of both industry and non-LALC RAPs in navigating the current heritage system highlights this clearly. Therefore, the ability to act as a support organisation for the Local ACH Consultation Panel should be extended to any Aboriginal organisation based within the area of the Local ACH Consultation Panel. Further, the choice of supporting organisation should rest with the Local ACH Consultation Panel, not the ACH Authority. This will allow Local ACH Consultation Panels, who will ideally be representative of the wide cross-section of Aboriginal interests in the area, to choose the organisation which would be most appropriate in the unique circumstances of that area, to avoid any perceptions that the Panel is not properly representative or legitimate.

It is not possible to, as requested in targeted question B8 of the Proposal Paper, comprehensively identify other appropriate organisations to take on functions delegated from the ACH Authority, especially in the absence of knowing what the Local ACH Consultation Panel boundaries will be. There will be a multiplicity of organisations, unique to each area, potentially capable of taking on the role, including (but certainly not limited to): native title PBCs, Elders groups, Joint Management Committees, other bodies created under NTA processes (e.g. under ILUAs), and Aboriginal-owned cultural heritage service providers.

Finally, even were the approach taken to only allow delegation of support functions to LALCs, the Proposal Paper and Draft Bill is silent on what would occur if there are multiple LALCs which elect to take on a support role to a Local ACH Consultation Panel, where the Local ACH Consultation Panel area crosses LALC boundaries (noting a decision has not been made on Panel boundaries). The Regulations should address what would occur if this is the case.

Recommendations 12 – 13:

- ***Regulations made under section 13 should permit the ACH Authority to delegate the functions of co-ordinating the establishment and supporting the operation of Local ACH Consultation Panels to the organisation they consider best suited to the role on a case-by-case basis, whether that be a LALC or other organisation.***
- ***Regulations made under section 13 should provide that, in so delegating those functions, the ACH Authority must consult each Local ACH Consultation Panel as to the appropriate support organisation, and, where a preference is given by the Local ACH Consultation Panel, follow that preference.***

Both the Proposal Paper and Draft Bill are silent on whether there will be funding provided to organisations taking on a support role to Local ACH Consultation Panels. Whatever organisation takes on this support role, without additional resourcing, they will have to abandon existing projects and priorities to take on this role. It is entirely inappropriate for local organisations to face a choice between abandoning existing endeavours or taking a role in supporting the new framework, with the knowledge that if they fail to do the latter, Local ACH Consultation Panels may be left incapable of performing their functions.

> ***Recommendation 14: Organisations taking on support roles of Local ACH Consultation panels should be specifically and adequately resourced by government for that support role.***

Part 3 – Aboriginal cultural heritage declarations and information

Scope of Declarations

The expanded scope of the new Declared ACH (ie. compared to the existing Aboriginal Place process) in s 18 is a welcome development. The proposed s 18(1), which outlines the criteria for classification as Aboriginal cultural heritage, is comprehensive as it includes objects, land, ancestral remains or 'any other tangible material relating to Aboriginal life or historical events.'[3] This broad scope aligns with the main aims of the Draft Bill by recognising and enhancing the protection and conservation of ACH of a variety of sources of this heritage.[4]

Process for nomination of Aboriginal Cultural heritage

The Committee does not consider the process for the nomination and approval of Declared ACH to be satisfactory. In order for there to be genuine control of the process by Aboriginal people, final approval should be at the hands of the ACH Authority, and not the Minister. It is not sufficient for the ACH Authority to only be empowered to make a recommendation regarding a declaration, with the final approval remaining with the Minister. The justification provided in the Proposal Paper for why the Minister has this role (ie. that it can be declared over public and private land, and that it provides a high level of permanent protection)[5] is not compelling.

The proposal that the ACH authority should consult with local ACH consultation panels, landholders or owners of any object concerned before making recommendations is a beneficial provision, however it would align more with the aims of the act of promoting participation and enabling decision-making by Aboriginal

[3] Ibid.
[4] Office of Environment and Heritage, A proposed new legal framework: Aboriginal cultural heritage in New South Wales, Proposal Paper (2017).
[5] Ibid 31.

peoples[6] if the Minster was not vested with final approval.

Additionally, without a definitive deadline or timeline for the determination of whether to approve Declared ACH, the decision-making process may be lengthy, which could hinder the protection of ACH.

Recommendation 15: A deadline for determination of whether to approve Declared ACH should be included in section 18.

Public and Private ACH

Section 18(5) of the Draft Bill indicates that Declared ACH may include public or private land, objects or materials. However, neither the Proposal Paper nor the Draft Bill contain sufficient details about the role of private (or for that matter public) landowners in the nomination process. This may result in conflict with private owners of proposed ACH. For example – what happens if the ACH Authority/Local ACH Consultation Panel cannot reach a negotiated outcome on a Declared ACH Nomination (including where the landowner refuses from the outset to consider the nomination)? Although it is not legislatively required, the current practice appears to be that ACH will not be declared on private land without the consent of the landowner. This provides a significant barrier in recognising ACH which should be resolved in the Draft Bill.

Recommendation 16: A different structure or strategy should be considered and included to facilitate interaction between the ACH authority and private land or object owners to minimise conflict and ensure ACH is protected.

