

**Submission
No 295**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: NSW Aboriginal Land Council

Date Received: 14 July 2021



**New South Wales
Aboriginal Land Council**
ABN 82 726 507 500
alc.org.au

Dear Committee Members,

Inquiry into the *Heritage Act 1977 (NSW)*

Thank you for the opportunity to provide input into this inquiry (**Heritage Act**).

Our cultural heritage and landscapes are being destroyed at alarmingly high rates and are under increasing threat. Many Australians have expressed outrage at the severely deficient legislative regimes that allow the destruction of Aboriginal cultural heritage across the Country every day.

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples across NSW and with over 23,000 members, is the largest Aboriginal member-based organisation in Australia. NSWALC, and the network of 120 Local Aboriginal Land Councils (**LALCs**) across NSW, work to improve, protect and foster the best interests of all Aboriginal peoples in NSW.

The Land Rights Network is the key vehicle to deliver social, cultural and economic outcomes to Aboriginal communities and is the framework for achieving self-determination in NSW. NSWALC is focused on building a better future for Aboriginal people by unlocking the full potential of our three greatest assets; the land we reacquire, our culture and heritage, and our people.

Laws relating to the protection and promotion of Aboriginal cultural heritage (**ACH**) are outdated, ineffective, inadequate, and are in need of urgent, significant reform.

In NSW, currently the key law relating to Aboriginal cultural heritage is the *National Parks and Wildlife Act 1974 (NPW Act)*, however the *Heritage Act 1977 (Heritage Act)*, *Environmental Planning and Assessment Act 1979 (EP&A Act)*, and related land use and water laws have important roles to play.

These laws all require reform to ensure Aboriginal people make decisions about Aboriginal cultural heritage, and enshrine increased and appropriate protections and penalty regimes.

Currently, Aboriginal heritage provisions are not well integrated within the planning, land use and development processes in NSW. This has resulted in a reactive system that often does not consider Aboriginal heritage until after the development assessment process or when Aboriginal heritage is under immediate threat of destruction.¹ The high rates of destruction of Aboriginal sites, both ‘approved’ and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of Aboriginal peoples to connect with a living culture and create wellbeing and healthy communities. Our sites must be protected to provide Aboriginal people with opportunities to strengthen and maintain culture, now and in the future.

¹ Hunt, J. (2020), Cultural vandalism: Regulated destruction of Aboriginal cultural heritage in New South Wales. Topical Issue No. 3/2020, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra. <https://doi.org/10.25911/5ef088fdc313f>

ALWAYS WAS ALWAYS WILL BE ABORIGINAL LAND

Head office	Western Zone	Northern Zone	Northern Zone (Tamworth)	Eastern Zone	Southern Zone	Far Western Zone
Level 5, 33 Argyle Street Parramatta NSW 2150	2/36 Darling Street Dubbo NSW 2830	Suite 5, Level 1 66-90 Harbour Drive Coffs Harbour NSW 2450	2/158 Marius Street Tamworth NSW 2340	Suite 23, 207 Albany Street North Gosford NSW 2250	Unit 22, 2 Yallourn Street Fyshwick ACT 2609	Ground Floor Suite 49 Oxide Street Broken Hill NSW 2880
PO Box 1125 Parramatta NSW 2124	PO Box 1196 Dubbo NSW 2830	PO Box 1912 Coffs Harbour NSW 2450	PO Box 890 Tamworth NSW 2340	PO Box 670 Gosford NSW 2250	PO Box 619 Queanbeyan NSW 2620	Ph: 08 8087 7909 Fax: 08 8087 3851
Ph: 02 9689 4444 Fax: 02 9687 1234	Ph: 02 6885 7000 Fax: 02 6881 6268	Ph: 02 6659 1200 Fax: 02 6650 0420	Ph: 02 6766 4468 Fax: 02 6766 4469	Ph: 02 4337 4700 Fax: 02 4337 4710	Ph: 02 6124 3555 Fax: 02 6280 5650	

Overall, the *Heritage Act* does not currently meet Aboriginal community aspirations for protection of and decision making about ACH. The *Heritage Act* does not enshrine decision making rights for Aboriginal people about ACH, fails to embed and promote Aboriginal people's understandings of ACH, and does not include safeguards to ensure cultural sensitivities are appropriately managed.

While the development of comprehensive new Aboriginal cultural heritage laws are needed, there are opportunities to improve the *Heritage Act* to complement existing and new ACH laws. In relation to new dedicated ACH laws, we note the NSW Government has indicated there is a separate process under way to develop these.

The State Heritage Register (SHR) provides some protections for 'listed' ACH, however, in practice this mechanism has not been widely used and protects only a very small number of ACH sites. While the SHR listing can be an important mechanism to provide protections, improvements are needed to better protect the diversity of ACH across NSW in line with the wishes of Aboriginal communities.

