

# A proposed new legal framework

Aboriginal cultural heritage in NSW



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## Ministers' foreword

The Aboriginal and Torres Strait Islander people of Australia are custodians of the world's oldest continuous living culture. Their culture has been kept alive and passed from generation to generation through ceremony and ritual, dance and art extending across time and embedded in the land, plants and animals, waters and sky.

For too long, Aboriginal cultural heritage (ACH) in New South Wales has been viewed as an archaeological artefact, rather than a living and dynamic culture to be celebrated. This view is reflected in the State's laws for protecting and regulating Aboriginal cultural heritage. The primary Act for protecting and regulating Aboriginal cultural heritage in New South Wales is the *National Parks and Wildlife Act 1974*, an arrangement that is outdated, offensive to Aboriginal people, and out of step with other jurisdictions. Crucially, Aboriginal people have no authority to make decisions about how their own cultural heritage is protected, and the Act's regulatory requirements create uncertainty and complexity for industry, landowners, Aboriginal people and the broader community.

In 2011 the NSW Government committed to reforming the way Aboriginal cultural heritage is managed and to create a standalone Aboriginal Cultural Heritage Act. We began by asking Aboriginal communities and key stakeholders what needed to be addressed, and set up an independent Aboriginal Culture and Heritage Reform Working Party to recommend a way forward.

In 2013 we released a draft reform model for public comment. The feedback we received showed strong support for reform among all stakeholders, but also wide-ranging and often contrasting views about core elements of the proposed model. After careful consideration and further targeted discussions with key stakeholders, we revised the 2013 model and are preparing the draft Aboriginal Cultural Heritage Bill explained in this document.

We acknowledge this has been a lengthy process, but we need time to get it right. And there are still some steps to take.

The draft Bill is our next major step. It will present a transformative, contemporary and respectful vision for the management of Aboriginal cultural heritage in New South Wales. It will explicitly recognise Aboriginal custodianship of ACH, and afford Aboriginal people genuine decision-making authority. It will establish clearer pathways for assessing ACH values in the landscape, and offer more flexible and effective conservation and management options. In short, it will offer better outcomes for ACH conservation and greater certainty for development interests.

The draft Bill will be consistent with the NSW *Constitution Amendment (Recognition of Aboriginal People) Act 2010*, which acknowledges and honours Aboriginal people as the State's first people, and recognises Aboriginal people as the traditional custodians and occupants of the land in New South Wales. The draft Bill will build on and strengthen cultural heritage provisions in the *Aboriginal Land Rights Act 1983* to establish a unified and workable legal framework for cultural heritage management. It will also align with other current NSW Government initiatives, including the OCHRE plan (Opportunity, Choice, Healing, Responsibility, Empowerment for Aboriginal Affairs). It will support the key themes of OCHRE, including healing through recognition that Aboriginal cultural heritage belongs to Aboriginal people; adopting a more comprehensive and respectful understanding of culture; creating mechanisms for local decision-making by Aboriginal communities; establishing clear accountability and transparency in decision-making; and delivering meaningful and measurable reporting and evaluation, including through a regular NSW ACH Report.

These historic reforms are timely. It is 50 years since the Australian people voted to amend the Australian constitution in the 1967 referendum, 40 years of land rights in NSW and 25 years since the landmark Mabo High Court case in 1992 recognised native title in Australia.

The current reform proposals are part of our evolution towards a more respectful, inclusive and dynamic society.

Now it is time for your say on the reform proposals. We want to encourage as many people as possible to participate in the community consultation sessions we are holding around the state, to carefully consider what we are proposing, and to make submissions either orally or in writing.

To help us get it right, together.

We look forward to hearing from you.



**The Honourable Gabrielle Upton,  
Minister for the Environment and Heritage**



**The Honourable Sarah Mitchell,  
Minister for Aboriginal Affairs**



# Introduction

## The need for reform

New South Wales is now the only jurisdiction in Australia without either updated legislation or standalone legislation for Aboriginal cultural heritage (ACH). Protection and management of Aboriginal cultural heritage in New South Wales primarily occurs under Part 6 of the *National Parks and Wildlife Act 1974* (NPW Act).

Although there have been a number of amendments to the NPW Act in recent decades, we know from feedback and research that the current system is not delivering for Aboriginal people, industry or the wider community. Major limitations include:

- regulating Aboriginal cultural heritage under flora and fauna legislation is outdated, offensive to Aboriginal people, and out of step with approaches in other states
- the absence of a formal role for Aboriginal people to make decisions about how cultural heritage is protected and managed
- narrow legal definitions of 'Aboriginal cultural heritage' that are limited to objects and places and do not recognise other aspects such as stories, lore, ancestors and living practice
- the absence of formalised local arrangements for coordinating cultural knowledge, creating uncertainty and complexity for both Aboriginal communities and those seeking to consult meaningfully with those communities
- an approach to regulation that is largely reactive, and doesn't support the type of upfront planning approaches that are better at preventing harm and driving positive conservation action
- complexity, uncertainty and delays for those undertaking development
- the absence of formal processes for resolving disputes when they occur, which can lead to challenging relationships, difficult negotiations, and in some cases costly court proceedings.

In recognition of these issues, the NSW Government is developing a new legal framework to improve the way Aboriginal cultural heritage is protected, managed and celebrated in NSW.

The new legal framework will be significantly different to the current system, and it is important to take the time needed to get it right.

After several years and three previous rounds of consultation, draft legislation to establish the first part of the new legal framework will shortly be released.

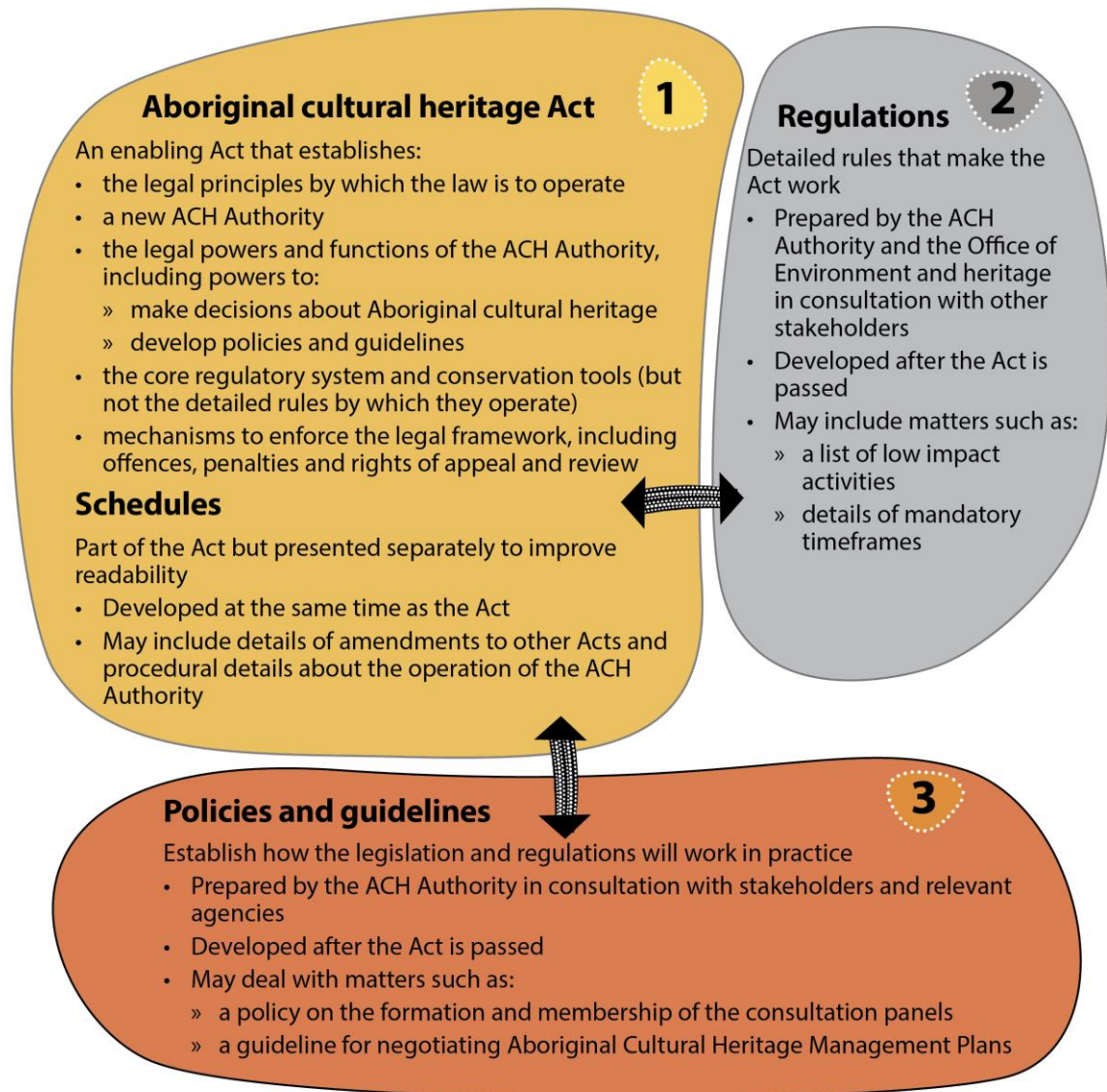
The draft legislation will be called the 'draft Aboriginal Cultural Heritage Bill' (draft Bill). A 'bill' refers to a proposal for new legislation or a change to existing legislation before it has been approved by Parliament.

We will be asking communities, individuals and other stakeholders to tell us what they think about the proposals in the draft Bill, to see what changes we may need to make before the Bill is introduced to Parliament. Once the Bill has been passed by Parliament it will become an Act – the Aboriginal Cultural Heritage Act.

This document provides a plain English explanation of key proposals in the draft Bill to help people understand what the draft Bill contains before it is released.

## Establishing a new legal framework

The new Act proposed by the draft Bill will be an ‘enabling Act’. An enabling Act is a piece of legislation that establishes a body or agency, and empowers it to take certain actions, including making regulations, policies and guidelines that provide the detailed rules for how the new arrangements will work. Together, the Act, regulations, policies and guidelines form the overall legal framework (Figure 1).



**Figure 1: The proposed new legal framework for Aboriginal cultural heritage**

As Figure 1 shows, the new Act proposed by the draft Bill is only the first part of the new legal framework, and it won't come into force straight away or all at once.

Importantly, the first part of the Act that will come into force will provide for the establishment of a new state-wide body of Aboriginal people (the 'ACH Authority'). Over two to three years, the ACH Authority will work with Aboriginal people, government agencies, industry bodies and other stakeholders to develop the detailed rules (including regulations, policies and guidelines) that will form the rest of the legal framework. Once all the parts of the legal framework have been developed, the rest of the Act will come into force and the new system will be 'switched on'.

This means there will be further opportunities over coming years for communities, individuals and other stakeholders to provide input on the detailed rules for the new legal framework. There is more information about this process under the *Transitioning to the new framework* section of this document.

## Where we are up to

In 2011, the NSW Government announced reforms to the way Aboriginal cultural heritage is protected and managed. A key commitment was to create new standalone Aboriginal cultural heritage legislation that

- better respects and conserves Aboriginal cultural heritage in NSW for current and future generations, and
- provides clear and consistent processes for economic and social development.

Since then, the NSW Government has held three rounds of consultation. The first two rounds of consultation were to seek feedback and share information on key issues. This was followed by a third round of consultation in 2013 on a draft reform model.

Between 2013 and 2017 considerable work has been undertaken to review and address the wide ranging and sometimes polarised views that were put to government. This has taken some time, but it was important to ensure all views were fully considered and explored before taking the next step in the reform process.

The next step involves seeking feedback on a draft Aboriginal Cultural Heritage Bill. This proposal paper is being released before the draft Bill, to provide a plain English explanation of what it proposes and to make it easier for people to consider the draft Bill and prepare their feedback.

The draft Bill builds on the significant amount of work and extensive public feedback already provided through previous rounds of public consultation. Those elements of the 2013 reform model that were widely supported have been preserved, while new approaches have been proposed for elements that were not supported. Further information on the differences between the 2013 model and the draft Bill can be found under the 'How will the draft Bill compare to the 2013 proposal?' section of this summary.

Figure 2 provides a timeline for the development of the draft Bill, and for the future development of regulations, policies and procedures (including opportunities for input).

As explained above, once the draft Bill has passed Parliament it will become the Aboriginal Cultural Heritage Act. A timeline for transitioning from the current system to the new framework is provided under the 'Transitioning to the new framework' section of this paper. Work is also underway to determine the resources needed to establish the new framework.

# Timeline

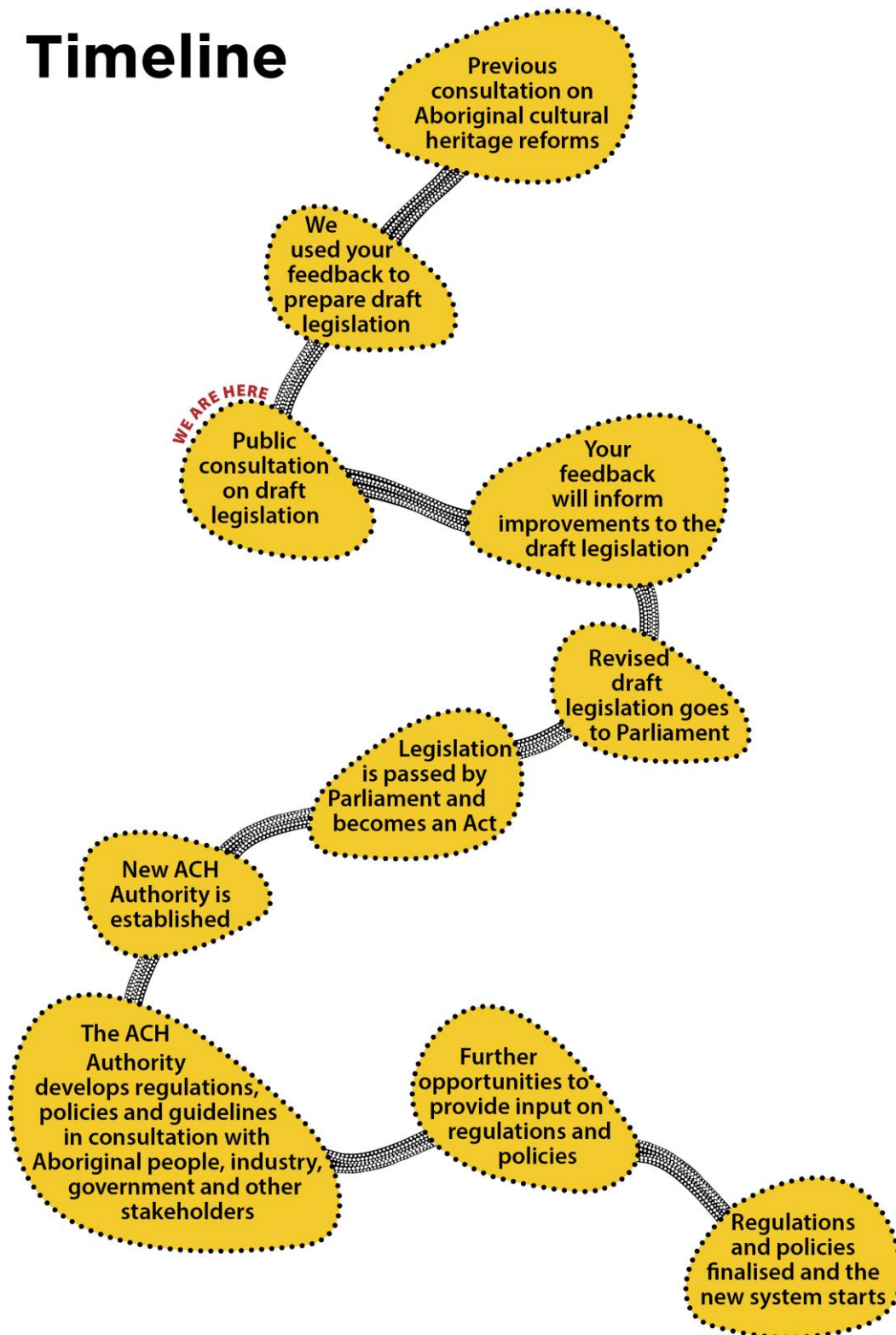


Figure 2: Timeline for development of the legal framework



## Aims of the draft Bill

The NSW Government is committed to implementing new standalone legislation that respects and protects Aboriginal cultural heritage for current and future generations and provides clear and consistent processes for economic and social development in New South Wales.

The draft Bill seeks to achieve this outcome by delivering on five key aims:

- to better recognise ACH values
- to enable decision-making by Aboriginal people
- to provide better information gathering and management
- to improve protection and conservation of ACH
- to provide greater confidence in the regulatory system.

Table 1 shows how the proposals in the draft Bill support each of these aims. The proposals are further discussed in the sections that follow.