Mandatory Considerations

The Draft Bill is silent on what mandatory considerations are to be taken into account when determining whether to approve a Declared ACH nomination. Section 18(4) only notes that the ACH Authority in making a recommendation must have regard to the regulations or the ACH strategic plan[7] (despite the Proposal Paper noting that the Draft Bill would provide transparency around the matters to be considered by the ACH Authority in making a recommendation[8]). In the absence of mandatory considerations in the Draft Bill, both the regulations and the ACH strategic plan will be critical to the integrity of the Declared ACH process, and the sufficiency of the Declared ACH nomination process cannot be fully considered without them.

Recommendation 17: Section 18 should specify the mandatory considerations of the Minister when determining a Declared ACH nomination.

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[6] Office of Environment and Heritage, A proposed new legal framework: Aboriginal cultural heritage in New South Wales, Proposal Paper (2017).

[7] Draft Bill Pt 3 s18.

[8] Office of Environment and Heritage, A proposed new legal framework: Aboriginal cultural heritage in New South Wales, Proposal Paper (2017) 31.

Information System

The Committee considers that the proposed ACH Information System, to be administered by the ACH Authority, seems sound and a significant improvement on the AHIMS system. The inclusion of both a restricted access database and a public online portal for public sharing of information[9] will promote public participation. Particularly positive is the ability for there to be a restricted access database and a tightly controlled public online portal.[10] This will go some way to alleviating the concerns of community members in relation to having the location or other sensitive information about the most important cultural sites on publicly available registers to not put the most important sites on cultural heritage registers. 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) and if all members of the community with cultural heritage knowledge will be comfortable having it placed on the ACH Information System.

ACH Mapping, Strategic plans and state of ACH reporting

The Committee considers it appropriate that the exact nature and methodology of the NSW ACH Mapping is not proscribed by the Draft Bill, but rather left to be developed by the ACH Authority, as the details from Local ACH Consultation Panels come in (as is proposed in s 20).

In relation to ACH Strategic Plans, the requirement for strategic plans is a strong proposal, provided that Local ACH Consultation Panels will be appropriately resourced to do this in addition to and without detracting from their day-to-day role in negotiating ACHMP. The requirement for public authorities in s 21(3) to take into consideration relevant ACH strategic plans when exercising all aspects of their duties and functions is welcome. The Committee submits that this will embed consideration of ACH by public authorities into a broadened scope of the exercise of their functions.

The requirement to prepare State of ACH reports that address the matters in s 22(3) is supported, however the Committee suggests a shorter period of two years for the preparation of reports under s 22(1)(b) to ensure recommendations are considered in a timely manner and that the assessment of ACH and review of programs occurs frequently.

> ***Recommendation 18: Section 22(1)(b) be amended to require the preparation of a State of ARH report every two years.***

Part 4 – Conservation of Aboriginal Cultural Heritage

Part 4 of the Draft Bill regarding Aboriginal Culture Heritage Declarations and Information appears sound. The amendments to s 4B of the Heritage Act proposed in the Draft Bill, which provide that the ACH Authority

[9] Draft Bill Pt 3 s19.
[10] Ibid.

takes the place of the Minister in advising the Heritage Council on matters relating to Aboriginal cultural heritage[11] is appropriate.

Ownership and repatriation of ACH

With regard to s 24[12], the mechanism by which Aboriginal objects, previously determined to be the property of the Crown, are transferred to the ACH Authority to be held on behalf of Aboriginal people, appears sound. However, more information should be provided on what controls and safeguards will be placed on the ACH Authority to ensure the terms of this trust confer effective ownership to Aboriginal people at large. There remains a grey area regarding ACH (noting the expanded definition) falling outside the scope of the previous vesting in the Crown. It is unclear why there are no provisions vesting or confirming ownership of such cultural heritage with Aboriginal people; the Draft Bill only states that all Aboriginal objects are property of the ACH authority,[13] not the Aboriginal community members who may have traditional ownership over the specific ACH themselves. This falls short of the aim of the Proposal Paper to 'clearly establish that Aboriginal cultural heritage belongs to Aboriginal people'.[14]

In relation to s 25,[15] the repatriation process is welcome as it will fill a current regulatory gap (although OEH does carry out repatriation activities, there is no comprehensive legislative framework to regulate this). The provisions appear to be broad enough to allow the ACH Authority to deal with any repatriation opportunities as they arise, and the requirements of reasonableness and mandatory consultation with the Local ACH Consultation Panel are appropriate safeguards to ensure the powers are appropriately exercised.

> ***Recommendation 19: Provisions vesting or confirming ownership of ACH lies with Aboriginal people should be included in section 24 of the Draft Bill.***

Notification of ACH

In s 27,[16] there are some issues with the requirement to notify the ACH Authority of the location of tangible cultural heritage. As it applies to non-Aboriginal people, the retention of a notification requirement is appropriate, although it should be considered whether the appropriate body to be notified is the ACH Authority or the Local ACH Consultation Panel, noting that the latter is more likely to have particular knowledge of the cultural heritage in question and/or the context in which it is located. The Committee submits that an amendment should be made to the defence of believing the ACH Authority is aware of the

[11] Draft Bill sch 2 cl 2.
[12] Draft Bill Pt 4 div 1 s24.
[13] Ibid.
[14] Office of Environment and Heritage, A proposed new legal framework: Aboriginal cultural heritage in New South Wales, Proposal Paper (2017) 11.
[15] Draft Bill, Pt 4 div 1 s25.
[16] Ibid s27.

existence of the item to include the test of reasonableness, as currently exists in s 89A of the NPW Act. The requirement to notify should be sensitive to the existence of cultural protocols around the retention and limited transfer of knowledge around the subject ACH. The notification provisions should not detract from the power of Aboriginal people to conserve knowledge of intangible cultural heritage and to respond to newly discovered heritage.