Importantly, decisions about Aboriginal cultural heritage must be made by Aboriginal people to ensure continued custodianship and protection for future generations.² In this regards, we note that the draft *Aboriginal Cultural Heritage Bill 2018 (Draft ACH Bill)* proposed that an Aboriginal body would act in the place of the Heritage Council to:

- Make recommendations to the Minister on the listing of items on the State Heritage Register that relate to Aboriginal cultural heritage, and
- determine applications for approval of actions that would affect any such listed items.

NSWALC advocates for Aboriginal people to make decisions about ACH, rather than a Minister. However, placing responsibility for ACH matters under the *Heritage Act* in the hands of an Aboriginal body, rather than the Heritage Council, would be an improvement. It will also be important that any revised *Heritage Act* improves interactions with planning laws and new ACH laws being developed. Resourcing Aboriginal Land Councils and Aboriginal communities to protect ACH for future generations provides a key opportunity to strengthen culture and local communities.

Furthermore, we urge the Committee to broaden understandings of 'significance' from archaeological understandings, to holistic Aboriginal understandings of Country, and living Aboriginal cultures. It is fundamental that the richness and diversity within and between our peoples, cultures, and languages (both contemporary and historical) are recognised for their significance as determined by our peoples. In this regard, we note that the draft ACH Bill proposed improved definitions for ACH.

NSWALC has long advocated for improved ACH laws in NSW, and has consistently highlighted the deficiencies in the current regimes.

We note that have been numerous reviews and inquiries into the reform of Aboriginal culture and heritage laws since in 1978. All of the reviews³ have supported:

- Aboriginal ownership and the right of Aboriginal peoples to control their culture and heritage recognised in separate stand-alone legislation, and
- Independent Aboriginal controlled bodies to make decisions, with decentralised control of Aboriginal culture and heritage with the day-to-day management responsibilities are invested in local Aboriginal people, and Aboriginal understandings and definitions of what is culture and heritage.

² See for example, paragraphs 20 to 24 of the Outcome document of the World Conference on Indigenous Peoples which refers to the rights and interests of Indigenous Peoples pertaining to our lands, territories, cultural sites and other resources

³ See: <https://alc.org.au/wp-content/uploads/2019/12/110215-our-sites-our-rights-final.pdf>

NSWALC recommends that new laws relating to ACH must:

- a) Strengthen self-determination and empower Aboriginal people;
- b) Be led by Aboriginal people;
- c) Be inclusive and respectful of cultural and native title rights;
- d) Build on existing structures of land rights and native title;
- e) Be independent of government;
- f) Improve ACH protection, promotion & repair, including rights to say no (free, prior, informed consent) including approaches to protection, regulation, intangible ACH, knowledge, languages, cultural access & use, repatriation, water, cultural practices;
- g) Have no detrimental impacts to land rights, native title or ACH

Furthermore, the management of Aboriginal culture and heritage is inextricably linked with Country. It would be remiss not to acknowledge this relationship and the need to recognise the need for broader reform regarding land and water management. We note Dr. Terri Janke has highlighted key deficiencies in current laws relating to Aboriginal knowledge.⁴

It is important to acknowledge that Aboriginal Land Councils are owners of some properties listed under the *Heritage Act*. We note the discussion paper includes some proposals to 'incentivise' heritage protection. Any such proposals will need to be carefully designed to ensure that important heritage protections remain in place, while not unduly burdening owners of heritage listed properties. We do note, however, that the current *Heritage Act* includes a number of economic considerations and exemptions, including ensuring that listings do not cause undue financial hardship. We would welcome the opportunity to provide further input regarding this.

We urge the committee to ensure that:

1. Laws relating to ACH protection and promotion are designed and delivered with representative Aboriginal community-controlled organisations and Aboriginal communities. This is in line with the NSW Government's existing commitments under the National Agreement on Closing the Gap
2. Governments partner with us to develop and implement broader reforms that uphold our rights to self-determination, and free, prior and informed consent.

Thank you for the opportunity to provide these comments. NSWALC is committed to working to develop reforms and solutions to deliver better protections for ACH in NSW and empower Aboriginal people. We would welcome the opportunity to provide further inputs as the Inquiry progresses. Please contact us on 9689 4444 or policy@alc.org.au.

Sincerely,

Yuseph Deen
Chief Executive Officer
NSW Aboriginal Land Council

Date: 14 July 2021

⁴ Dr. Terri Janke and Maiko Sentina, *Indigenous Knowledge: Issues for Protection and Management*, IP Australia, Commonwealth of Australia, 2018