**Table 1: Aims and key proposals**

Aims	Key proposals
<b>A. Broader recognition of Aboriginal cultural heritage (ACH) values</b> Recognising in law a more respectful and contemporary understanding of Aboriginal cultural heritage	Statutory objects to guide interpretation of the draft legislation A new definition of ACH Legal acknowledgement of Aboriginal ownership of cultural heritage
<b>B. Decision-making by Aboriginal people</b> Creating new governance structures that give Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage	ACH Authority Local consultation panels Local coordination and support Ministers and agencies
<b>C. Better information management</b> Improving outcomes for Aboriginal cultural heritage through new information management systems and processes that are overseen by Aboriginal people	Aboriginal Cultural Heritage Information System ACH mapping products and processes Strategic plans Monitoring and reporting
<b>D. Improved protection, management and conservation of ACH</b> Providing broader protection and more strategic conservation of Aboriginal cultural heritage values	Conservation tools Repatriation Funding for ACH conservation
<b>E. Greater confidence in the regulatory system</b> Providing better upfront information to support assessments, clearer consultation processes and timeframes, and regulatory tools that can change to suit different types of projects	A new assessment pathway Aboriginal Cultural Heritage Management Plans Integration with development assessment Dispute resolution Appeals and reviews Compliance and enforcement



## Links to other reforms

The draft Bill will be part of a system of existing and proposed laws that:

- aim to empower Aboriginal people to conserve and keep alive their culture in all of its forms and representations – these include the proposed Aboriginal Languages Bill and the *Aboriginal Land Rights Act*
- regulate activities that can impact on Aboriginal cultural heritage, for example, the *Environmental Planning and Assessment Act 1979*.

More broadly, the draft Bill will support the NSW Government's OCHRE plan (Opportunity, Choice, Healing Responsibility, Empowerment). OCHRE aims to support strong Aboriginal communities in which Aboriginal people actively influence and participate fully in social, economic and cultural life.

## Improvements for the NSW community, industry and Aboriginal people

The draft Bill will establish a modernised framework that responds to the contemporary and changing needs of Aboriginal people, industry stakeholders, planning authorities and the wider NSW community.

### Improvements for industry proponents

- Greater certainty – Better information and up-front assessment of Aboriginal cultural heritage values will minimise the chance of unexpected discoveries, and reduce project delays and associated costs (Aims C and E)
- Tailored assessment pathways respond to different levels of risk - rather than the current 'one-size-fits-all' approach (Aim E)
- One point of contact to access Aboriginal cultural knowledge holders who can speak for Country – rather than having to consult with a number of Aboriginal parties. This will simplify consultation processes and reduce project delays (Aim B)

### Improvements for Aboriginal people

- Aboriginal people will be recognised in law as the rightful owners of their cultural heritage. (Aim A)
- New structures that make Aboriginal people responsible for decisions about their cultural heritage (Aim B)
- Stories, lore, ancestors, places and living practice will all be recognised in new legal definitions that encompass the full breadth of Aboriginal cultural heritage – extending conservation beyond just the physical objects and artefacts that are currently protected (Aims A and D)
- Better information gathering and culturally sensitive information management systems will give Aboriginal people control over information about their cultural heritage, and enable them to proactively identify, manage, conserve and celebrate that heritage (Aims C and D)
- A new Aboriginal cultural heritage fund will consolidate and improve resourcing arrangements for Aboriginal cultural heritage planning and management across NSW (Aim D)
- Aboriginal cultural heritage will be considered early in the development process, providing opportunities for proposed developments to be designed in ways that avoid or minimise harm to Aboriginal cultural heritage values (Aim E)

### Improvements for planning authorities

- Better integration of Aboriginal cultural heritage considerations with development assessment pathways will reduce uncertainty and complexity (Aim E)
- Strategic plans developed by consultation panels will clearly signal conservation priorities to public authorities (Aim C)
- Consultation panels will be the recognised source of cultural authority at the local level – simplifying consultation procedures and ensuring more consistent information and advice about Aboriginal cultural heritage values (Aim B)

## Consultation materials

This document is one in a package of materials that has been released to help people understand the proposals in the new legislation and to provide feedback. The package comprises:

1. A series of short videos, which outline the purpose and benefits of the proposed new legislation.
2. A two-page factsheet, which summarises the purpose of the proposed legislation.
3. A proposal paper (this document), which gives an overview of the key proposals being put forward by the draft Bill and the reasons behind them.
4. The draft Aboriginal Cultural Heritage Bill.
5. A Yarn Up Handbook, which is intended to facilitate group discussions and is targeted towards Aboriginal people. It focuses on the governance structure proposed by the draft Bill and explores options for forming key governance bodies. The material covered in the *Yarn Up Handbook* is also covered in this document.

These are all available on our [consultation page](http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation) on the OEH website at: [www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation](http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation).

## Providing feedback

We invite you to provide feedback once you have reviewed the draft Bill and the supporting package of information. Feedback and submissions received will help refine the draft Bill before it is introduced to Parliament. However, once the Bill is finalised, further details about operational aspects of the new system will be developed and outlined in regulations, policies and guidelines. There will be further opportunities to comment on these supporting elements.

To prompt discussion and assist you in structuring your submission once you have reviewed the draft Bill, there are key questions included in this document based on the broad aims set out in Table 1. In some places, there are also additional questions focusing on specific proposals.

## Have your say

**To ensure your views are considered, please provide your feedback by 6 April 2018.**

You can provide feedback on the proposals in several ways:

1. Complete the online submission form on our [consultation page](http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation): <http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation>
2. Forward a written submission via email to: [ACH.reform@environment.nsw.gov.au](mailto:ACH.reform@environment.nsw.gov.au) or hardcopy to: NSW Office of Environment and Heritage, PO Box A290 Sydney South, NSW 1232.
3. Provide feedback at one of the 20 workshops as part of a group discussion.
4. Complete the Yarn Up Handbook and send this [via email](mailto:ach.reform@environment.nsw.gov.au): [ach.reform@environment.nsw.gov.au](mailto:ach.reform@environment.nsw.gov.au) or send a hardcopy to: NSW Office of Environment and Heritage, PO Box A290 Sydney South, NSW 1232.
5. Call 13 1555 and ask to leave a verbal submission. These can be up to five minutes long.

Written submissions will be published on the OEH website, but you may ask to remain anonymous. Feedback provided at the workshops, verbal submissions and feedback provided via the phone line will be summarised, anonymised and made available on the OEH website.

## Public information sessions and workshops

Public information sessions and workshops will be held in 19 locations across New South Wales.

First, information sessions will be held to allow you to find out more about what is being proposed in the draft Bill and to ask questions before the draft Bill is released.

Then, after the draft Bill has been released, workshops will be held to enable you to discuss issues and provide feedback.

The locations of the information sessions and workshops are:

- Albury
- Ballina
- Bathurst
- Bega
- Bourke
- Broken Hill
- Coffs Harbour
- Dubbo
- Gosford
- Griffith
- Muswellbrook
- Narrabri
- Newcastle
- Nowra
- Port Macquarie
- Queanbeyan
- Sydney (x2)
- Wentworth.

Find out the dates of these forums and register your interest online, or to register for a webinar go to our [consultation page](http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation): [www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation](http://www.environment.nsw.gov.au/aboriginal-cultural-heritage-consultation).

## Aim A: Broader recognition of Aboriginal cultural heritage values

Aim A is to recognise in legislation a more respectful and contemporary understanding of Aboriginal cultural heritage. Key proposals that seek to achieve this aim are:

### Key proposal

Statutory objects to guide interpretation of the draft legislation

A new definition of ACH

Legal acknowledgement of Aboriginal ownership of cultural heritage

In reading through this section, you might want to consider the following questions:

### Aim A questions

Do you think the statutory objects effectively describe the intent of the draft Bill? (note that the statutory objects will be available in the draft Bill when it is released for comment)

How well does the following approach to defining Aboriginal cultural heritage match what you consider to be Aboriginal cultural heritage? (note that the proposed definition will be available in the draft Bill when it is released for comment)

## Statutory objects

The objects of an Act ('statutory objects') explain what the Act is intended to achieve and establish the high-level principles that guide how the Act should be implemented. Statutory objects are important because they set the overall scope of the Act and give decision-makers and the courts direction about how the Act is to be interpreted and applied.

The draft Bill will establish a new set of statutory objects that collectively support the aims outlined in Table 1.

## Opportunities to improve the current system

The statutory objects that underpin the current system for protecting and managing Aboriginal cultural heritage are set out in section 2A of the NPW Act. They consist of short statements about conserving and promoting understanding of objects and places that are significant to Aboriginal people.

They do not recognise the aspirations of Aboriginal people to be acknowledged as the rightful custodians of their cultural heritage and to exercise authority over that cultural heritage. Nor do they set clear expectations about regulating development and other activities to achieve better outcomes for Aboriginal people, proponents and the wider NSW community.

## Key features of the proposal

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



## Definitions

The draft Bill will include a comprehensive definition of 'Aboriginal cultural heritage' that captures its diverse expressions and practices, including tangible and intangible elements. The proposed definition will capture not only Aboriginal objects but also memorabilia, stories and song-lines.

## Opportunities to improve the current system

The definition of Aboriginal cultural heritage in the NPW Act does not include an overarching definition of Aboriginal cultural heritage that captures the full scope of cultural expression and practice. Instead, it restricts the definition of Aboriginal cultural heritage to tangible aspects, specifically, 'Aboriginal objects' and 'Aboriginal places.' In addition, the definition of 'Aboriginal objects' currently includes Aboriginal remains. This is recognised to be inappropriate and disrespectful.

There are three main reasons for improving this approach:

1. The current definitions are outdated and no longer appropriate. They reflect an understanding of Aboriginal cultural heritage dating back to the 1960s, which assumed that Aboriginal cultural practices had ceased and that Aboriginal heritage consists largely of objects with archaeological and scientific value. We now know this is not the case.
2. The current definitions do not recognise Aboriginal people as the keepers of knowledge about their cultural heritage.
3. The way Aboriginal cultural heritage is defined in legislation determines how the law regulates and protects it. Consequently, the NPW Act only regulates and protects Aboriginal objects and Aboriginal places.

## Key features of the proposal

The draft Bill will establish a new definition of Aboriginal cultural heritage that will encompass the following:

living, traditional or historical practices, ancestral remains, representations, expressions, beliefs, knowledge and skills – and associated environment, places, landscapes, objects and materials – that Aboriginal people recognise as part of their cultural heritage.

The draft Bill will:

- establish definitions for the different aspects of Aboriginal cultural heritage captured by the overarching definition, including 'Aboriginal objects', 'materials' and 'intangible Aboriginal cultural heritage'
- afford Aboriginal remains separate legal recognition, rather than defining them as 'Aboriginal objects'
- include a revised definition of 'harm' and for the first time a definition of 'desecration'.

## Ownership

The draft bill will clearly establish that Aboriginal cultural heritage belongs to Aboriginal people. This is not the case under the current system.

## **Opportunities to improve the current system**

The NPW Act does not formally recognise Aboriginal people's relationship to their cultural heritage. In addition, the NPW Act makes 'certain Aboriginal objects' the property of the Crown (i.e. government). Those 'certain Aboriginal objects' are Aboriginal objects that were not in private ownership before October 1967.

These arrangements are paternalistic and out of step with approaches taken in other Australian states and territories and overseas.

## **Key features of the proposal**

The draft Bill is based on the understanding that Aboriginal cultural heritage belongs to Aboriginal people, and will give effect to this through:

- new statutory objects that affirm Aboriginal people's relationship to, and authority over, their own cultural heritage
- a new definition of Aboriginal cultural heritage that captures the full scope of Aboriginal cultural expression and practice
- new governance arrangements, including a new Aboriginal Cultural Heritage Authority, that give Aboriginal people the legal authority to make decisions about the conservation and management of Aboriginal cultural heritage (Aim B)
- provisions that transfer ownership of those 'certain Aboriginal objects' described above from the Crown to the new Aboriginal Cultural Heritage Authority (on behalf of all Aboriginal people of New South Wales).

## Aim B: Decision-making by Aboriginal people

Aim B is to create a new governance structure that gives Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage. Key proposals that seek to achieve this aim are:

### Key proposal

ACH Authority

Local ACH consultation panels

Local coordination and support

Ministers and agencies

In reading through this section, you might want to consider the following question:

### Aim B question

Do you think the proposed governance structure described in Figure 3 adequately involve Aboriginal people in making key decisions about managing and conserving Aboriginal cultural heritage?

## New governance arrangements

The draft Bill will create a new governance structure that enables key ACH decisions to be made by a new body of Aboriginal people. The new structure will establish clearer processes for people at the local level with cultural knowledge and authority, as recognised by their communities, to be involved in those decisions.

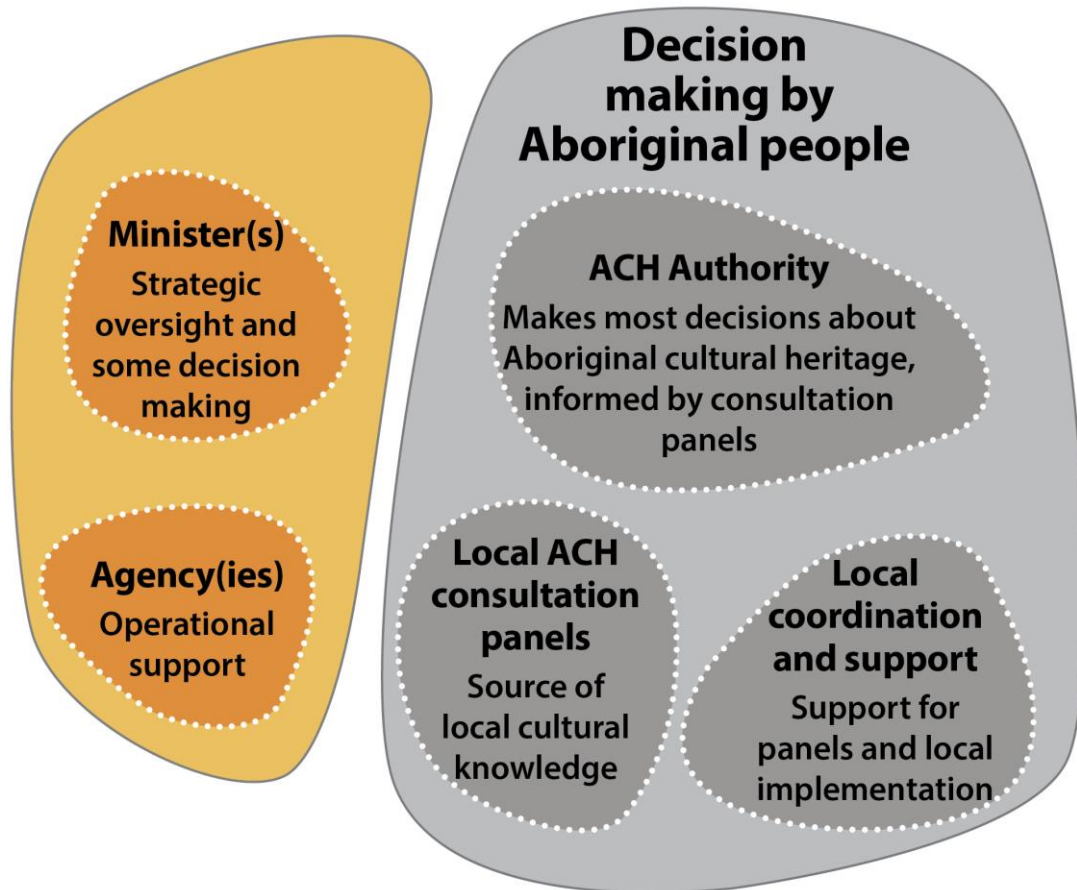
The draft Bill will build on arrangements under the *Aboriginal Land Rights Act 1983* (ALR Act) by identifying Local Aboriginal Land Councils to play particular roles in local coordination, support and implementation.

In addition to promoting Aboriginal self-determination, the new governance structure has been designed to provide

- administrative efficiency
- transparency and accountability in decision-making (through clear roles and responsibilities)
- certainty for industry and other stakeholders as to who they need to engage with, particularly for regulatory purposes.

The governance structure is summarised in Figure 3 and described further in Aim B. It is also described in the *Yarn Up Handbook*, which Aboriginal people and groups in particular are encouraged to pick up and use in more detailed discussions with their families, friends and local communities.

The new governance structure, along with other aspects of the new arrangements for Aboriginal cultural heritage, will require dedicated resourcing. These resourcing requirements are currently being considered and will be finalised following consideration of the feedback received on the proposals in the draft Bill.



**Figure 3: Proposed new governance structure for Aboriginal cultural heritage.**

## Aboriginal Cultural Heritage Authority

The draft Bill will establish a new state-wide body of Aboriginal people – the Aboriginal Cultural Heritage Authority (or ACH Authority) – to make decisions about the management and conservation of Aboriginal cultural heritage. The ACH Authority’s decisions will be informed by local ACH consultation panels (see *Local ACH consultation panels*).

The draft Bill will refer to the state-wide body of Aboriginal people the ACH Authority. The NSW Government is looking for your feedback on whether there are other names that the ACH Authority could be called.