Recommendations 20 – 22:

- ***The Local ACH Consultation Panel, rather than the ACH Authority, should be the body that is notified of the location of tangible cultural heritage.***
- ***The requirement to notify the Panel of the location of tangible cultural heritage should be sensitive to the existence of cultural protocols around the retention and limited transfer of knowledge around ACH***
- ***The defence of belief that the ACH Authority is already aware of the location of tangible ACH in section 27(2) should be subject to a test of reasonableness.***

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. The provisions for registration of ACH conservation agreements on title in ss 32-33 of the Draft Bill go towards ensuring the robustness and effectiveness of the agreements over time.

However the Committee recommends that the effectiveness of this Division may be strengthened by providing for the ACH Authority to consult with the Local ACH Consultation Panel where it intends to vary or terminate a conservation agreement (consistent with its obligation to do so when entering into such a conservation agreement under s 29(2).[17] Further, the power of the Minister to direct the ACH Authority to vary or terminate a conservation agreement in the event a mining or petroleum authority has been granted[18] should be removed, as should the accompanying exemption for mining and petroleum activities contained in s 35.[19] These provisions undermine the robustness of the conservation agreement regime, in particularly the certainty and security of protection afforded by agreements. It also fails to achieve the aim of placing Aboriginal cultural heritage in the control of Aboriginal people. It is inequitable that only the holders of mining or petroleum authorities are given the ability to request the Minister to effectively override a decision made by the ACH Authority and the relevant landowner/s (or previous landowner/s); they should be required to negotiate with the ACH Authority to vary or terminate the conservation agreement in the same manner as

[17] Ibid s 29(2).
[18] Ibid s 31(7).
[19] Ibid s 35.

any other person with an interest in the land would be required to, should they choose to conduct activities requiring such variation or termination.

The power to provide consent to development by public authorities on land subject to an ACH conservation agreement should also rest with the ACH Authority, rather than the Minister[20]. The control of this power by the Minister is inconsistent with the aim of placing Aboriginal cultural heritage in the control of Aboriginal people.

Recommendations 23 – 25:

- ***The ACH Authority should be required to consult with the Local ACH Consultation Panel before varying or terminating a conservation agreement.***
- ***The power of the Minister to direct the ACH Authority to vary or terminate a conservation agreement in the event a mining or petroleum authority has been granted should be removed, as should the accompanying exemption for mining and petroleum activities contained in section 35.***
- ***The power to consent to development by public authorities on land subject to an ACH conservation agreement should rest with the ACH Authority, rather than the Minister.***

Intangible ACH

The Committee supports the intangible ACH registration provisions in the Draft Bill and considers this to be a positive inclusion. Particularly, the ability of many different types of Aboriginal organisations to apply for registration of intangible ACH in s 37[21] gives an equitable and achievable practical aspect to the recognition of intangible cultural heritage in the proposed framework. It protects intangible ACH from being used for commercial purposes, thus preserving the integrity and spiritual significance of this heritage for Aboriginal peoples.

Part 5 – Regulatory System

The Committee submits that, in general terms, the ACH assessment and management pathway outlined in the Draft Bill is a much more robust and appropriate regime than that currently in place. However, the efficacy of the new pathway in practice, particularly in achieving the aim of local Aboriginal decision-making, will depend heavily on the robustness (including especially in terms of equality in negotiating and engaging with proponents) of Local ACH Consultation Panels, the completeness of cultural heritage mapping and the appropriateness of the ACHAP Code of Practice. These aspects are beyond the scope of the Draft Bill, and will be developed over time.

[20] Draft Bill s 34.
[21] Ibid s 37.

The Committee also retains some concerns about certain parts of the procedure set out in the Draft Bill, as detailed in the following recommendations. Subject to the satisfactory and appropriate development of the elements mentioned in the preceding paragraph, and the adoption of the recommendations proposed hereunder, the Committee supports the regulatory system proposed in Part 5 of the Draft Bill.

Offences

The feedback questions on p 40 of the Proposal paper suggest that the new low-impact defences created via regulation under s 43(1) will duplicate existing low impact activities. Given that they will permit harm to and destruction of cultural heritage without the input of the Local ACH Consultation panel, the low impact defences are extremely important. Therefore there should be wide public consultation on these defences independently, before any such regulations are drafted.

> ***Recommendation 26: There should be extensive public consultation undertaken in relation to additional 'low impact defences' to be created under section 43, prior to the drafting of any regulations creating such defences.***

The defence outlined in s 44 of the Draft Bill (which mirrors the current due diligence defence) depends on the robustness of the ACHAP Code of Practice. There are significant problems currently with the enforceability of the due diligence codes of practice, and there is a confusing overlap of the Due Diligence Code of Conduct with other policies and guidelines. It is important that the ACHAP Code of Practice is enforceable and easy to navigate for proponents and other stakeholders alike. The Committee recommends it should therefore be subject to extensive public consultation before it is adopted.

> ***Recommendation 27: There should be extensive public consultation undertaken in relation to the ACHAP Code of Practice, before it is finalised.***

Further on the proposed s 44 defence, the Committee submits that, logically, if the 4 stages of assessment in Div 4 of Part 5 are carried out, and the ACH authority determines heritage will be harmed, the s 44 defence should not be able to apply. The Committee recommends that the ACHAP Code of Practice should clearly reflect this and, for certainty, this should be clarified in the Draft Bill, by insertion into s 44.