### Targeted question B1

The draft Bill will refer to the state-wide body of Aboriginal people as the ACH Authority. Do you agree with this name? If not, what would you suggest the state-wide body of Aboriginal people be called?

## Opportunities to improve the current system

The NPW Act creates the Aboriginal Cultural Heritage Advisory Committee (ACHAC). ACHAC is a state-wide body of Aboriginal people but its role is limited to providing advice. ACHAC has no decision-making functions. The majority of legal decisions about Aboriginal cultural heritage are made by the NSW Government, including decisions about the significance of cultural values and whether harm to cultural heritage values should be permitted.

## Key features of the proposal

### Functions of the ACH Authority

The draft Bill will assign a range of functions to the ACH Authority including:

- administering the new legal framework
- making key decisions about Aboriginal cultural heritage, such as forming local ACH consultation panels, approving ACH strategic plans, and approving or refusing ACH Management Plans negotiated between developers and consultation panels
- providing advice and recommendations to the Minister administering the new Act in relation to the operation of the Act, including recommending Declared ACH and seeking the Minister's approval for the method used to make maps
- developing and adopting operational policies, guidelines, codes of practice and methods that guide how the new ACH legislation is to be applied in practice and to guide how the ACH Authority will fulfil its functions.

The ACH Authority will be subject to standard governance requirements, including financial reporting.

If it chooses to, the ACH Authority may delegate some of its functions. It may also establish subcommittees to assist it in undertaking its tasks.

### Membership of the ACH Authority

The draft Bill will require that all members of the ACH Authority are Aboriginal. It is proposed that the Minister appoints the members of the ACH Authority. By being ministerially appointed, the ACH Authority and its members will be able to make legally binding decisions about ACH. In addition, if someone wants to challenge the ACH Authority about a decision, it is the ACH Authority as a body (not its individual members) that can be taken to court.

It is important that Aboriginal people across NSW have confidence in the decisions of the ACH Authority. Feedback is sought on possible processes for nominating Authority members (see targeted questions below). The draft Bill will include provisions suggesting that members of the ACH Authority should collectively possess a range of skills and experience, including:

- protection and management of ACH
- land-use planning and development assessment
- heritage, land rights and native title law
- decision-making and leadership
- Aboriginal community engagement and social policy
- economics and financial planning (including fund management)
- community development
- mediation and negotiation
- information technology and data management
- land management
- knowledge and/or experience of government processes and administration.

The reason for the proposed skills-based approach is to ensure the members of the ACH Authority collectively possess the skills and experience needed to ensure the Authority can meet its legal, governance and financial obligations and successfully oversee the operation of the new Act. If required, some of these skills could be provided by external bodies



Alternatives to the skills-based approach have been suggested, including that membership of the Authority should be based on:

- recognised cultural authority from an area of New South Wales (in which case the Authority might access the skills listed above by seeking external advice), or
- both the skills and experience specified above and recognised cultural authority.

We are especially interested in your feedback on this matter (see Targeted question B1). When you are thinking about your response, it is important to note that the ACH Authority will be required to seek advice from 'local ACH consultation panels' when making most of its decisions (see *Local consultation panels*). The consultation panels will be made up of people who hold relevant cultural knowledge for an area, or who represent people who hold relevant cultural knowledge.

#### Targeted question B2

The ACH Authority will oversee the operation of the new legislation. This will include making legal, financial and governance decisions as well as decisions about Aboriginal cultural heritage. Local ACH consultation panels will provide the ACH Authority with local knowledge.

Given the range of decisions that the ACH Authority needs to make, what skills and experience do you think members of the Authority should have? Should this be:

- a. relevant skills and experience (as listed above). For instance, experience working on Aboriginal cultural heritage issues, working in land management or land-use planning, interpreting legislation, managing budgets, supporting community development or previous board experience
- b. recognised cultural authority from an area of New South Wales, or
- c. both?

### Formation of the ACH Authority

The draft Bill will not set out a process for forming the ACH Authority. This is because the Authority must have the confidence of Aboriginal people if it is to be effective, and Aboriginal people must have a say in how it should be formed before a process is established in law.

We are therefore seeking the views of Aboriginal people in particular on how the Authority should be formed – although everyone is welcome to have their say (see Targeted question B2). This will enable a culturally appropriate process to be included in the final Bill before it is submitted to Parliament.

The NSW Aboriginal Land Council (NSWALC) will be represented on the ACH Authority due to links between the new legislation and the ALR Act, and because of the proposal for Local Aboriginal Land Councils (LALCs) to have a local coordination and support role in the new governance structure (see *Local coordination and support*). This requirement may influence views on how the Authority is best formed.

Regardless of the process used to form the ACH Authority, those nominated would need to meet the membership requirements discussed above.

#### Targeted question B3

How should the ACH Authority be formed so that Aboriginal people across New South Wales have confidence in the Authority and its decisions?

Below are three examples of processes that could be used. These are only examples and are intended to encourage thinking and feedback. There may be other processes you can think of that are not described below. In all cases, the names that are put forward are then provided to the Minister and the ACH Authority members are chosen from that group of names.

**Example 1:** A NSW state agency asks Aboriginal groups (including native title holders and registered claimants, LALCs, Aboriginal owners, Elders groups, and other groups) to put forward the names of Aboriginal people who hold the skills and/or experience and/or cultural authority set out in the previous section.

### Targeted question B3

**Example 2:** A special panel of Aboriginal people (established to convene the ACH Authority) asks Aboriginal groups (as listed in Example 1) to put forward names of Aboriginal people with the right skills and/or experience and/or cultural authority.

**Example 3:** The Aboriginal community participates in an open election process (coordinated by a state agency) and votes for Aboriginal people with the right skills and experience to become an ACH Authority member. Election boundaries are based on NSW Aboriginal Land Council region boundaries. This process is open to any Aboriginal person and would not be restricted to Local Aboriginal Land Council members.

## Local ACH consultation panels

The draft Bill will provide for the creation of local ACH consultation panels. The consultation panels are intended to be made up of people who hold relevant cultural knowledge for an area or who represent people with relevant cultural knowledge. This is because the role of the consultation panels will be to speak for Country and to provide advice to the ACH Authority on how best to manage and conserve Aboriginal cultural heritage on that Country.

## Opportunities to improve the current system

Currently, proponents must meet the requirements set out in the National Parks and Wildlife Regulation 2009 and the *Aboriginal cultural heritage consultation requirements for proponents 2010* (OEH) in consulting with Aboriginal communities in certain circumstances. These processes are intended to provide an opportunity for Aboriginal people to inform decision-making on Aboriginal Heritage Impact Permit applications (under s.90 NPW Act).

However, feedback from previous rounds of consultation and from people actively involved in Aboriginal cultural heritage has clearly indicated that these arrangements could be improved. For example, the creation of lists of Registered Aboriginal Parties (RAPs) is creating conflict within and between Aboriginal communities about who has the right to speak for Country. It is also creating uncertainty for developers and heritage consultants about who they need to speak to and the outcomes reached through consultation. The complexity of identifying and consulting with numerous RAPs can add significant time and costs to projects.

As well as problems with consultation in a development context, there are also limited processes for engaging Aboriginal people in other key ACH conservation and management activities.

## Key features of the proposal

### Functions of consultation panels

Local ACH consultation panels will be made up of Aboriginal people recognised by their local communities as having the authority to speak for Country. Their role will be to provide advice to the Authority on a number of issues including:

- information to be included in the ACH Information System and in the NSW Aboriginal Cultural Heritage Map (see *ACH Information System* and *ACH mapping products and processes*)
- the content of ACH strategic plans – by identifying ACH conservation and funding priorities in their areas – and the implementation of those plans (see *Strategic plans*)
- the repatriation of Aboriginal objects or materials and human remains, proposals for Declared ACH, conservation agreements, ACH nominations on the State Heritage Register under the *Heritage Act 1977*, and applications for intangible ACH to be registered on the ACH Information System (see *Repatriation* and *Conservation tools*)

- the outcomes of their negotiations of Aboriginal Cultural Heritage Management Plans (ACHMPs) with development proponents (see *ACH Management Plans*).

Panels will operate according to policies and guidelines designed by the ACH Authority. They will be subject to standard governance requirements including declaration of conflict of interest and pecuniary interest.

### Membership of consultation panels

The draft Bill does not set out how consultation panels should be formed or how they should operate. Instead, the draft Bill will require the ACH Authority to consult with Aboriginal communities and develop a formal policy that sets out how consultation panels will be formed and how they will operate. This work will begin after the ACH Authority has been established, and will take a number of years to conclude. However, we would welcome your early views on how consultation panels should be formed and operate, as this will help inform those parts of the draft Bill that create roles for consultation panels.

The ACH Authority will be responsible for appointing members to panels. Feedback from previous public consultation and discussions with Aboriginal stakeholders has indicated a strong preference that only people with cultural authority (or who can represent others with cultural authority) should be able to sit on consultation panels and speak for Country. Another view is that membership of consultation panels should be drawn from organisations, such as LALCs, whether or not those individuals themselves are recognised as having cultural authority to speak for that Country.

Regardless of the process that is finally agreed upon, the membership and operation of consultation panels must accommodate the existing legal rights of certain Aboriginal stakeholders. These include native title holders (including parties to Indigenous Land Use Agreements) and Joint Management Boards established under Part 4a of the NPW Act.

Targeted question B4 aims to encourage discussion and feedback on consultation panel membership. Targeted question B5 asks for views on whether a person should be allowed to be a member of more than one panel, recognising that a person could have connection to more than one Country, or more than one panel area.

#### Targeted question B4

Given the role of local ACH consultation panels, who do you think should sit on a panel:

- a) any Aboriginal person whose community recognises them as having cultural authority
- b) any Aboriginal person whose LALC recognises them as having cultural authority
- c) an Aboriginal person who belongs to a particular group, such as being a native title holder, an Aboriginal Owner, a Local Aboriginal Land Council member or a recognised Elder
- d) a combination of the above, or
- e) others not described above (please provide further details)?

#### Targeted question B5

Should an Aboriginal person be able to sit on more than one panel if they have connections to more than one Country?

### Formation of consultation panels

The ACH Authority will oversee the formation of the consultation panels in line with the policy it will develop. Aboriginal communities will need to have confidence in the consultation panels and the process used to form them if the panels are to operate effectively. We are therefore seeking your early views on a preferred way to form the consultation panels so the

ACH Authority (once formed) has information it can use to put a process in place that is well supported (see Targeted question B6). The ACH Authority will consult on the draft policy before it is finalised.

#### Targeted question B6

How should local ACH consultation panels be formed so that Aboriginal communities represented by that panel have confidence in it?

Below are five examples of processes that could be used. These are only examples and are intended to encourage thinking and feedback. There may be other processes you can think of that are not described below, or you may prefer different parts from each example. When you are thinking about your answer, it might help to think about what kind of process would give you the most confidence that you were choosing the right person to speak about your Country.

**Example 1:** People could nominate themselves or be nominated by someone else and then should provide a set number of referees (e.g. from organisations such as a relevant Native Title Prescribed Body Corporate or LALC). The ACH Authority would appoint from amongst the nominees, according to criteria.

**Example 2:** An Aboriginal person (whose LALC recognises them as having cultural authority) could nominate themselves and then an open merit based process is undertaken to appoint from the nominees, according to criteria

**Example 3:** People could be nominated by others and a secret ballot could be held if more people are nominated than there are spots available. The ACH Authority would either appoint the nominees or those successful in the vote.

**Example 4:** Aboriginal 'groups' (for example Native Title Prescribed Body Corporates, LALCs, etc.) within an area could each nominate representatives up to a certain number and the ACH Authority would appoint from amongst the nominees, according to criteria.

**Example 5:** The Aboriginal Owners register under the Aboriginal Land Rights Act could be expanded and panels formed from those on the register.

There are also factors that could inform the number and boundaries of consultation panels that are created (see Targeted question B7). In part this will need to be based on ensuring the panels have a manageable workload. For instance, there may need to be a greater number of panels in parts of the state where there is a high level of development occurring. However, we have also heard that cultural boundaries and the boundaries of existing organisations (e.g. LALCs) should be taken into account.

#### Targeted question B7

What factors should be considered when determining the number and boundaries of local ACH consultation panels? Factors may include:

- panel workload, as determined by the intensity or scale of development in an area
- the boundaries of existing organisations
- areas of established working relationships and alliances (i.e. bodies that are already working well together at a larger scale)
- cultural or nation boundaries.

## Local coordination and support

Local consultation panels will need to be supported in order to perform their roles. This will include coordination and support to those involved in the new decision making structures, and to help deliver information management and strategic planning functions.

Section 52(4) of the ALR Act provides that the functions of LALCs include to 'take action to protect the culture and heritage of Aboriginal persons in the Council's area, subject to any other law'. The draft Bill builds on the ALR Act and to provide LALCs with further opportunities to exercise these functions.

It will be up to individual LALCs to decide if they want to take on these functions. If they do, they will need to meet certain criteria and be authorised by the ACH Authority. The ACH Authority will develop a policy to set out the criteria LALCs will need to meet in order to have ACH functions delegated to them. These criteria are likely to focus on governance and collaboration capabilities. The Authority will be required to consult on the policy, particularly with the Land Council network, before finalising and implementing the policy.

Whether or not an individual LALC chooses to seek the delegated functions, its statutory role under the ALR Act will not change. Additionally, the proposed governance structure offers a new way for LALC members to be involved in ACH decisions should they participate on consultation panels (see *Local ACH consultation panels* above).

## Opportunities to improve the current system

Current arrangements under the NPW Act do not include local coordination and support for ACH activities. This support will be essential to the success of the new governance structure, particularly the operation of the consultation panels.

There is currently no clear connection between the ACH provisions in the NPW Act and the ACH provisions set out at s. 52(4) of the ALR Act. The draft Bill creates a clear connection between the new ACH legislation and the ALR Act, underpinned by formal delegation arrangements and supported by clear and transparent accountability requirements.

## Key features of the proposal

The draft Bill will enable the ACH Authority to authorise LALCs to undertake specific functions under delegation from the Authority, subject to LALCs meeting certain requirements. These functions include:

- coordinating the formation of consultation panels and supporting their operation in accordance with the policy developed by the ACH Authority
- in accordance with the requirements of consultation panels and the ACH Authority, gathering ACH information, preparing maps, and administering the ACH Information System database at the local level (see *ACH Information System* and *ACH mapping products and processes*)
- in accordance with priorities determined by consultation panels, preparing ACH strategic plans, seeking and investing funding for conservation outcomes that support these strategic plans and being a point of contact for Declared ACH nominations and intangible ACH applications (see *Strategic plans* and *Conservation tools*.)
- being the first point of contact for development proponents and then coordinating contact between the proponents and consultation panels to enable information sharing, scoping assessments, negotiation of Aboriginal Cultural Heritage Management Plans and the provision of advice to the ACH Authority (see *A new assessment pathway* and *ACH Management plans*).

The draft Bill will allow for regulations to enable the ACH Authority to delegate these functions to other Aboriginal organisations on an interim basis in certain circumstances. These circumstances may include if a LALC does not currently have the capacity to take on the new ACH functions or chooses not to. The same delegation criteria and resourcing arrangements would apply to these other organisations.

We are interested in your feedback on whether the ACH Authority should be able to delegate these functions to other organisations and if so, what types of organisations you think may be appropriate.



#### Targeted question B8

In circumstances where a LALC does not currently have the capacity to take on the new ACH functions or chooses not to, should the new ACH legislation enable the ACH Authority to delegate certain functions to Aboriginal organisations other than LALCs in certain circumstances. If so, what types of organisations would be appropriate?

## Ministers and agencies

The draft Bill will establish a strategic oversight role for the Minister responsible for the new Act. However, much of the day-to-day decision-making will be done by the ACH Authority independent of the Minister's direction.

The draft Bill will not describe the role of government agencies in the new arrangements except to enable the ACH Authority to delegate some of its functions to agencies should it choose to.

## Opportunities to improve the current system

Currently the Minister for the Environment (as the Minister responsible for the NPW Act) or the NSW Office of Environment and Heritage (OEH) makes most decisions about the identification, management and conservation of Aboriginal cultural heritage, including issuing Aboriginal Heritage Impact Permits. Feedback from previous consultation has identified the absence of any formal role and standard requirements for Aboriginal people in decision-making as a key concern and limitation on self-determination and cultural authority.

## Key features of the proposal

### Minister

The role of the Minister under the new legislation will focus primarily on establishing and supporting the ACH Authority to meet the objects of the Act. The draft Bill will, however, assign a limited number of decision-making functions to the Minister. These include giving the Minister strategic oversight of the Act (through appointing members and approving the Authority's funding allocation strategy), approving some parts of the Act that have regulatory implications (NSW ACH map and some policies and guidelines) and approving permanent protection over private or Crown land. The specific functions are to:

- appoint members to the ACH Authority
- approve the ACH Authority's funding allocation strategy (see *Funding for ACH conservation*)
- approve Declared ACH as recommended by the ACH Authority (see *Conservation tools*)
- approve the NSW ACH Map (see *ACH mapping products and processes*)
- approve policies and guidelines that have a regulatory impact, such as the methodology for making the ACH maps (see *ACH mapping*), the ACH assessment code of practice (see *A new assessment pathway*), the Aboriginal Cultural Heritage Management Plan negotiation guideline (see *ACH Management Plans*), criteria for Declared ACH nominations (see *Conservation tools*) and the ACH monitoring and reporting framework (see *Monitoring and reporting*).

The draft Bill will not specify which Minister of the government will have responsibility for the new Act. It is normal practice for such decisions to be made administratively by the Premier.

## **Agencies**

While the draft Bill will be silent on the role of state agencies, it is anticipated that agencies, and in particular OEH, will continue to support ACH operations under delegation from the Authority for some time. This will be especially important in the early stages of implementation to ensure a smooth transition from the current system. The type of agency support that could be provided in this way includes, providing secretariat support for the ACH Authority, administering the Aboriginal Cultural Heritage Information System (ACHIS) on behalf of the ACH Authority, and providing technical support in preparing ACH maps.

## Aim C: Better information management

Aim C is to improve outcomes for Aboriginal cultural heritage through new information management systems and processes that are overseen by Aboriginal people. Key proposals that seek to achieve this aim are:

### Key proposal

ACH Information System

ACH mapping products and processes

ACH strategic plans

Monitoring and reporting

In reading through this section, you might want to consider the following question:

### Aim C question

Do you think the proposed changes to the way Aboriginal cultural heritage information is managed (including new information systems, maps and strategic plans) will better support land-use planning and conservation decisions?

## ACH Information System

A new ACH Information System will be established that is controlled by the ACH Authority. The new information system will:

- modernise the way information about Aboriginal cultural heritage is managed
- better respect the breadth of Aboriginal values and enables more culturally appropriate and effective use of information to support decision making by Aboriginal people.

It will contain existing and new information about Aboriginal cultural heritage across New South Wales. Management of Aboriginal cultural heritage will be improved through culturally appropriate access to information, recording the full breadth of Aboriginal cultural heritage values, enhanced information collection, better information products and Aboriginal custodianship of data.

## Opportunities to improve the current system

The current Aboriginal Heritage Information Management System (AHIMS) was designed to meet the existing requirements of the NPW Act and is not capable of fully supporting the draft Bill. AHIMS is not designed for detailed monitoring, evaluation and reporting and is centrally administered, limiting opportunities for local participation in information management. Some Aboriginal people do not have sufficient trust in the system to register ACH items and confidentially share their knowledge.

Industry stakeholders have indicated they cannot always rely on the accuracy of AHIMS data. This can lead to poorly informed decision-making, increased assessment costs, development assessment delays, and adverse management outcomes. Limited ways in which to view and use information and report on cumulative impacts and landscape-scale change means that it is difficult to make informed decisions.

## Key features of the proposal

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

- a **restricted access database** – for operational day-to-day use by authorised database administrators to support decision-making
- a **public online portal** – to enable the ACH Authority to share information that supports strategic, landscape-scale planning and management of Aboriginal cultural heritage. The portal will allow public access to a subset of the information contained in the database, limited to information that is not culturally sensitive and is appropriate to share more widely.

The draft Bill will broadly outline the types of information about Aboriginal cultural heritage that could be held in the information system. These include but are not limited to:

- ACH assessment reports
- ACH management plans
- Declared ACH
- NSW ACH Map
- local ACH maps
- ACH strategic plans
- information or records regarding ACH values known to local consultation panels or the ACH Authority.

The ACH Authority will have responsibility for developing legally binding policies on the management and use of the ACH Information System. These will include policies that acknowledge the cultural sensitivity of information provided by Aboriginal cultural knowledge holders and manage access accordingly, and protocols on how information is recorded, updated or amended.

The draft Bill will enable the ACH Authority to delegate the administration of the Information System to local coordination and support bodies.

Information in the restricted access database will be used primarily by local consultation panels, with the support of their coordination bodies, and the ACH Authority to produce maps (see *ACH mapping products and processes*), support ACH assessment and decision-making (see *A new assessment pathway*), encourage strategic planning and facilitate monitoring and reporting. Figure 4 shows the inputs, structure and uses of the ACH Information System. Database information may include documents created during assessment and negotiation processes or cultural information volunteered by cultural knowledge holders or emerging from walking Country activities. Prescribed fees will apply to some information access requests similar to the arrangements for AHIMS.

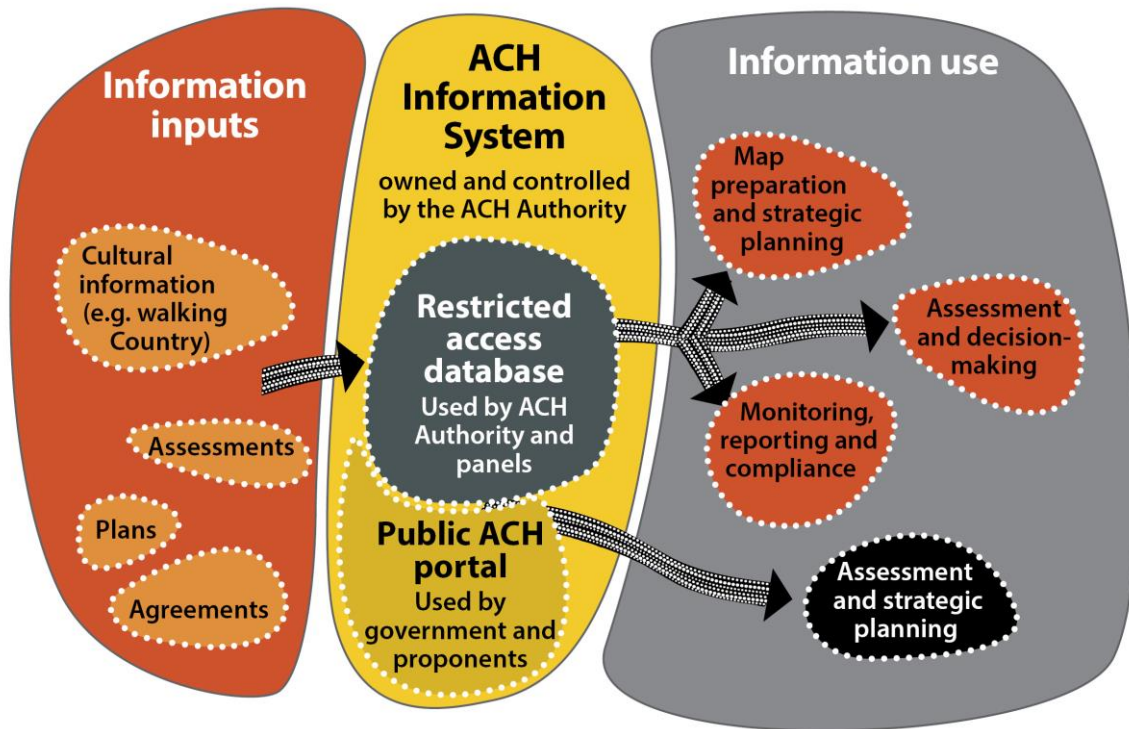


Figure 4: Inputs, structure and uses of the ACH Information System

## ACH mapping products and processes

Aboriginal cultural heritage maps will support early consideration of Aboriginal cultural heritage in land-use planning, development assessment and land management activities. They will provide greater certainty for proponents about when ACH assessments and investigations are required, by highlighting land with known or likely ACH values in a culturally appropriate way that protects confidential knowledge. Maps will be used to help define the appropriate assessment activities that must be undertaken by proponents.

### Opportunities to improve the current system

Currently, most information gathered about the location of ACH values is the spatial data attached to AHIMS records, which is shown as a single point on a map. Maps that identify land known or likely to have ACH values are not formally and consistently used for assessment and decision-making. Proponents are instead required to make assessment and due diligence decisions based on the type of development proposed and whether the land on which the activity is to occur is disturbed or undisturbed. This creates challenges for measuring compliance, increases the likelihood of unexpected finds, reduces opportunities to avoid or minimise harm and limits consideration of cumulative impact.

### Key features of the proposal

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

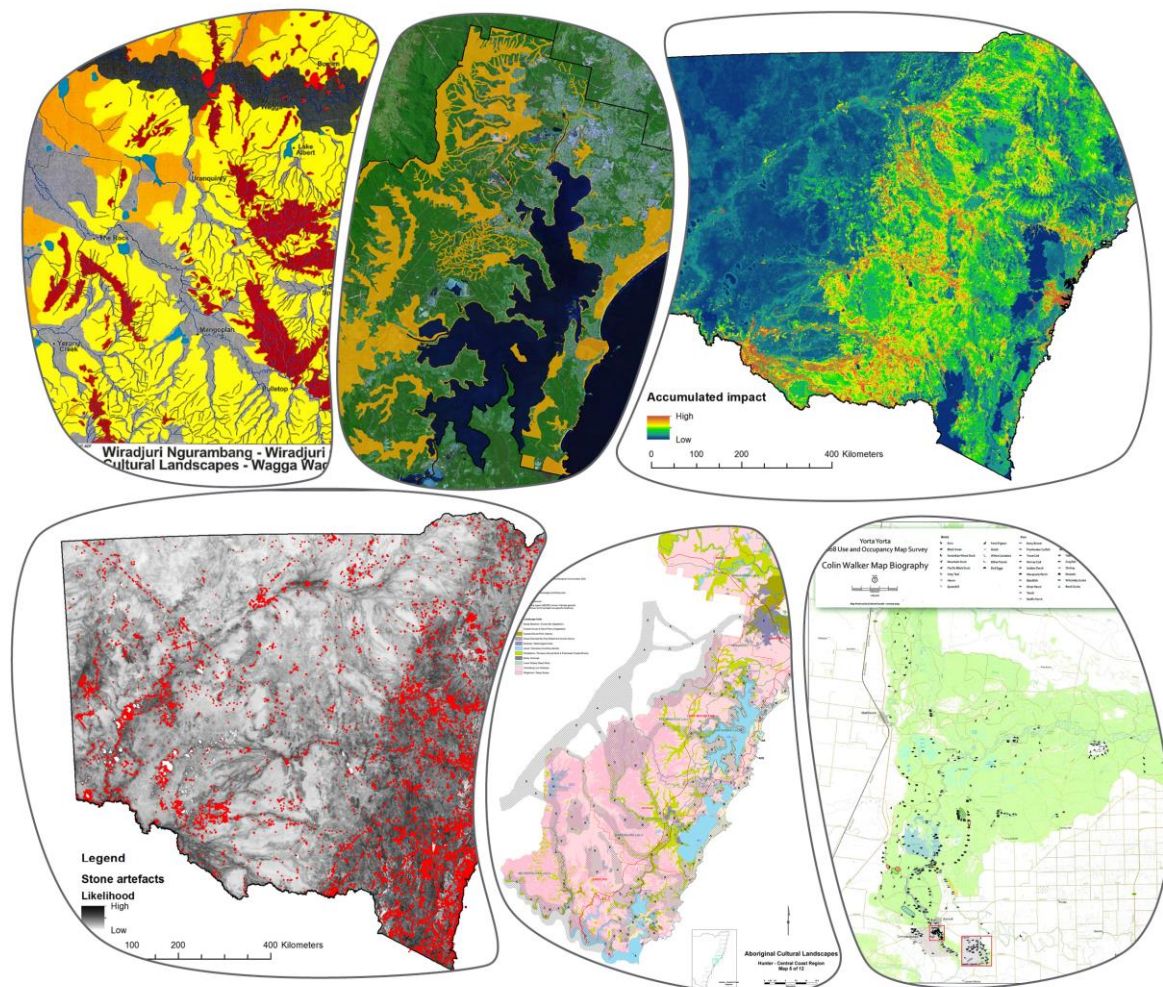


Where a map indicates that there are known or likely ACH values, proponents will be required to contact the ACH Authority for further information. This further information will guide the proponent in completing any requirements of the ACH assessment pathway (see *A new assessment pathway*).

Preparation of a NSW Aboriginal Cultural Heritage Map by the ACH Authority will need to comply with clear preparation guidelines (i.e. a mapping methodology) and be approved by the Minister before publication.

The draft Bill will also include opportunities for consultation panels, in partnership with local coordination and support bodies, to prepare 'Local Aboriginal Cultural Heritage Maps' that refine and improve upon the NSW Aboriginal Cultural Heritage Map for their particular area. The ACH Authority will establish requirements and methods for the preparation of maps to ensure state-wide consistency

The ACH Authority must be confident that consultation panels and their coordination and support bodies have followed map preparation guidelines before it submits them to the Minister for approval and updating the NSW Aboriginal Cultural Heritage Map. Ministerial approval of maps having regulatory effect is necessary to ensure a consistent approach and methodology is applied; this is the case with other regulatory maps. Figure 5 shows examples of ACH maps prepared using different mapping approaches and methodologies. A combination of these approaches could be used to develop the NSW and local ACH map.



**Figure 5: Examples of Aboriginal cultural heritage mapping products**



## Strategic plans

Consultation panels will be encouraged to develop ACH strategic plans either individually or collectively at appropriate regional scales. Strategic plans will proactively identify conservation priorities within local areas for the purpose of influencing and informing government agencies or public authorities, such as planning authorities, public land managers and infrastructure providers in making planning and resource management decisions.

## Opportunities to improve the current system

Currently, Aboriginal communities have limited ways to communicate ACH conservation priorities to government agencies and public authorities. This means ACH management is often reactive and primarily driven by development pressures. There are also limited opportunities for proactive collaboration between Aboriginal people and proponents around ACH conservation.

## Key features of the proposal

The draft Bill will propose a role for consultation panels and their coordination and support bodies to develop strategic plans that signal ACH conservation priorities. They may include priorities around conservation and management goals, access to Aboriginal cultural heritage, expanding cultural practice, public awareness and promotion, funding strategies and links with government programs or priorities. They may use maps to effectively communicate strategic intent. Finalised strategic plans and supporting maps and data will be reviewed and approved by the ACH Authority before publication on the ACH public portal.

The draft Bill will require government agencies and public authorities to consider strategic plans when exercising their legislative functions including planning proposals and regional plans. This will support the management of Aboriginal cultural heritage as part of everyday public authority activities. Strategic plans will also serve as a useful source of information on ACH conservation priorities for other land holders and developers.

## Monitoring and reporting

The draft Bill will establish arrangements to monitor and report on the state of ACH in New South Wales and the performance of the new ACH framework. This is important for transparency and public accountability.

## Opportunities to improve the current system

There is currently no comprehensive monitoring and reporting framework for Aboriginal cultural heritage in New South Wales. This means there is no clear, consistent record of where and how Aboriginal cultural heritage has been conserved or harmed. There is also limited formal monitoring and reporting on the effectiveness of the regulatory system, making it difficult to identify what is working well and where the system could be improved.

## Key features of the proposal

The draft Bill will require the ACH Authority to develop a monitoring and reporting framework, to:

- improve the evidence base for decision-making
- improve the quality of information provided to the public about ACH conservation actions and outcomes
- enable ongoing review and evaluation to improve the effectiveness of the framework over time.

The monitoring and reporting framework, supported by the new ACH Information System, will provide ongoing monitoring requirements and will guide the ACH Authority and other bodies in fulfilling their reporting obligations.

In addition to its annual reporting, the ACH Authority will prepare an ACH Report every three years. This report will provide an overview of the state of Aboriginal cultural heritage in New South Wales and identify opportunities to better manage it and achieve improved conservation outcomes.

**Table 2: Monitoring and reporting framework and frequency**

Monitoring and reporting	Purpose and frequency
ACH Report	Produced by the ACH Authority every three years to provide an overview of the state of Aboriginal cultural heritage in NSW
ACH Authority's annual report	Produced annually to provide an update on the ACH Authority's activities and a financial report
Local bodies reporting to the ACH Authority	To update the ACH Authority annually on local activities
Ongoing performance monitoring	Ongoing monitoring of ACH outcomes and conservation activities

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

Aim D is to provide broader protection and more strategic conservation of Aboriginal cultural heritage values. Key proposals that seek to achieve this aim are:

### Key proposal

Conservation tools

Repatriation

Funding for ACH conservation

In reading through this section, you might want to consider the following question:

### Aim D question

Do you think the proposed conservation tools, repatriation processes and conservation funding will be better than the current tools and processes for conserving Aboriginal cultural heritage?

## Conservation tools

The draft Bill will improve existing conservation tools and introduce new tools to protect the full breadth of ACH values (as discussed in *Definitions*). It will support Aboriginal people to continue practising their culture.

### Opportunities to improve the current system

The NPW Act currently provides a limited set of conservation tools that protect Aboriginal objects and Aboriginal places. These tools do not enable conservation of the full breadth of Aboriginal cultural heritage values nor do they provide adequate roles for Aboriginal people in identifying and managing these values.

Currently, OEH accepts and assesses Aboriginal place nominations and makes recommendations to the Minister. There is little legal or policy guidance as to how these processes are to occur.