> ***Recommendation 28: Provisions should be inserted into section 44 which provide that, if the assessment process of Div 4 of Part 5 has been carried out by a proponent and the ACH Authority, on review of the assessment provided, forms the view that cultural heritage will be harmed by the proposed action, the section 44 defence will not available in respect of the action. This should also be reflected in the ACHAP Code of Practice.***

ACHMPs

The Committee views the guidelines on negotiating ACHMPs, which will be contained within the ACHAP

Code of Practice (as per s 48(2)), as a key part of the new regulatory framework. The efficacy of ACHMP negotiations will determine the ability of Local ACH Consultation Panels to protect cultural heritage. The guidelines are key to ensuring that proponents engage in these negotiations in good faith and that there is not an imbalance of negotiating power between the parties. Therefore, whilst the broad statements on p 41 of the Proposal Paper are sound, it is impossible, without seeing the final ACHAP Code of Practice, for the Committee to properly evaluate whether the ACHMP negotiation process will provide an adequate mechanism for local communities to engage in cultural heritage assessments and protect cultural heritage.

The issue of potential imbalance of negotiating power further highlights the need for Local ACH Consultation Panels to be appropriately and independently resourced, so they are able to obtain the necessary expertise (eg. archaeologists, anthropologists, lawyers, geologists, etc) to ensure they are participating in ACHMP negotiations on a fully informed basis.[22]

Section 50 provides that the mandatory ACHMP negotiation timeframes will be provided in regulations, and commence on 'the date on which the proponent requests the Local ACH Consultation Panel to negotiate a plan'. As there is no trigger for this to occur in the Draft Bill (see below discussion on failure to integrate assessment and ACHMP processes), it is unclear whether this includes the assessment process, or only commences once an assessment has been provided to the satisfaction of the Local ACH Consultation Panel. Responding to the suggested timeframes for inclusion in the regulations outlined on p 35 of the Proposal Paper, if the assessment process is included, they are all far too short to allow for proper negotiation to occur. If it is not included, then they are more reasonable, although they fall short of the timeframes suggested by Aboriginal groups in the previous consultation (e.g. the 3 month timeframe previously suggested by NTSCORP).[23] The Committee submits that further consultation should therefore be undertaken on the negotiation timeframe, specifically targeted at identifying timeframes which allow negotiation to occur in a culturally appropriate manner, including time for the ACH Consultation Panel to consult with relevant knowledge holders as required.

Recommendations 29 – 30:

- ***The definition of 'negotiation period' in section 50 should be redrafted, to clarify whether it includes the assessment process.***
- ***Further consultation should be undertaken in relation to the duration of the negotiation period, before it is prescribed in regulations pursuant to section 50.***

The Committee supports the proposal that there be a deemed refusal if the minimum timeframe for determination is reached without decision (s 52(3)), particularly noting the last model proposed by OEH

[22] See Recommendation on page 13.

[23] http://www.environment.nsw.gov.au/resources/cultureheritage/achreform/Aboriginal-Orgn-Submissions.pdf.

involved a 'proceed with caution' approach in such circumstances.[24] It is consistent with the approach generally taken in planning law.

The Committee notes there is no indication in the Proposal Paper or Draft Bill whether ACHMPs will be made public. In the interests of transparency, and to allow for civil enforcement of ACHMPs, there should be a public register of ACHMPs, with redaction of such aspects as are necessary to maintain cultural integrity (ie. if the ACHMP refers to sensitive cultural values).

> ***Recommendation 31: A public register of ACHMPs should be created and maintained by the ACH Authority. ACHMPs appearing on the register should be redacted as necessary to maintain cultural integrity.***

The Committee notes that the three-tiered ACHMP proposal on p 43 of the Proposal Paper is not referred to in the Draft Bill. In the absence of provisions in the Draft Bill, the Committee assumes that proposal will be adopted within the ACHAP Code of Practice. If this is the case, there must be mechanisms to determine which tier of ACHMP should be used, and for resolving disputes between the proponent and the Local ACH Consultation Panel as to this.

> ***Recommendation 32: If the three-tiered ACHMP proposal is adopted within the ACHAP Code of Practice, the Code must include:***
>
> - ***a clear process for determining which tier of ACHMP should be used; and***
> - ***a dispute resolution process in circumstances where the proponent and the Local ACH Consultation Panel disagree as to which tier of ACHMP should be used.***

The Committee notes that, in s 52 of the Draft Bill, merits appeals will be available only to ACHMP applicants. The Committee submits that, if merits appeals are to be available, equity demands they be given to those seeking to reduce cultural heritage protection provisions in a determined ACHMP and those seeking to vary or increase them. This second class would certainly include Local ACH Consultation Panels, to account for circumstances where the ACH Authority imposes an ACHMP which departs from that negotiated or preferred position of the Local ACH Consultation Panel, or where the Local ACH Consultation Panel has not substantially negotiated an ACHMP at all. It should also extend to members of the Aboriginal community who are dissatisfied with an ACHMP agreed to by the ACH Authority (whether or not it has been one negotiated and agreed by the Local ACH Consultation Panel). Noting the potential problems associated with ensuring that a Local ACH Consultation Panel represents all the Aboriginal perspectives within its area, this would allow a final and limited opportunity for members of the community to attempt to protect cultural heritage where they are at odds with the decision of the Local ACH Consultation Panel. The Committee submits that to only allow merits appeal rights for ACHMP applicants would result in imbalance and inequity

[24] See p 32 of Reforming the Aboriginal Cultural Heritage System in NSW: A NSW Government model in response to the ACH Reform Working Party's recommendation and public consultation (OEH, 2013).

in the new framework, to the detriment of Aboriginal people seeking to protect their cultural heritage.