There is no existing mechanism in New South Wales designed specifically to protect intangible Aboriginal cultural heritage that is not connected to a place or object. Feedback from previous consultations identified the need to protect this type of intangible cultural heritage from inappropriate commercial exploitation.

Aboriginal cultural heritage is also protected under the *Heritage Act 1977*. The Heritage Act enables the recognition and protection of ACH values of state significance through listing on the State Heritage Register (SHR). There is currently no formal role for Aboriginal people in recommending SHR listings to the Minister for Heritage (who approves listings), or in considering proposed works to listed items with ACH values.

## Key features of the proposal

To improve the management and conservation of Aboriginal cultural heritage, the draft Bill will include a broader suite of conservation tools to protect the full breadth of Aboriginal cultural heritage values. These tools are:

- Declared ACH
- ACH conservation agreements
- intangible ACH agreements.

Table 3 shows the conservation tools and describes what they support.

**Table 3: Conservation tools proposed in the draft ACH Bill**

Current tool	What does it conserve?	New tool	What will it conserve?
<b>Aboriginal places</b>	Aboriginal objects Environment, places and landscapes Associated intangible values	<b>Declared ACH</b>	Aboriginal objects Environment, places and landscapes Aboriginal materials Associated intangible values
<b>Voluntary conservation agreements</b>	Aboriginal objects Environment, places and landscapes Associated intangible values	<b>ACH conservation agreements</b>	Aboriginal objects Environment, places and landscapes Associated intangible values
		<b>Intangible ACH agreements</b>	Practices Representations Expressions Beliefs Knowledge Skills

The draft Bill will establish a role for the ACH Authority in SHR listings and approvals.

### Declared ACH

Declared ACH is a new tool that will replace and expand upon Aboriginal places established under the NPW Act. Declared ACH may be a place, a landscape, a landscape feature, a precinct, an archaeological site, objects, materials, ancestral remains or a combination of these.

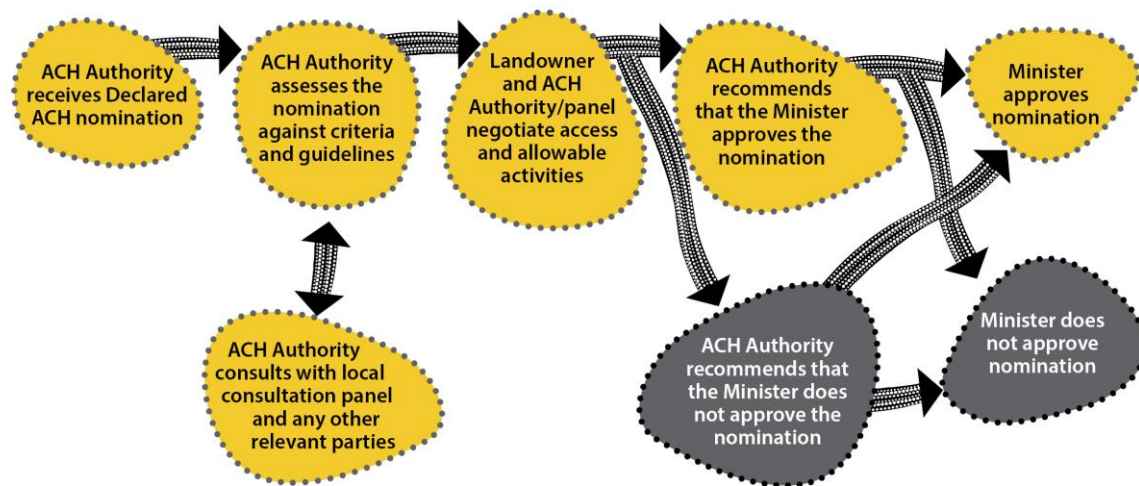
Declaration would be able to permanently protect both tangible and intangible cultural heritage values. It may also recognise associations between components of a landscape. Existing Aboriginal places will be deemed to be Declared ACH under the new Act.

Any activity that will harm the values associated with Declared ACH will need an approval from the ACH Authority. Certain activities, such as demolition or destruction of all or part of Declared ACH, or activities that will have a significant adverse impact on Declared ACH, will not be permitted except in exceptional circumstances:

- Where the Declared ACH poses a danger to human health
- Where Aboriginal people for whom the Declared ACH is significant have requested that the activity take place.

Nominations for Declared ACH will be made to the ACH Authority which will seek the advice of the relevant consultation panel. The ACH Authority will consider any ACH strategic plan that applies to the area and consult with landowners before making a recommendation to the Minister. The draft Bill will create more transparency around the matters that are to be considered by the Authority in recommending a nomination to the Minister. The Minister will determine whether to approve or refuse a nomination, based on the recommendation of the ACH Authority and any other matters the Minister considers relevant. As Declared ACH may be declared over both private and Crown land, and provides a high level of permanent protection similar to that provided by SHR listing, Ministerial approval is required. Figure 6 outlines the process.

As part of the process for finalising Declared ACH, the consultation panel and the landowner will be able to negotiate the kinds of activities that may be carried out without further approval. They may also negotiate arrangements for Aboriginal people to access the Declared ACH for the purpose of practising culture.



**Figure 6: Process for nominating and approving Declared ACH**

### ACH conservation agreements

The draft Bill will provide for ACH conservation agreements, which will be voluntary agreements that may provide permanent protection for ACH on either private or public land. They will be similar to voluntary conservation agreements established under the NPW Act, but there are some key changes that bring them in line with the new focus of the draft Bill. In particular, they:

- will be agreed between the ACH Authority and a landowner, rather than the Minister and a landowner. The ACH Authority will also need to consider the views of the consultation panel before signing an agreement
- may apply to both tangible and intangible cultural heritage
- may formalise arrangements agreed with the landholder for Aboriginal people to access the land to practise culture and conserve the cultural heritage values of that area of land
- will allow a landowner to voluntarily agree to undertaking particular management actions.

### **Intangible ACH agreements**

While Declared ACH and ACH conservation agreements can protect the intangible values attached to tangible heritage (e.g. a story attached to a place in the landscape), they cannot protect other types of intangible heritage. The draft Bill will therefore establish intangible ACH agreements to protect intangible Aboriginal cultural heritage not connected to a place or object, including stories, songs, ceremonies, practices, techniques, and traditional knowledge (see also *Definitions* under Aim A). Intangible ACH agreements are intended to recognise that intangible cultural heritage belongs to groups of people.

For this type of intangible ACH to be protected, it needs to be registered in the ACH Information System by the ACH Authority. Recognising that intangible cultural heritage belongs to groups of peoples and that the party seeking to register the intangible ACH needs to be able to legally represent others, the draft Bill will allow the following groups to apply to the ACH Authority to register intangible ACH:

- consultation panels
- native title holders
- Native Title Prescribed Body Corporates
- boards constituted under Part 4A of the NPW Act
- registered Aboriginal corporations
- LALCs.

The ACH Authority will develop protocols to guide the process of listing intangible ACH. After it receives a request, the ACH Authority will need to consult with the relevant consultation panel, and any other relevant people or groups, and consider these views before deciding whether to register the intangible ACH.

Once intangible ACH has been registered in the ACH Information System, it may not be used for commercial purposes without approval, in the form of an intangible ACH agreement. These agreements will allow a person or body to negotiate with the group that successfully sought registration, on how the registered intangible heritage may be used.

The purpose of intangible ACH agreements is to:

- protect registered intangible ACH against improper use (such as use without authorisation)
- authorise the use of intangible ACH by certain people or groups for specific purposes, including for commercial purposes
- allow Aboriginal people to benefit from the authorised use of intangible cultural heritage by others for commercial purposes.

### **State Heritage Register listings and approvals**

The Heritage Act 1977 currently provides for Aboriginal cultural heritage to be protected under that Act, through listing state significant ACH items on the State Heritage Register. The Minister for Heritage decides whether or not to list items on the State Heritage Register, at the recommendation of the Heritage Council of NSW. After something has been listed on the register, certain activities that may impact the heritage values of the item require the approval of the Heritage Council before the activity can take place.

The draft Bill will give responsibility for managing and conserving Aboriginal cultural heritage across New South Wales to the ACH Authority. The Authority should therefore have a decision-making role under the Heritage Act when a listing on the State Heritage Register includes ACH values.



The draft Bill will provide the ACH Authority with an equal role to the Heritage Council. Specifically:

- when an item has been nominated for listing on the register entirely on the basis of its ACH values, the ACH Authority will make the recommendation to the Minister for heritage and be responsible for any subsequent approvals relating to that item
- when an item has been nominated for listing on the basis of both ACH values and other values, the ACH Authority and the Heritage Council will jointly make recommendations to the Minister and be responsible for any subsequent approvals
- when there are no ACH values associated with a nominated item, the ACH Authority will have no role in recommendations for listings or associated approvals.

## Repatriation

The draft Bill will require the ACH Authority to repatriate Aboriginal objects and ancestral remains if it receives a valid request to do so, and if it is not unreasonable for the Authority to comply with the request.

### Opportunities to improve the current system

Currently the NPW Act authorises the Chief Executive of OEH to repatriate or return Aboriginal objects that are owned by the Crown. The effect of this arrangement is that decisions about repatriating Aboriginal objects and ancestral remains are ultimately made by non-Aboriginal people.

### Key features of the proposal

The draft Bill will set out a process to be followed when a person or community makes a repatriation request. The process requires any repatriation request to be submitted to the relevant consultation panel before it is considered by the ACH Authority. This is to ensure there is appropriate support for the request and the proposed repatriation arrangements.

The draft Bill will require the ACH Authority to develop and comply with a detailed policy and guideline for repatriating Aboriginal objects and remains.

In cases where the objects or remains to be repatriated are held by a third party on behalf of the Authority (for example, a museum), the Authority will be able to direct the third party to comply with the repatriation request.

## Funding for ACH conservation

The draft Bill will establish an ACH Fund which will be managed by the ACH Authority. The purpose of the fund is to consolidate funding from a variety of sources and deliver it more strategically for ACH conservation outcomes.

### Opportunities to improve the current system

Currently, funding is available through different programs such as Heritage Council grants and the Environmental Trust. However, these programs are required to fund a variety of works and are not solely focused on ACH outcomes. This can make it challenging for people to apply to the most appropriate funding source and make it difficult to achieve strategic and ongoing management of Aboriginal cultural heritage. Also, decisions about what to fund do not typically involve Aboriginal people.

## Key features of the proposal

The draft Bill will enable the ACH Fund to receive money from a variety of sources including government, proponents and donors. The ability of the fund to receive money from proponents addresses feedback from the public consultation in 2013 where some industry stakeholders noted they feel limited in the ways they can support ACH outcomes, particularly in the context of development projects. This includes contributions to the fund by proponents that are agreed through the ACH management plan negotiation process (see *ACH management plans*). This could be for management outcomes that cannot happen immediately, for example, building a keeping place on a site after other works have been completed.

The ACH Authority will be responsible for identifying ACH funding priorities and allocating funding from the ACH Fund. These decisions will be made in accordance with a Funding Allocation Strategy developed by the ACH Authority that identifies funding priorities for a period of three years. The draft Bill will require that payments from the fund are to support ACH outcomes only. As some public money is expected to be managed through the ACH Fund, the Minister will need to approve the strategy.

Funding priorities will be determined by the ACH Authority based on information obtained from the ACH Report and local ACH strategic plans (see relevant sections under Aim C).

The ACH Fund will centrally hold all funding obtained by the ACH Authority. Separate accounts are proposed within the fund to meet different funding purposes such as conservation and management, promotion and administration. These discrete accounts will have different funding sources and management arrangements appropriate to their intended purposes. Discrete accounts will enable greater transparency around expenditure and provide for more effective reporting requirements.

## Aim E: Greater confidence in the regulatory system

Aim E is to provide better upfront information to support assessments, clearer consultation processes and timeframes, and regulatory tools that can adapt to different types of projects. Key proposals that seek to achieve this aim are:

### Key proposal

A new assessment pathway

ACH management plans

Integration with development assessment

Dispute resolution

Appeals and reviews

Compliance and enforcement

In reading through this section, you might want to consider the following question:

### Aim E question

Do you think the new Aboriginal cultural heritage regulatory system depicted in Figure 7 will improve outcomes for managing Aboriginal cultural heritage?

## Aboriginal cultural heritage regulatory system

The draft Bill will include new arrangements to better support the assessment, management and protection of ACH values in the context of land-use planning, development assessment and land management activities. Figure 7 provides a high-level illustration of the regulatory system.

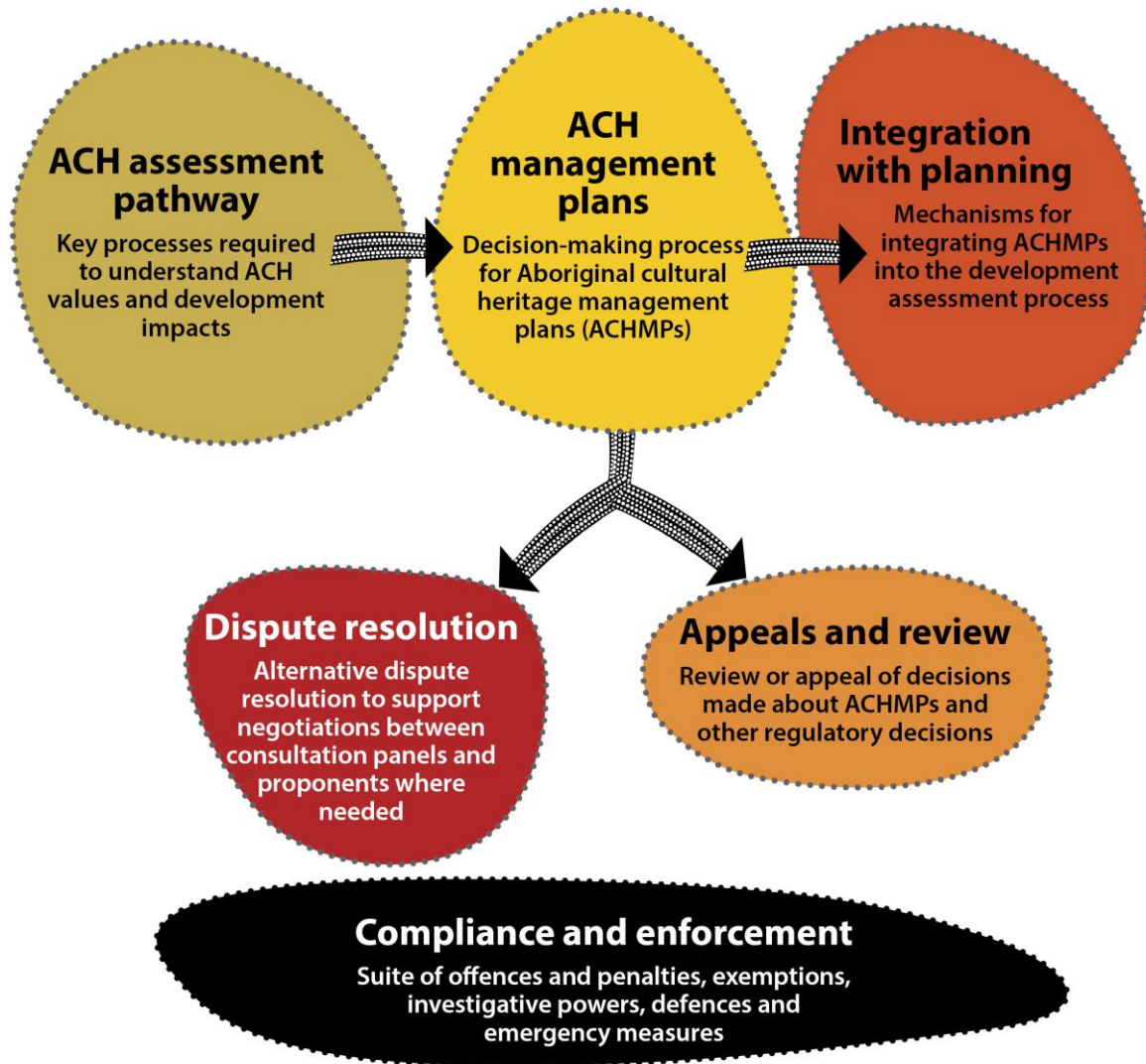


Figure 7: The Aboriginal cultural heritage regulatory system

## A new assessment pathway

The ACH assessment pathway is a process to consistently determine ACH assessment requirements including whether a proponent needs to obtain an ACH management plan (ACHMP) before undertaking a proposed activity. The draft Bill will establish key stages of the ACH assessment pathway to enable structured decision-making and encourage upfront consideration of Aboriginal cultural heritage.

This pathway will replace existing due diligence guidelines with a transparent and measurable assessment process that targets activities most likely to harm ACH values. The pathway also provides greater certainty around consultation processes and regulatory service timeframes and places a greater emphasis on trying to avoid or minimise harm as a first principle.

## Opportunities to improve the current system

Changes introduced in 2010 made it an offence to harm ACH, regardless of whether or not the person knew they were harming cultural heritage.

This reform was supported by a due diligence code of practice to help proponents determine if an Aboriginal Heritage Impact Permit (AHIP) is required. Stakeholder feedback on the code and supporting guidelines has since identified several issues including:

- consultation with Aboriginal people occurs too late in the assessment process
- some proponents disproportionately rely upon subjective classifications of land as disturbed or undisturbed to determine assessment requirements, which creates uncertainty
- difficulties in understanding whether proponents are following the due diligence requirements, creating challenges for compliance and enforcement, monitoring and reporting.

## Key features of the proposal

The draft Bill will establish an ACH assessment pathway made up of four discrete stages (Table 4).

**Table 4. Key stages in the Aboriginal cultural heritage assessment pathway**

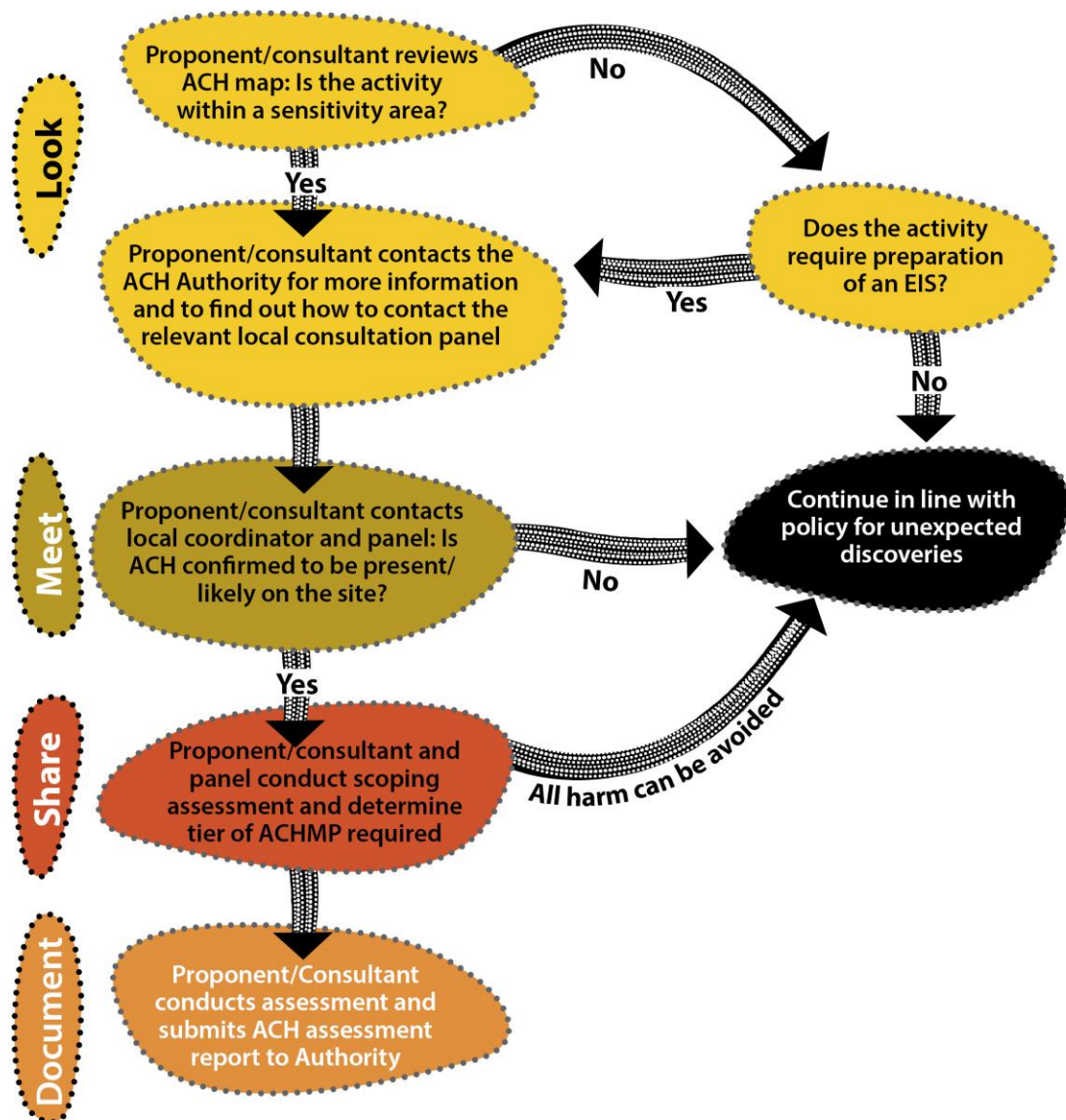
Stages	Activities	Participants
<b>1. ACH map review</b> Understanding activity risks to Aboriginal cultural heritage	<b>LOOK</b> at the NSW ACH map to locate activity	proponent/consultant ACH Authority
<b>2. ACH preliminary investigation</b> Making contact and building connections	<b>MEET</b> with local consultation panel to confirm ACH values	proponent/consultant consultation panel local coordination and support body
<b>3. ACH scoping assessment</b> Sharing information and understanding values	<b>SHARE</b> critical assessment requirements	proponent/consultant consultation panel local coordination and support body
<b>4. ACH assessment report</b> Identifying and assessing values to enable decision making	<b>DOCUMENT</b> values and impacts to enable negotiation and decision-making	proponent/consultant ACH Authority

The purpose of the ACH assessment pathway is to:

- require proponents to use ACH maps to determine whether they need to proceed through the ACH assessment pathway
- enable early engagement with consultation panels to support the exchange of information about ACH values and potential activity impacts
- guide preparation of ACH assessment reports, which will form the basis of negotiation between proponents and consultation panels on the management of ACH values, before finalising an ACHMP (see *ACH Management Plans*)
- move away from a one-size-fits-all assessment approach to an assessment pathway that can respond to different levels of risk defined by significance of ACH values, activity size and project complexity.

Figure 8 illustrates how parties would proceed through the assessment pathway.





**Figure 8: ACH assessment pathway**



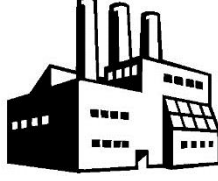
ACH = Aboriginal cultural heritage; ACHMP = Aboriginal cultural heritage management plan; EIS = environmental impact statement

### Tiered assessment

The ACH assessment pathway (Figure 8) can be tailored to specific project risk factors including project scale, project type and significance of ACH values. The draft Bill will provide for three tiers of ACHMP – basic, standard and complex. Different tiers will determine the level of detail and investigation required during the ACH assessment report. Different tiers will have different mandatory timeframes (Table 7). Consultation panels and proponents will determine the appropriate tier of ACHMP to be developed and negotiated, in accordance with guidelines. Table 5 provides some examples of how projects may possibly be classified under guidelines to be developed by the ACH Authority.



**Table 5: Example of a possible classification system for ACH projects**

Basic ACHMP	Standard ACHMP	Complex ACHMP
		
Single residential dwelling construction impacting Aboriginal cultural heritage with limited significance	Small to medium-scale road project (non-major project) impacting Aboriginal cultural heritage of local significance	Large-scale industrial or commercial redevelopment site with highly significant Aboriginal cultural heritage

ACHMP = Aboriginal cultural heritage management plan

### Unexpected discovery of Aboriginal cultural heritage

The draft Bill will include powers to establish processes for the unexpected discovery of Aboriginal objects and/or human ancestral remains. Proponents will be required to complete the ACH assessment pathway where development or land management activities result in the discovery of previously unknown Aboriginal cultural heritage.

### Application of ACH assessment pathway

The draft Bill will establish the ACH assessment pathway as applying to all activities that have the potential to harm ACH and are the subject of harm offences (see *Compliance and enforcement*). These activities may include, but are not limited to:

- development activities under Part 4 and Part 5 of the *Environmental Planning and Assessment Act 1979*
- controlled activities under the *Water Management Act 2000*
- some clearing and land management activities under the *Local Land Services Act 2013*.



### Exemptions from the ACH assessment pathway

The draft Bill will identify certain activities that are exempt from the harm offences identified in the compliance and enforcement section of this proposal paper. Proponents carrying out these exempt activities will not be required to complete the ACH assessment pathway, although they will be encouraged to work with consultation panels to minimise any potential impacts on Aboriginal cultural heritage.

The obligation to follow the ACH assessment pathway (to be set out in the draft Bill) will not apply to state significant development (SSD) and state significant infrastructure (SSI). This is currently the case not only for Aboriginal cultural heritage, but for other types of assessment. However, these types of development will continue to be subject to the Secretary's

Environmental Assessment Requirements (SEAR), created under the *Environmental Planning and Assessment Act 1979* (EP&A Act), which will be updated to adopt the key features of the assessment pathway. Currently, SSD and SSI projects are exempt from the need to obtain an AHIP and prosecution for offences relating to the harm of Aboriginal objects.

As is currently the case, there will continue to be a list of low impact activities that will not be subject to the ACH assessment pathway, unless the proponent has knowledge of the presence of ACH values. The purpose of these arrangements is to ensure that time and resources dedicated to assessments are focused on developments that may genuinely impact ACH and not on minor, low risk activities. The list of low impact activities will continue to appear in a regulation to the new legislation, rather than in the legislation itself.

We are interested in your early feedback on the current list of low impact activities in the National Parks and Wildlife Regulation 2009 (see Targeted question E1). Your feedback will inform the later development of the regulation. There will be further opportunities to comment on this proposal.

#### Targeted question E1

The draft Bill will propose that proponents who are undertaking low impact activities are exempt from completing the ACH assessment pathway, unless they know the proposed activity will harm Aboriginal cultural heritage values or they make an unexpected discovery of ACH during their activity. We are interested in your early feedback on the current list of low impact activities in the National Parks and Wildlife Regulation 2009 (Appendix B). Your feedback will inform the later development of the regulation.

Should any activities on the current low impact activities list be removed from the list?

Should any activities not currently on the low impact list be added?

## ACH management plans

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

These plans will replace AHIPs that are currently issued and approved by OEH. Any impacts on ACH values will need to be negotiated through an ACHMP and approved by the ACH Authority. An approved ACHMP will provide a defence to harm offences if the activity is undertaken consistent with an ACHMP.

## Opportunities to improve the current system

Currently, an AHIP is required where Aboriginal cultural heritage will be impacted. AHIPs are often sought after a development approval has been issued and building and construction plans are complete. Refining project plans without sufficient upfront consideration of Aboriginal cultural heritage can result in project delays and unforeseen costs associated with unexpected discoveries. They can also lead to poor ACH outcomes due to limited scope for avoiding harm.

AHIPs are a one-size-fits-all instrument that do not always respond well to differences in project size, scope and impact. They are focussed on allowing harm and are not sufficiently designed to achieve positive conservation outcomes.

## Key features of the proposal

The draft Bill will introduce ACHMPs as the primary tool for managing impacts on Aboriginal cultural heritage. It will set out the purpose, scope and legal effect of ACHMPs, and high-level processes for developing them.

The draft Bill will provide for ACHMPs to:

- be negotiated between consultation panels and proponents, thereby directly involving Aboriginal people in decisions about how their heritage will be managed
- be tailored to different types of projects and project risks, through different tiers of ACHMP (basic, standard and complex)
- incorporate conservation outcomes for Aboriginal cultural heritage
- be negotiated consistent with the high-level principles in the draft Bill and processes which will be developed by the ACH Authority and detailed in a 'Negotiation Framework'
- be subject to service guarantees, through mandatory timeframes for negotiations and decision-making
- be assessed and approved by the ACH Authority against clear standards and guidelines.

The negotiation principles in the draft Bill, and the processes to be set out in the ACH Authority's Negotiation Framework, will ensure that:

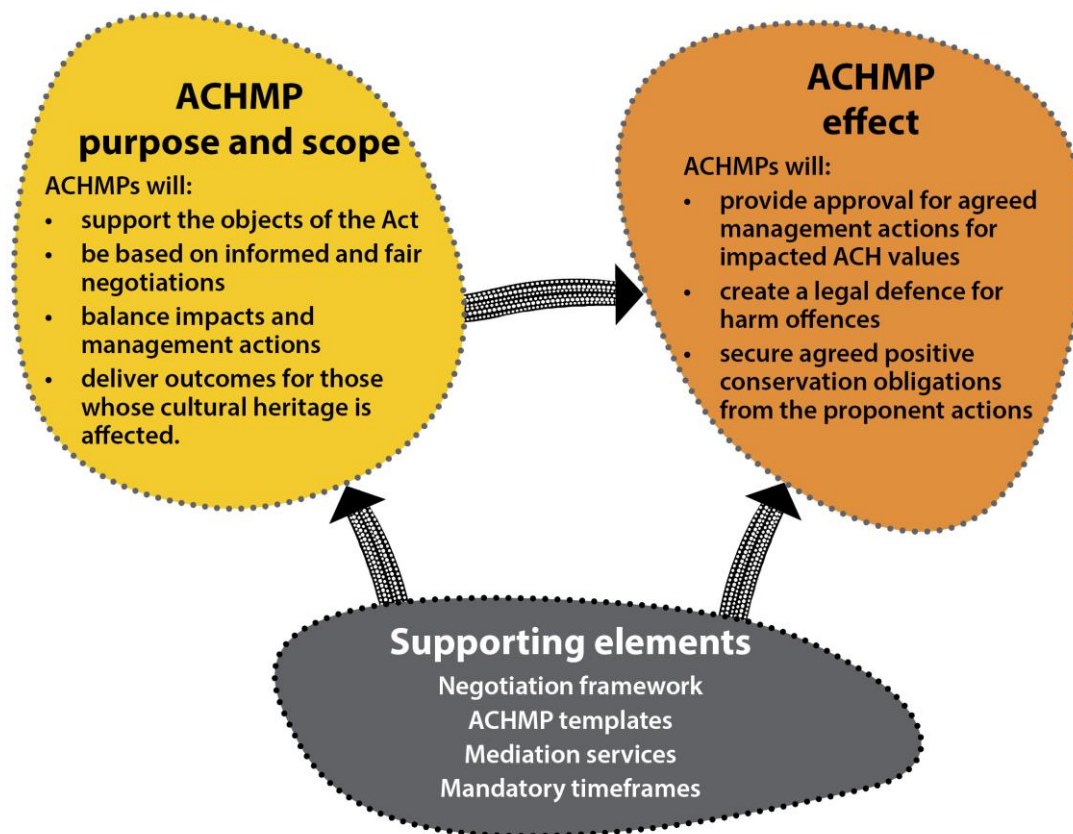
- negotiations between consultation panels and proponents are fair and conducted in good faith
- the actions and outcomes included in ACHMPs are directly related to Aboriginal cultural heritage and promote the objects of the new legislation
- the conservation obligations assumed by the proponent in the ACHMP are in balance with the impacts authorised by the ACHMP
- there is a direct link between the people benefiting from any proponent obligations in an ACHMP and the people whose cultural heritage is impacted.

In addition to the Negotiation Framework, ACHMP templates, mediation services and mandatory timeframes (see *A new assessment pathway*, *ACH management plans* and *dispute resolution*.) will also support consultation panels and proponents to negotiate ACHMPs. The details of these will be set out in a regulation to the new legislation.

Once approved, the legal effect of an ACHMP is to:

- provide *approval* for ACH management actions. This will support planning authorities such as local councils and joint regional planning panels to understand the impact of development activities on ACH values and guide development assessment
- create a legal *defence* against offences for harming Aboriginal cultural heritage, where a proponent has complied with the requirements of the ACHMP
- secure agreed *obligations* from the proponent, which may include conservation measures or actions.

Figure 9 summarises the purpose, scope and legal effect of an ACHMP and the elements that will support negotiations.



**Figure 9: Key aspects of Aboriginal cultural heritage management plans**

State significant development (SSD) and state significant infrastructure (SSI) projects will be legally exempt from preparing an ACH Management Plan under the draft Bill. This feature of SSD and SSI applies to a number of other regulatory assessments and approvals (e.g. assessments under the Heritage Act). However, major projects will continue to be subject to Secretary's Environmental Assessment Requirements (SEAR), created under the EP&A Act, which will be updated to adopt the key features of the ACH Management Plan negotiation process and supporting guidelines.

In many cases, major projects will create equivalent management plans for consideration by the Minister for Planning, Department of Planning and Environment or the Planning Assessment Commission.

### **ACH management plan negotiation and determination**

ACHMPs will be negotiated between a consultation panel and a proponent. Consultation panels and proponents will consider the ACH assessment report and discuss preferred actions to manage ACH values. They will be supported with a range of tools that aid the negotiation process including dispute resolution where necessary. At the end of the negotiation phase, a consultation panel and proponent:

- will have agreed on a draft ACHMP and submitted the plan to the ACH Authority for determination, or
- if the consultation panel and proponent could not agree on a draft ACHMP, the panel will have provided advice to the ACH Authority on the proposal and values. The ACH authority will determine the outcome.

ACHMP negotiations will be subject to mandatory timeframes (Table 7). This is to ensure negotiations do not end in a stalemate and that other regulatory processes are not delayed.