Recommendation 33: Section 52 should be amended to provide that merits appeals regarding ACHMPs are also available to Local ACH Consultation Panels and persons who have an interest in the cultural heritage being impacted by that ACHMP.

Assessment Pathway

The Committee notes that it is unclear from the Draft Bill how the cultural heritage assessment and ACHMP processes will fit together.

Section 46 refers to 'assessment and negotiation' prior to an ACHMP plan being approved, however it is unclear whether the assessment and negotiation are carried out subsequently or contemporaneously (see also comments above regarding negotiation timeframes, and the lack of clarity around whether they include assessment processes). Section 47 states that assessment must take place before an ACHMP is submitted for approval, but is silent on when those ACHMP negotiations must commence, and whether the assessment report and draft ACHMP are to be submitted subsequently or contemporaneously. The trigger for whether an assessment must move to stages 2 and 3 of the assessment process is that 'an ACH management plan is still required' (ss 56(2), 57(2)).

The Committee submits that both Divs 3 and 4 of Part 5 lack a clear indication of who determines an ACHMP is needed and when this determination takes place. The Committee recommends that the most logical solution (and the one which delivers control over assessment processes to local Aboriginal people) is to include at both stage 2 and 3, by insertion into ss 56 and 57 respectively, points at which the Local ACH Consultation Panel can determine that an ACHMP is required and, if after stage 3 they have not been able to make this determination, they refer the decision to the ACH Authority, to consider when they receive the assessment report after the completion of stage 4. This should be drafted so as to clarify when the 'negotiation period' in s 50 commences. In the Committee's view, negotiations should not be able to commence until at least stage 3 of the assessment process has been completed, so there will be enough assessment information available to allow the Local ACH Consultation panel to be informed when commencing ACHMP negotiations. The Committee submits that such a redraft would be consistent with the aim of delivering decision-making powers to Aboriginal people, since it would be the local representative body that determines if cultural heritage will be impacted.

Recommendations 34 – 37:

- ***Section 56(2) should be redrafted to provide that the Local ACH Consultation Panel must determine, after Stage 2 of the assessment process, whether an ACHMP may still be required.***
- ***Section 57(2) should be redrafted to provide that the Local ACH Consultation Panel must***

determine, after Stage 2 of the assessment process, whether an ACHMP may still be required.

- ***An additional provision should be added to section 58(2) which requires the proponent to provide, with the assessment report, a copy of any determination/s received from the Local ACH Consultation Panel as to whether an ACHMP may be required.***
- ***Provisions should be drafted linking the assessment process to the negotiation period defined in section 50. The Committee's recommended provision is that the proponent may request ACHMP negotiations with the Local ACH Consultation panel at any point in time after stage 3 of the assessment process has been completed.***

In the process for review of an assessment report in s 59(3) provides that the ACH Authority may require only one further assessment to be undertaken in reviewing a report. The rationale for this is unclear: what is the ACH Authority to do if, after that further assessment, if it is still not considered to be compliant with the ACHAP Code of Practice? The Committee submits that, instead, the ACH Authority should either be able to request reviews as many times as is necessary until a compliant assessment is received, and/or be able to advise, after receipt of a further assessment, that it remains non-compliant.

It is also unclear why failure of the ACH Authority to review an assessment report within the timeframe required effectively results in 'a deemed approval' (s 59(2)(b)). The Committee notes this is at odds with normal practice in planning law, where such failure would result in a deemed refusal (see, for example, cl 113 EPA Reg). Accordingly, s 59(2)(b) should be removed, and replaced with a deemed refusal provision.

It is difficult in advance, before seeing the detail required to be in assessment reports (which will be contained within the ACHAP Code of Practice) and the frequency of assessment reports being submitted, for the Committee to form a view whether the 10 day timeframe the ACH Authority has to review an assessment report is sufficient. To allow for circumstances where this 10 day timeframe is not sufficient, the Committee suggests s 59 should include the power of the ACH Authority to extend this timeframe where circumstances require. The Committee suggests that it may be appropriate to specifically review this timeframe after all the provisions of the Draft Bill have commenced.

Recommendations 38 – 41:

- ***Section 59(3) should be removed and replaced with provisions permitting the ACH Authority to continue to require further assessments be undertaken if they continue to consider the assessment report provided does not meet the assessment requirements. These provisions should also enable the ACH Authority, after one or more further assessments have been provided, to advise the proponent that their assessment report is not compliant.***
- ***Section 59(2)(b) should be removed, and replaced with provisions providing that, if an***

ACH Authority does not provide advice to the proponent within 10 business days (or longer, as per the following recommendation), the ACH Authority is deemed to have determined the assessment report is not compliant with assessment requirements.

- ***Provisions should be inserted into section 59 which allow the ACH Authority to extend the 10-day review period if required.***
- ***After the legislation has commenced, the 10-day review period within section 59(2)(a) should be the subject of a review to determine whether it is a workable and appropriate timeframe in practice.***

The Proposal Paper indicates on p 39 that powers will be introduced to establish an unexpected finds policy. The Committee considers that such a standardised policy would be beneficial, compared to the current approach where each proponent develops one on a case by case basis. However, we could not identify where such powers have been specifically provided for in the Act, as prefaced in the Proposal Paper. In any case, given that the unexpected finds policy would be a key fail-safe to protect cultural heritage in the event the assessment process fails to identify it, and to provide certainty to developers as to what actions they should take, the Committee recommends that it should be included in the Draft Bill itself. It is particularly important in respect of subsurface cultural heritage. The unexpected find policy, whether included in the Draft Bill or in later regulations or policies, should be the subject of specific consultation, to ensure that it is sufficiently robust in the opinion of all stakeholders.

Recommendation 42: The standardised unexpected finds policy should be developed after a specific consultation process. The policy, once developed, should be drafted into the legislation.

As noted above, the Committee considers that the ACHAP Code of Practice (referred to in s 54) is particularly critical, given that the Draft Bill does not include the real 'nuts and bolts' of how assessment will take place. The assessment process is currently the biggest cause of conflict among Aboriginal stakeholders and between Aboriginal stakeholders and proponents (and a cause of delay for proponents). Particularly, a system where a proponent can impose a choice of assessment tier, or a decision that harm can be avoided, or produce an assessment report that is not considered sufficient, regardless of the views of the Local ACH Consultation Panel, will not be a system where Aboriginal communities are empowered and have control of and informed participation in decision-making. Accordingly, the Committee makes the following recommendations for provisions the ACHAP Code of Practice should include (or alternatively, things which could be inserted into Divs 3 and 4 of Part 5), which are not canvassed within the Proposal Paper.

Recommendation 43: In addition to the provisions suggested in the Proposal Paper, the ACHAP Code of Practice should include the following:

a. A minimum standard for cultural heritage assessment;

b. ***A requirement for field surveys to be conducted and for local knowledge holders (as put forward by the Local ACH Consultation Panel) to be present for field surveys conducted;***

c. ***A mechanism to allow Local ACH Consultation Panels to publicly call for interested parties to come forward to be involved in the assessment process, where they deem it necessary; and***

d. ***A mechanism to deal with differences of opinion as to whether an ACHMP is required.***

Integration with Planning Legislation

The Committee supports the proposal to amend s 4.46 (formerly s 91) of the EPA Act to provide that development requiring an ACHMP is integrated development, and considers this a sound mechanism for ensuring that the new cultural heritage assessment regime is incorporated into the development assessment process under that Act.

The Committee submits that the integration of cultural heritage assessment and approval processes with the planning system as proposed in the Bill creates a new timeline which will help alleviate problems currently faced by Aboriginal stakeholders seeking to prevent or mitigate impacts to cultural heritage from development. Currently, the only engagement with Aboriginal stakeholders is in seeking information for a cultural heritage assessment, often performed quite late in the development assessment process, if prior to lodging a development consent at all. Often, consultation only occurs when proponents commence AHIP application assessment procedures, normally after, and sometimes well after, the development application has been submitted and/or approved. This leads to two related problems:

1. Heritage assessment and approval being seen as a separate (and often secondary) process to other assessment and approval processes, meaning it is given less importance, and considered a merely procedural rather than substantial process (a perspective which is enhanced by the extremely high AHIP approval rates under the current regime); and

2. Even where proponents wish to genuinely engage in cultural heritage assessment, the fact that it takes place after a development has been otherwise assessed and approved means there is often reluctance (or, particularly in the case of development already approved, an inability) to amend the proposed development to avoid or mitigate harm to or destruction of cultural heritage values.

Whilst these problems will not be completely solved simply by bringing cultural heritage assessment and approval processes earlier in the development assessment timeframe, the Committee notes it would likely make them less pronounced than currently (although attitudinal change among developers and assessment consultants may be a regrettably slow process).

The Committee submits that the provisions in s 61 which require proponents to disclose their cultural heritage assessment and ACHMP requirements in applying for development consent is an appropriate way to support this integration, and will ensure that consent authorities are appropriately informed as to whether the application needs to be referred to the ACH Authority. The circumstances in s 61(2)(b) which a draft ACHMP, rather than a finalised ACHMP, may be supplied are appropriate to avoid unnecessary delays for proponents.

Where an ACHMP has not been finalised prior to a development consent being lodged, the ACH Authority will presumably need to provide the consent authority with proposed terms of approval. In these circumstances, the Committee recommends that there should be provisions in Div 5 of Pt 5 (or in later Regulations) that the ACH Authority must consult with the Local ACH Consultation panel before providing these terms of approval. This will ensure that Local ACH Consultation panels are still involved in making decision about impacts on cultural heritage, in circumstances where an ACHMP has not been finalised or approved within the statutory timeframes.

> ***Recommendation 44: Provisions should be inserted into Div 5 of Pt 5 (or in Regulations following) that the ACH Authority must consult with the Local ACH Consultation Panel before providing terms of approval to a consent authority.***

The Committee strongly submits that the (continued) exclusion of SSD and SSI from the cultural heritage assessment and ACHMP processes (by virtue of amendments to ss 4.41 and 5.23 of the EPA Act (formerly ss 89J and 115ZG)) is not acceptable. The Committee notes that SSD and SSI are generally activities that involve significant land disturbance, and have generally been the sites where disputes regarding cultural heritage assessments are most prevalent, and where large-scale destruction of Aboriginal cultural heritage, against the wishes of the Aboriginal community, have occurred. There are numerous case studies to illustrate this. Accordingly, the Committee submits that a framework which actually creates Aboriginal control of decision-making must include all development involving significant disturbance and destruction of cultural heritage. The justification for this exclusion is that other types of assessment are excluded from applying to SSD and SSI (see p 42 of the Proposal Paper). However Aboriginal cultural heritage is unique and the Committee considers it is appropriate that it be dealt with in a unique manner.