The ACHMP review and determination stage starts once the ACH Authority has received either an agreed draft ACHMP, or advice from the panel that it is not supporting the ACHMP. During this stage the ACH Authority is required to approve or refuse the ACHMP in line with legislative requirements. This decision would be subject to a maximum review period to ensure timely decision-making.

**Table 6. The three key stages of ACHMP development and determination, as set out in the draft Bill.**

Stages	Activities	Participants
<b>1. ACHMP negotiation</b> Negotiating outcomes and expressing management preferences	<b>NEGOTIATE</b> draft ACHMP and provide to ACH Authority	proponent consultation panel local coordination and support body
<b>2. ACHMP review and determination</b> Considering and determination of ACHMP	<b>CONSIDER</b> draft ACHMP and advice of the local coordination and support body	ACH Authority
<b>3. Approval integration</b> Integrating ACHMP into land management and development assessment	<b>SUBMIT</b> ACHMP with other approval applications	proponent planning authority

### Mandatory timeframes and review periods

As noted above, the negotiation of an ACHMP between a consultation panel and proponent will be subject to mandatory timeframes, and the determination of an ACHMP by the ACH Authority will be subject to maximum review periods. These timeframes and review periods will depend on the type of ACHMP being negotiated and considered. These timeframes are for the negotiation and review of ACHMPs and will begin after an assessment report has been prepared.

Mandatory timeframes and maximum review periods are needed to provide certainty that a decision will be made in a timely manner. They are also important to facilitate Aboriginal cultural heritage being considered before a proponent submits a development application to a planning authority (see *Integration with development assessment*).

The draft Bill will not set out the mandatory timeframes or maximum review periods that will apply to ACHMPs. These details will be set out in a regulation to be developed after the Bill is finalised. However, consideration has been given to what the appropriate timeframes might be for the different types of ACHMP (Table 7).

**Table 7: Proposed mandatory timeframes and maximum review periods for different types of Aboriginal cultural heritage management plan (ACHMP)**

Proposed timeframe	Basic ACHMP	Standard ACHMP	Complex ACHMP
Negotiation mandatory timeframe	10 business days	35 business days	75 business days
Determination maximum review period	5 business days	15 business days	20 business days



Mandatory timeframes can be varied by agreement between the consultation panel and proponent. Where an agreement is not reached or a consultation panel does not provide advice to the Authority within the mandatory timeframe, the draft Bill will require the ACH Authority to assume the consultation panel does not support the ACHMP.

Once a consultation panel has provided its advice to the ACH Authority, or the mandatory timeframe for negotiation has expired, the Authority must then determine whether to approve or refuse the ACHMP. The ACH Authority must make its decision based on matters set out in the draft Bill, which include but are not limited to the advice of the consultation panel.

The ACH Authority would have to make its decision within the maximum review period. Where this does not occur and the maximum review period expires without a decision being made, the proponent receives a deemed refusal similar to the deemed refusal of development applications under the EP&A Act.

We are particularly interested in your input on the proposed mandatory timeframes and maximum review period proposals (see Targeted question E2).

Targeted question E2
Do you think the proposed mandatory timeframes for negotiating ACH management plans (see Table 7) are appropriate?
Do you think the proposed maximum review periods for the ACH Authority to review ACHMPs (see Table 7) are appropriate?

## Integration with development assessment

The draft Bill will generally require ACHMPs to be submitted with development applications and relevant land management approvals. The aim is to support upfront ACH assessment by linking decisions about ACH management to development assessment decisions.

### Opportunities to improve the current system

Existing policies and laws require proponents to obtain AHIPs only after they have obtained their development approval. While some planning processes allow the general terms of approval to be issued during development assessment, the formal AHIP application does not occur until after development approval.

This approach provides limited opportunities for proponents and planning authorities to consider ACH values early and minimise impacts. Preparing a detailed ACH assessment after development approval may increase the potential for construction delays and disruption from unexpected discoveries, and limit opportunities to concurrently undertake ACH assessment alongside assessment activities for other matters such as biodiversity, natural hazards and social impacts.

### Key features of the proposal

The draft Bill will establish a relationship between ACH legislation and planning laws to ensure ACHMPs are integrated into land-use planning and development assessment decisions. The draft Bill will do this by requiring development proponents to disclose whether they needed to prepare an ACHMP to planning authorities or whether they are exempt (see *A new assessment pathway*).



Proponents who advise they need to prepare an ACHMP will need to follow specific procedures. This includes attaching to a development application either an approved ACHMP or evidence that a refused ACHMP is being appealed or reviewed. Similar requirements will also apply to development activities conducted under Part 5 of the EP&A Act.

This means that ACHMPs will be exhibited with development applications and form part of the information considered by planning authorities when determining a development proposal or application. Culturally sensitive information will not be exhibited.

Planning authorities will not play a role in determining the significance of ACH values or reviewing agreed actions in the ACHMP.

The draft Bill will provide guidance and procedures where a planning authority may need to impose conditions of consent on the development approval that are inconsistent with an ACHMP, either in a minor way or in a way that would result in harm to ACH values beyond what is approved in the management plan. These procedures may include either consulting with the ACH Authority or seeking the Authority's concurrence before imposing conditions of consent that are inconsistent with the ACHMP.

Integrating ACHMPs with development applications and other statutory approvals will:

- ensure ACH values are considered alongside other factors in early project design, which will allow better decision-making about ACH management and lead to better conservation outcomes
- encourage proponents to prepare ACH assessment reports at the same time as environmental impact assessments
- improve clarity for planning authorities on ACH values in the landscape
- enable greater alignment between ACH management and development consents.

## **Dispute resolution**

The draft Bill will establish formal procedures for resolving disputes that arise during the negotiation of ACHMPs. The draft Bill will enable the ACH Authority to provide guidance and support to resolve disputes in other circumstances. The purpose of these procedures is to encourage and enable parties to resolve issues in a fair, equitable and timely manner.

## **Opportunities to improve the current system**

Currently there are no formal procedures to resolve disputes that arise in relation to the management of Aboriginal cultural heritage. AHIPs are approved and issued by OEH and do not require a negotiated agreement between a proponent and an Aboriginal community. Although proponents must consult with Aboriginal communities during the AHIP application process, it is OEH that decides whether harm to cultural heritage values should be allowed.

As a consequence, there are no formal dispute resolution processes and the only recourse is for a party to challenge an AHIP decision in court. This is both time-consuming and costly, and can perpetuate significant power imbalances, particularly for Aboriginal communities.

In the new system, permits are replaced with ACHMPs, requiring a proponent and a consultation panel to negotiate the terms of the plan. Formal dispute resolution procedures are necessary in these circumstances to give confidence to both parties that negotiations are fair, and for an outcome to be reached within the relevant mandatory timeframe for negotiation.

## Key features of the proposal

The draft Bill will establish formal legal procedures to assist with resolving disputes between a consultation panel and a proponent during ACHMP negotiations.

If a dispute arises during the negotiation period, either party may request the ACH Authority to appoint an independent mediator to assist with resolving the issue. The role of the mediator would be to facilitate further discussion between the consultation panel and proponent, and assist the parties to find a mutually agreed way forward. If the dispute cannot be resolved within the relevant mandatory timeframe, the draft Bill will require the ACH Authority to assume the consultation panel does not support the ACHMP.

As set out above, the ACH Authority must then determine whether to approve or refuse the ACHMP, based on criteria set out in the draft Bill including, but not limited to, the advice of the consultation panel.

For other circumstances where disputes may occur, for example, during the formation of consultation panels, the draft Bill will enable the ACH Authority to provide guidance and support to assist parties to resolve these disputes. Procedures in this instance may include the ACH Authority organising community conciliation, Elder circles or mediation to enable parties to resolve the issue.

The details of these dispute resolution procedures will be contained in a regulation, not the Bill, and will be open to public feedback in the future.

## Appeals and reviews

The draft Bill will create several decision points for the ACH Authority and the Minister responsible for the Act. Unless otherwise specified, these decisions are called administrative decisions and they can be challenged in court. Examples of these types of decisions in the draft Bill will be the ACH Authority's decision to issue stop work orders or the Minister's decision to approve or refuse listings on the State Heritage Register.

While all administrative decisions can be challenged in court, sometimes specific pathways need to be set out so that decisions can be challenged in different ways. The two main ways that decisions are challenged in court are by merit appeal and judicial review. Judicial review is generally available to any person but merit appeal rights need to be specifically set out in law.

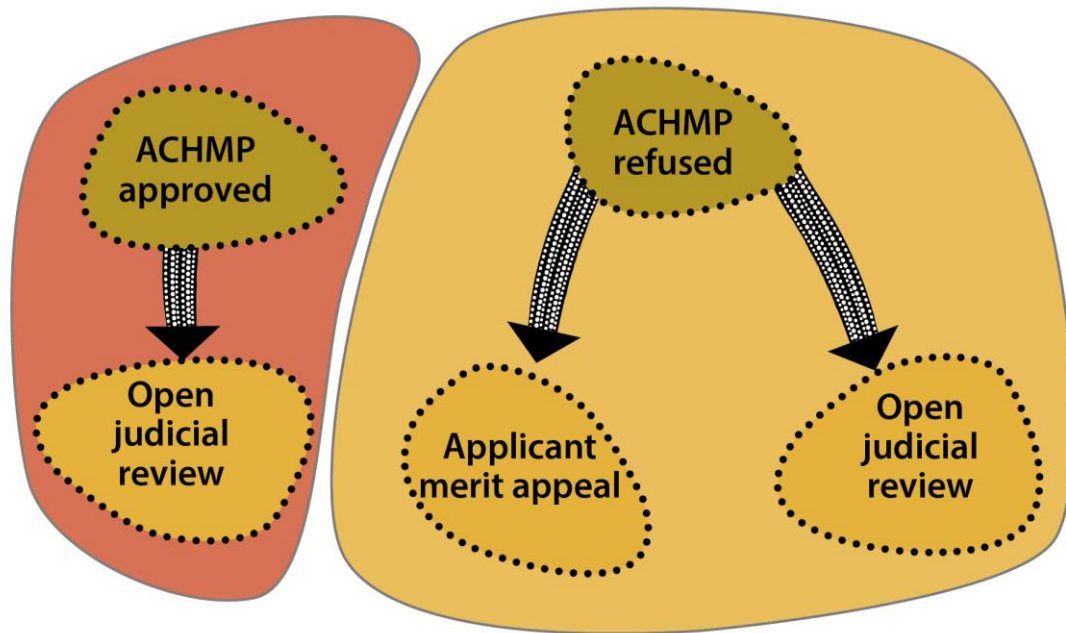
## Opportunities to improve the current system

The draft Bill will set out new arrangements for managing Aboriginal cultural heritage, including new decision points. This means that new pathways for review and appeal of decisions are required. The area where this is most important is for decisions about approving or refusing ACHMPs.

## Key features of the proposal

The draft Bill will create specific pathways for the review or appeal of the ACH Authority's decisions on ACHMPs (see Figure 10).

Where the ACH Authority approves an ACHMP, this decision is open to judicial review and anybody can request this review. Where the ACH Authority refuses an ACHMP, this decision is open to either merit appeal or judicial review. In this case, the merit appeal would need to be brought by the person who applied for the ACHMP.



**Figure 10: Pathways for the review or appeal of ACHMP decisions**

As discussed above, other review and appeal mechanisms that already exist will also apply in the new Act wherever administrative decisions are made.

Appeals and reviews of decisions made under the new ACH legislation will be heard in the Land and Environment Court of NSW, as is currently the case.

## Compliance and enforcement

Many of the provisions in the draft Bill are designed to make it easier for people to comply with the legislation. For example, giving people access to more information upfront through maps, and better consultation arrangements should mean that people are less likely to break the law. But there may still be circumstances where people do the wrong thing, so the draft Bill will contain appropriate compliance and enforcement provisions – including a regime of offences and penalties.

### Opportunities to improve the current system

The NPW Act makes it an offence to harm or desecrate an Aboriginal object or Aboriginal place. This is often called the ‘universal harm offence’. The NPW Act also establishes relevant exemptions and defences to this offence. For instance, proponents have a legal defence if harm to Aboriginal objects or places is authorised by an AHIP and the conditions of the AHIP are satisfied.

Penalties for these offences differ depending on whether the person knew they were committing the offence or not, with a higher penalty for a ‘knowing’ offence and a lower penalty for the ‘strict liability’ offence.

In addition to the universal harm offence, the NPW Act establishes a suite of other offences, defences, exemptions and penalties for breaches of the Act. These were most recently amended by the *National Parks and Wildlife Amendment Act 2010* which, among other things, increased the maximum penalties that could be applied for offences, introduced a range of alternative regulatory measures (e.g. remedial directions, tiered offences and penalties), and increased the period for prosecuting offences from one to two years after the event.

Feedback has suggested that while most of these provisions are sound, their enforcement has proved challenging. One problem is that the current laws do not include useful definitions of concepts such as desecration. This means it is very difficult to prosecute offences of this kind. Feedback has also suggested that compliance and enforcement efforts, and prosecution processes, need more support.

Because the draft Bill will create several new areas that must be complied with, some new offences are also needed.

## Key features of the proposal

The draft Bill will carry over the current harm provisions. This means that it will still be an offence to harm an Aboriginal object, remains or Declared ACH. As outlined in the *Definitions* section, a definition of desecration is included in the draft Bill.

Most of the current defences for the offence of harm will be carried over, but with changes to reflect the content of the new legislation. These amended defences are those relating to:

- compliance with an ACHMP (this replaces compliance with an AHIP and is a defence against harm only; an ACHMP cannot be obtained as a defence for desecration)
- demonstrating compliance with the ACH assessment pathway (this replaces the due diligence defence)
- low impact activity
- trivial and negligible harm (which forms part of the definition of harm)
- honest and reasonable mistake (for offences of harm to Aboriginal objects and remains and harm or desecration of an Aboriginal place).

The draft Bill will also include a suite of exemptions that either reflect current exemptions (amended to reflect the new legislation), or resolve uncertainties that currently exist in the NPW Act.

All other offences currently set out in the NPW Act that relate to Aboriginal cultural heritage will be retained in the draft Bill. These include for example, failure to comply with conditions of an ACHMP (previously AHIP), contravening orders, and failure to notify the relevant authority about the location of an Aboriginal object, remains or place.

There will also be new offences that reflect new elements of the proposed legislation – the protection of intangible ACH and the ACH restricted database.

## Penalties

Penalty amounts have also been reconsidered. The highest penalties will be for offences that are considered the most serious. These offences are likely to result in the most serious impacts to ACH values and/or undermine the effective functioning of the framework for ACH protection. The amounts also take into consideration public perception of the seriousness of the offence and the need for penalties to act as an effective deterrent. The maximum penalty amounts that courts can issue will be set out in the draft Bill. Penalty notice amounts will be set in the regulation which will be drafted once the Bill is finalised.

## Emergency measures

The draft Bill will include emergency measures similar to those contained in the NPW Act, including interim protection orders, stop work orders and remediation directions. Emergency measures can temporarily protect newly discovered places, objects, materials and archaeology that may have ACH values while their significance is being determined and appropriate conservation or management measures are developed. They can also be used to stop work that is damaging or may damage known Aboriginal cultural heritage.

New proposals for emergency protection measures include the ability for stop work orders to be issued verbally, allowing for remediation directions to be issued for outcomes rather than specific works, and the addition of voluntary enforceable undertakings. Together, these emergency measures provide a suite of flexible options to allow appropriate responses to protect Aboriginal cultural heritage.

## **Enforcement**

The draft Bill will give the ACH Authority responsibility for ensuring people comply with the new Act and for enforcing any breaches. The ACH Authority will be able to make arrangements with an appropriate state agency to carry out these functions on its behalf. OEH currently has responsibility for ACH compliance and enforcement and it is expected that OEH will continue to support this work as the new arrangements are being established.

The draft Bill will also require the ACH Authority to prepare a compliance policy which will clearly set out the approach to compliance and enforcement and any arrangements made with a supporting agency.

In terms of supporting prosecution of ACH offences, the ability to ascribe significance upfront and better access to verified information is expected to support prosecution process.



## Transitioning to the new framework

If the draft Bill is passed by Parliament, it will become the Aboriginal Cultural Heritage Act.

The draft Bill represents a significant change to the way in which ACH is protected and managed in New South Wales. The new governance structure, new conservation tools and new assessment and management plan processes will take time to put in place.

Implementation will occur over a number of years, which means the new legislation will take effect in a few key stages. However, to make it easy for users the number of stages will be kept to a minimum (Table 8). In the meantime, the current system will continue to operate.

This staged approach to implementation will ensure the new system is set up well and will operate effectively into the future. The first priority will be to establish the ACH Authority so it can oversee implementation of the legislation and consult with others in these processes.

In doing this, the ACH Authority will work with Aboriginal people and other stakeholders to prepare, consult on, and publish detailed policies and guidelines to drive the implementation of the new framework. This will take a number of years and there will be further opportunities for input.

Table 8 illustrates this staged approach to implementation and highlights anticipated key milestones and timeframes. The timeframes are indicative only and will be monitored and refined by the ACH Authority as implementation progresses. The complexity of the changes means support, for instance in the form of capacity and awareness building, needs to be provided to Aboriginal communities, industry, public authorities and others, to enable them to operate within the new system.