The Proposal Paper at p 40 suggests that SEARs which incorporate the assessment pathway will be developed. The Committee notes it is difficult to see how this statement can be correct given the assessment pathway, leading to negotiation of ACHMPs, ultimately gives the ACH Authority the ability to say no to projects (by refusing to register an ACHMP), which would not be possible to integrate into SEARs.

If it is considered absolutely necessary, despite the above, to maintain some form of exemption, the Committee recommends that it would be more appropriate that an ACHMP be included within ss 4.42 and 5.24 of the EPA Act (formerly ss 89K and 115ZH) as an approval that must be granted consistently with an

SSD approval, which would leave the option open for a proponent to engage in the assessment and ACHMP process up front if they so choose, or to do it after, knowing that an ACHMP must be granted by the ACH Authority if the assessment process if properly followed. Bringing SSD and SSI within the scope of the ACHMP system would also assist with achieving consistency across cultural heritage and assessment process, since all conditions would be contained within ACHMPs approved by the ACH Authority. This would assist in providing certainty (at least within broad parameters established by practice) to the Aboriginal community and industry alike as to the likely conditions imposed on development.

> ***Recommendation 45: The proposed amendments to ss 4.41 and 5.23 of the EPA Act should be replaced by amendments removing references to Aboriginal cultural heritage approvals from the SSD and SSI provisions of the EPA Act entirely. An alternative, less preferred by the Committee, would be move the references to Aboriginal cultural heritage approvals to ss 4.42 and 5.24.***

Part 6 – Financial Provisions

The proposal to utilise the ACH Authority to administer a new, consolidated ACH Fund[25] is concerning. The Committee supports the establishment and use of the ACH Fund for the purposes of conservation priorities. However, the provision of money to the ACH Fund should be separate from the provision of money to the ACH Authority (and Local ACH Consultation Panels, funding for which seems absent from the Bill), which is required to properly administer the new framework. Funding for administration of the new framework should be as per normal governmental funding arrangements, given that this work is commensurate with administration roles undertaken by government departments with responsibilities to administer other legislation (for example, OEH's role currently under the provisions of the NPW Act[26]).

> ***Recommendation 46: Funding for the administration of the ACH Authority to properly administer the new framework should be as per normal governmental funding arrangements, and should be separate from the ACH Fund.***

Part 7 – Regulatory Compliance Mechanisms

The retention of emergency regulatory compliance measures under Part 7 (stop work orders, interim protection orders, remediation orders) similar to existing measures is supported by the Committee, as is the extension of the scope of remediation orders. However, it should be noted that these emergency measures have been seldom exercised despite requests from members of the Aboriginal community, and therefore improvement in administration is needed. This may be achieved by placing the power to impose all

[25] Cultural Heritage Bill, above n 31, Pt 6.

[26] *National Parks and Wildlife Act 1974* (NSW) Pt 10.

emergency measures with the ACH Authority rather than with OEH.

Recommendation 47: Sections 78 - 81 should be amended to provide that the ACH Authority can make and give notice of interim protection orders.

Part 8 – Investigative powers

The Committee considers that the proposal to grant investigative and enforcement powers to the ACH Authority is sound. It is noted that OEH will likely assume this responsibility on the ACH Authority's behalf until the ACH Authority has built capacity to do so (see p 49 of the Proposal Paper). Given the paucity of trust the Aboriginal community has, from experience, with OEH's ability to effectively exercise an enforcement role, this transition should occur as soon as is possible.

The scope and detail of investigation powers provided under this Part seem sound, and are broadly the same as the equivalent EPA Act powers (Div 9.2 EPA Act)

Part 9 – Criminal and Civil Proceedings

Criminal Proceedings

The Committee considers the provisions around criminal proceedings in Div 2 of Pt 9 of the Draft Bill to be sound. The Committee notes that the maximum penalties for offences are similar to those for existing comparable offences.

Civil Proceedings

The Committee considers that the civil proceedings provisions of Div 2 Part 9 are generally sound, subject to the recommendations below.

The Committee particularly notes that the open standing provisions of ss 132 and 134 will allow Aboriginal communities and Local ACH Consultation Panels to take action to protect cultural heritage where the ACH Authority is unwilling or unable to do so. However, to further ensure this, s 133(1) should be amended to similarly allow any person to take action for a breach, or apprehended breach, of a conservation agreement or ACHMP (this may require consequential amendments to 133(3), to clarify to whom damages may be awarded).

The Committee notes that s 133(1)(b) provides that proceedings for breach of an ACHMP may only be brought in regards to provisions relating to conserving or minimising harm to cultural heritage. The rationale for so limiting enforceability is unclear, and the Committee is concerned it has the potential to undermine the enforceability of ACHMPs, particularly in relation to benefits provided to local ACH Consultation Panels. The

Committee therefore recommends that this limitation should be removed. Such removal would render the second limb of s 133(1)(b) unnecessary. The Committee submits that this may be advantageous because that second limb indicates that proceedings can only be taken when a proponent 'has relied on the authority conferred by the plan to harm Aboriginal cultural heritage'. This limits the ability to restrain a breach of an ACHMP in advance of harm occurring, and it would be preferable to allow proceedings be permitted prior to harm actually occurring (in the nature of proceedings for an apprehended breach).

Recommendations 48 – 49:

- ***Section 133(1) should be amended to allow any person to take proceedings to enforce an ACH Conservation Agreement or ACHMP.***
- ***Section 133(1)(b) should be amended to allow civil enforcement proceedings in respect of a breach of any provision of an ACHMP. In the alternative (and less preferred by the Committee) section 133(1)(b) should be amended to provide that proceedings can be taken to prevent harm to cultural heritage occasioned by an ACHMP in advance of that harm occurring.***

Procedural Provisions

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

The Committee also particularly supports the provisions in s 146 that a landholder is taken to have caused an offence unless they can demonstrate another person (without the landholder's permission) carried out the activity constituting the offence. There have been instances in practice where OEH have advised complainants that, although they are satisfied an offence has occurred in the recent past, they will not prosecute because they cannot establish who carried out the activity constituting the offence.

Part 10 – Native Title & Other Issues

Implementation

The Committee supports the proposal to ‘switch on’ the parts of the proposed framework in a staged manner (see pp 50-51 of the Proposal Paper), to allow the ACH Authority and the Local ACH Consultation Panels to build capacity, as it will assist in ensuring that the system is robust and furthers the empowerment of Aboriginal people in making decisions on their cultural heritage. However, it is unclear from the Proposal Paper and the Draft Bill how this will be administered (eg. by regulation, or at the discretion of the OEH, Minister, or ACH Authority). The Committee recommends that clarity around this should be provided, to give the Aboriginal community faith the reforms will be introduced in a timely manner. This is imperative, given it

is likely the length of the transition period will likely be a source of concern and frustration to the many Aboriginal people who are entirely disenchanted with the current cultural heritage regime, and may perceive it as a way of further delaying the long-promised reforms.

The Committee notes that there is a real risk, given the length of the transitional period, that there will be a 'proponent rush', in which AHIPs will be applied for well ahead of time to avoid ACHMPs having to be negotiated. The Committee recommends that measures should be developed to mitigate against this, for example, immediately introducing guidelines that require OEH not to grant AHIPs unless it is demonstrable the activities subject to the AHIPs will or are intended to commence in advance of the new ACHMP process being switched on.

Given that the reforms will disband the ACHAC (see Sch 3 of the Draft Bill), the Committee suggests it may be appropriate to include in the Draft Bill and/or in the NPW Act, measures ensuring regular consultation and collaboration between the Minister administering the NPW Act and the ACH Authority in the interim until the new regime is entirely 'switched on'.

Recommendations 50 – 52:

- ***Clarity should be provided as to how and by whom the staged implementation process will be administered.***
- ***Measures should be developed to avoid proponents from side-stepping the requirement to negotiating an ACHMP by unnecessarily applying for AHIPs well in advance of the activity to which the AHIP applies. A suggested measure is to introduce guidelines instructing OEH not to grant AHIPs unless the application demonstrates that they genuinely require the AHIP in advance of the new approval regime commencing.***
- ***Measures should be considered to facilitate regular consultation between the ACH Authority and the Minister administering the NPW Act during the interim period between the formation of the ACH Authority and the complete commencement of the new regime.***

Native Title

The Draft Bill states at s 152 that the legislation will not affect the operation of the NTA 'in respect of the recognition of native title rights and interests' or in any other respect. However the Committee notes that there will nevertheless be interactions between the new cultural heritage framework and native title rights and interests. Particular examples of this include:

1. What happens if a native title determination recognises a right to protect cultural heritage? How will the proposed legislation reflect and preserve these rights? What will occur if the exercise of such rights conflicts with the provisions of a negotiated ACHMP? The Committee notes that such native

title rights have been recognised in NSW in the Western Bundjalung,[27] Barkandji,[28] Yaegl,[29] Bandjalang,[30] Gumbaynggirr,[31] and Githabul[32] native title determinations.

2. What happens if an ILUA provides for an alternate procedure (see subdiv D of Div 3 of Part 2 of the NTA), which includes procedures for assessing and managing impacts to cultural heritage for specified activities? How will the proposed legislation reflect these processes, established through the NTA? The Committee understands that there are multiple ILUAs in NSW which include alternate procedures.
3. How will a proponent manage ACHMP negotiations if an activity also triggers the right to negotiate provisions of the NTA, given this will entail simultaneous negotiations about the same activity?

The Committee submits that the Draft Bill should detail how these interactions will occur. Without this, there is a grey area, which may lead to uncertainty for native title holders, other Aboriginal people and for proponents navigating the regime.

Recommendation 53: Provisions should be drafted around the interaction of the new cultural heritage framework and native title rights and interests, including:

(1) Interactions with native title rights to protect cultural heritage;

(2) Interactions with alternate procedures created under ILUAs; and

(3) Interactions with NTA right to negotiate processes.

[27] *Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at para 5(h).

[28] *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 at para 6(g) and *Barkandji Traditional Owners #8 (Part B) v Attorney-General of New South Wales* [2017] FCA 971 at para 6(g).

[29] *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647 at para 5(i) and *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993 at paras 6(c) and 7(b).

[30] *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278 at para 3(d).

[31] *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851 at para 9(e) of Annexure A.

[32] *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 at para 3(v).

THE LAW SOCIETY OF NEW SOUTH WALES
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Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:

David Turner

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:

Alistair Knox

Chair

NSW Young Lawyers Environment and Planning Law Committee

Email: envirolaw.chair@younglawyers.com.au