The NSW Government is aware that the success of the new Act will also depend on resourcing. Work is underway to determine the resources that will be required to effectively operate the new system. Feedback from the public consultation process and refinements to the draft Bill will inform this analysis.

**Table 8: Key transition points in implementation of the new ACH framework**

Key transition points	Activities
2018 Initial governance provisions of the Act will begin	The ACH Authority will be formed first so it can direct subsequent stages of implementation The ACH Authority will develop priority policies and guidelines to guide the implementation and operation of the Act (e.g. guidelines for the formation and operation of consultation panels). Many of these will be subject to further consultation
2019 onwards Remaining governance provisions will take effect	Capacity building and awareness raising for Aboriginal communities The ACH Authority will delegate to local coordination and support bodies and form local ACH consultation panels Consultation panels will begin gathering and storing ACH information, developing maps and identifying ACH priorities in their local areas for inclusion in strategic plans
2020 Conservation provisions of the Act will begin	Places and items of ACH significance can be formally declared and protected under the new Act

Key transition points	Activities
	<p>This part of the Act can only commence after: information gathering and management has begun</p> <p>conservation policies and guidelines have been developed by the ACH Authority</p>
<p>2021</p> <p>Regulation provisions of the Act will begin</p>	<p>The new assessment pathway must be used</p> <p>Use of ACHMPs starts as AHIPs are phased out</p> <p>Training and capacity building to support those who will operate within the system</p> <p>This part of the Act can only commence after: information gathering and mapping has substantially progressed</p> <p>regulation policies, guidelines and templates have been developed by the ACH Authority</p>
<p>2018</p> <p>Initial governance provisions of the Act will begin</p>	<p>The ACH Authority will be formed first so it can direct subsequent stages of implementation</p> <p>The ACH Authority will develop priority policies and guidelines to guide the implementation and operation of the Act (e.g. guidelines for the formation and operation of consultation panels). Many of these will be subject to further consultation</p>

## How will the draft Bill compare to the current National Parks and Wildlife Act?

The draft Bill will repeal Part 6 of the NPW Act (and other related sections of the Act) and create a new standalone Aboriginal Cultural Heritage Act. Part 4A of the NPW Act will not be changed. The new Act will be substantially different to the current legislation. The key changes are summarised in Table 9.

**Table 9: Key differences between the NPW Act and the draft Bill**

Topic	NPW Act	Draft ACH Bill
<b>Legislation</b>	Aboriginal cultural heritage protected under parks and wildlife legislation	Aboriginal cultural heritage protected under standalone ACH legislation
<b>Definitions</b>	Aboriginal cultural heritage not defined; only Aboriginal places and objects are defined	More respectful and contemporary definitions that reflect the breadth of ACH values – both tangible and intangible
<b>Governance</b>	Most decisions made by government agency (OEH) or Minister (for the Environment) Aboriginal people have limited advisory and consultation roles	New governance arrangements (including a new Aboriginal Cultural Heritage Authority and local ACH consultation panels made up of Aboriginal people) mean Aboriginal people will make or be directly involved in decisions about Aboriginal cultural heritage
<b>Ownership</b>	Certain Aboriginal objects ‘owned’ by the Crown (government)	Recognition that all Aboriginal cultural heritage belongs to Aboriginal people Those Aboriginal objects previously owned by the Crown will be owned by the ACH Authority on behalf of Aboriginal people, with arrangements for appropriate repatriation
<b>Consultation</b>	Consultation with Aboriginal people conducted according to government guidelines that identify a range of sources, including Registered Aboriginal Parties, proponents and others should refer to in determining who to consult with	Aboriginal people will decide who speaks for Country, and local ACH consultation panels will support communities to coordinate that cultural knowledge Consultation processes for proponents will be simplified through these panels
<b>Regulation</b>	Government issues permits (AHIPs) that allow proponents of activities to harm ACH AHIPs tend to be site-focussed and are generally sought and issued after development applications have already been approved	Permit-based system replaced with a negotiated process between proponents and Aboriginal people with cultural knowledge Negotiations focus on protection and avoiding harm wherever possible and can be tailored to the characteristics of the project Negotiated agreements are approved by ACH Authority Assessment and negotiations occur before development application is submitted, reducing the likelihood of unexpected finds and project delays

Topic	NPW Act	Draft ACH Bill
<b>Conservation</b>	Only Aboriginal places and objects are protected	Additional conservation mechanisms to accommodate the breadth of ACH values to be recognised in the new legislation Information gathering and management of ACH values, overseen by Aboriginal people and conducted in a culturally sensitive way
<b>Compliance and enforcement</b>	Arrangements support the design of the current Act	Redesigned to support the new legislation
<b>Monitoring and reporting</b>	No systematic monitoring and reporting to determine state of ACH across NSW and guide improvements over time	New requirements to provide transparency and support the operation of the legislation

## How will the draft Bill compare to the 2013 proposal?

Feedback from the 2013 model has been used in the development of the draft Bill. Generally, where elements of the 2013 model were supported, they will be incorporated in the draft Bill. Key changes will be made where feedback indicated a lack of support or a desire for greater detail. The key differences are shown in Table 10.

**Table 10: Key differences between the 2013 proposal and the draft Bill**

Level of support for 2013 reform model	2013 reform model	Draft ACH Bill
<b>Strongly supported</b>	Standalone legislation	<b>No change</b> The ACH Act will be standalone legislation.
	Transparent and accountable governance arrangements	<b>No change to intent for transparency and accountability; additional detail developed</b> Governance bodies will have clear roles and be required to report publicly on decisions.
	ACH register (with protocols for managing sensitive information)	<b>Minor change</b> A new information management system will be established and will have a restricted access database.
	Adequate resources and support for capacity building for committees	<b>No change to intent to resource new arrangements</b> Government is committed to ensuring the new legislation meets its aims. This includes support for capacity building and resources that will be required to effectively operate the new system.
<b>Broadly supported</b>	ACH maps/strategic planning/upfront information	<b>Minor change; significant additional detail developed</b> The draft Bill establishes upfront information gathering and mapping, in accordance with methodologies to be approved by the ACH Authority. Maps will show known or likely ACH values in a culturally appropriate way. Consultation panels will be involved in mapping local ACH values.
	A State of ACH Report	<b>Minor change; additional detail developed</b> The ACH Authority will prepare an ACH report every three years.
	Better links to land-use planning/earlier ACH assessment	<b>Moderate change; significant additional detail developed</b> Assessment and negotiation of ACHMPs will occur before development applications are lodged, which will support upfront consideration of ACH values.



Level of support for 2013 reform model	2013 reform model	Draft ACH Bill
	Incentives to protect ACH	<b>Minor change; significant additional detail developed</b> Changes will be made to existing conservation tools and new conservation tools will be introduced. These will protect the full breadth of ACH values. An ACH fund will provide funding for positive ACH outcomes.
	Continued role for joint management boards and committees and ILUAs	<b>Minor change; additional detail developed</b> Arrangements for consultation panels will accommodate existing legal rights and will not alter the primary role of joint management boards under Part 4A of the NPW Act.
	Dispute resolution processes	<b>Moderate change; additional detail developed</b> The draft bill identifies the circumstances in which formal dispute resolution processes, including mediation, will apply and how these processes will be facilitated. It also recognises circumstances in which the ACH Authority may facilitate more informal dispute resolution at a community level.
<b>Supported with amendment</b>	Preamble/objects	<b>Moderate change; additional detail developed</b> The objects better reflect the broader scope of the proposed legislation and the aspirations of Aboriginal people to be recognised as the rightful custodians of their cultural heritage.
	Definitions	<b>Moderate change; additional detail developed</b> The proposed definition of Aboriginal cultural heritage acknowledges the full breadth of values, including tangible and intangible aspects.
	Aboriginal ownership of ACH	<b>Moderate change; significant additional detail developed</b> The draft Bill establishes that ACH belongs to Aboriginal people.
	Composition of Local ACH Committees	<b>Moderate change; additional detail developed</b> The draft Bill requires the ACH Authority to form local ACH consultation panels. Panel members will be selected by the local community. How this will occur will be set out in a policy the Authority will prepare, consult on and adopt. Public consultation on the draft Bill asks targeted questions about what this process might look like.
	Project agreements that can adapt to the scale of a project	<b>Significant change; significant additional detail developed</b> Project agreements have been replaced with ACHMPs and their purpose and scope has been refined. There will be different tiers of ACHMP for different projects.

Level of support for 2013 reform model	2013 reform model	Draft ACH Bill
	Mandatory timeframes	<b>Significant change; significant additional detail developed</b> There will be mandatory timeframes but the proposed timeframes will better reflect the scale of the project. Timeframes will be based on the ACHMP tier.
	Appeal and review provisions	<b>Moderate change; additional detail developed</b> New appeal and review pathways will be established to reflect the content of the new legislation.
	New funding system	<b>Moderate change; additional detail developed</b> The ACH Fund will be a dedicated source of funding for positive ACH outcomes.
<b>Not supported</b>	Significance scale	<b>Major change; additional detail developed</b> The significance scale proposed in the 2013 model is not be used in the draft Bill. Instead the ACH Authority will develop guidance on how significance is to be ascribed in a culturally appropriate way.
	Retained government decision-making/ACHAC as advisory only	<b>Major change; significant additional detail developed</b> The ACH Authority, a body of Aboriginal people, will be a decision-making body.
	Local ACH Committee boundary options	<b>Moderate change; additional detail developed</b> The draft Bill requires the ACH Authority to form local ACH consultation panels. Panel members will be selected by the local community. How this will occur, and the boundaries that will apply, will be set out in a policy the Authority will prepare, consult on and adopt. Public consultation on the draft Bill asks targeted questions about what this process might look like and what factors might inform panel boundaries.
	'Proceed with caution' arrangements	<b>Significant change; significant additional detail developed</b> The 'proceed with caution' arrangements proposed in the 2013 model will not be adopted. Consultation panels and proponents will be supported to reach agreement. Where agreement cannot be reached, a decision will be made by the ACH Authority.

ACH = Aboriginal cultural heritage; ACHAC = Aboriginal Cultural Heritage Advisory Committee; ACHMPs = Aboriginal cultural heritage management plans; ILUAs = Indigenous land use agreement; NPW Act = *National Parks and Wildlife Act 1974*.

## Appendix A: Aboriginal cultural heritage legislation in other Australian states

NSW is the only state in Australia that does not have stand-alone legislation for managing and conserving Aboriginal cultural heritage. Table A1 provides a brief overview of the equivalent Aboriginal cultural heritage in other states, with a greater focus on Victoria and Queensland as neighbouring states with recent updates to their legislation.

**Table A1. Overview of Aboriginal cultural heritage legislation in other states**

State	Legislation
Victoria	<p><a href="#">Aboriginal Cultural Heritage Act 2006</a></p> <p>Some of the key areas that are similar to NSW's draft Bill include:</p> <ul style="list-style-type: none"> <li>• inclusion of intangible cultural heritage</li> <li>• establishment of a state-wide body with advisory and decision-making roles</li> <li>• standing groups with recognised cultural authority to speak for Country (registered Aboriginal parties)</li> <li>• use of negotiated ACH management plans</li> <li>• alternative dispute-resolution processes, including use of mediation during the negotiation of ACH management plans</li> <li>• establishment of an ACH fund.</li> </ul>
Queensland	<p><a href="#">Aboriginal Cultural Heritage Act 2003</a></p> <p>Some of the key areas that are similar to NSW's draft Bill include:</p> <ul style="list-style-type: none"> <li>• broader definition of Aboriginal cultural heritage</li> <li>• Aboriginal cultural heritage mapping and a central ACH database to inform planning activities</li> <li>• use of negotiated ACH management plans</li> <li>• Standing groups with recognised cultural authority to speak for Country (Cultural Heritage Bodies)</li> </ul>
Northern Territory	<p><a href="#">Aboriginal Sacred Sites Act 2006</a></p> <p>Some of the key areas that are similar to NSW's draft Bill include:</p> <ul style="list-style-type: none"> <li>• establishment of a state-wide body with advisory and decision-making roles</li> <li>• use of an information system managed by the state-wide body.</li> </ul>
ACT	<p><a href="#">Heritage Act 2004</a></p> <p>This piece of legislation is for Aboriginal, non-Indigenous and natural heritage. Fewer similarities with NSW's draft Bill.</p>
Western Australia	<p><a href="#">Aboriginal Heritage Act 1972</a></p> <p>Fewer similarities with NSW's draft Bill.</p>
Tasmania	<p><a href="#">Aboriginal Heritage Act</a></p> <p>Significant amendments were approved by the Tasmanian Parliament in 2017. They include the following, which are similar to NSW's draft Bill:</p> <ul style="list-style-type: none"> <li>• changing the name from the <i>Aboriginal Relics Act 1975</i> to the <i>Aboriginal Heritage Act</i></li> <li>• the establishment of a new statutory body, the Aboriginal Heritage Council</li> <li>• removing reference to 1876 as being a 'cut-off' point for what is considered as Aboriginal heritage.</li> </ul>
South Australia	<p><a href="#">Aboriginal Heritage Act 1988</a></p> <p>Fewer similarities with NSW's draft Bill.</p>

## Appendix B: Exemptions

Existing low impact activities listed in [section 80B of the National Parks and Wildlife Regulation 2009](#).

### **80B Defence of carrying out certain low impact activities: section 87 (4)**

**Note.** This clause creates a defence to the strict liability offence in section 86 (2) of the Act (being the offence of harming an Aboriginal object whether or not the person knows it is an Aboriginal object). The defence does not apply to the separate offence under section 86 (1) of the Act of harming or desecrating an object that a person knows is an Aboriginal object. If a person discovers an Aboriginal object in the course of undertaking any of the activities listed below, the person should not harm the object—as the person may be committing an offence under section 86 (1) of the Act (the offence of knowingly harming an Aboriginal object)—and should obtain an Aboriginal heritage impact permit, if needed.

(1) It is a defence to a prosecution for an offence under section 86 (2) of the Act, if the defendant establishes that the act or omission concerned:

- (a) was maintenance work of the following kind on land that has been disturbed:
  - (i) maintenance of existing roads, fire and other trails and tracks,
  - (ii) maintenance of existing utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines), or
- (b) was farming and land management work of the following kind on land that has been disturbed:
  - (i) cropping and leaving paddocks fallow,
  - (ii) the construction of water storage works (such as farm dams or water tanks),
  - (iii) the construction of fences,
  - (iv) the construction of irrigation infrastructure, ground water bores or flood mitigation works,
  - (v) the construction of erosion control or soil conservation works (such as contour banks), or
- (c) was farming and land management work that involved the maintenance of the following existing infrastructure:
  - (i) grain, fibre or fertiliser storage areas,
  - (ii) water storage works (such as farm dams or water tanks),
  - (iii) irrigation infrastructure, ground water bores or flood mitigation works,
  - (iv) fences,
  - (v) erosion control or soil conservation works (such as contour banks), or
- (d) was the grazing of animals, or
- (e) was an activity on land that has been disturbed that comprises exempt development or was the subject of a complying development certificate issued under the [Environmental Planning and Assessment Act 1979](#), or
- (f) was mining exploration work of the following kind on land that has been disturbed:
  - (i) costeaning,
  - (ii) bulk sampling,
  - (iii) drilling, or
- (g) was work of the following kind:
  - (i) geological mapping,
  - (ii) surface geophysical surveys (including gravity surveys, radiometric surveys, magnetic surveys and electrical surveys), but not including seismic surveys,
  - (iii) sub-surface geophysical surveys that involve downhole logging,

(iv) sampling and coring using hand-held equipment, except where carried out as part of an archaeological investigation, or

Note.

Clause 3A of this Regulation provides that an act carried out in accordance with the Code of Practice for Archaeological Investigation in NSW is excluded from the meaning of harm an object or place for the purposes of the Act.

(h) was the removal of isolated, dead or dying vegetation, but only if there is minimal disturbance to the surrounding ground surface, or

(i) was work of the following kind on land that has been disturbed:

(i) seismic surveying,

(ii) the construction and maintenance of groundwater monitoring bores, or

(j) was environmental rehabilitation work, including temporary silt fencing, tree planting, bush regeneration and weed removal, but not including erosion control or soil conservation works (such as contour banks).

(2) Subclause (1) does not apply in relation to harm to an Aboriginal culturally modified tree.

(3) In this clause, Aboriginal culturally modified tree means a tree that, before or concurrent with (or both) the occupation of the area in which the tree is located by persons of non-Aboriginal extraction, has been scarred, carved or modified by an Aboriginal person by:

(a) the deliberate removal, by traditional methods, of bark or wood from the tree, or

(b) the deliberate modification, by traditional methods, of the wood of the tree.

(4) For the purposes of this clause, land is disturbed if it has been the subject of a human activity that has changed the land's surface, being changes that remain clear and observable.

Note.

Examples of activities that may have disturbed land include the following:

(a) soil ploughing,

(b) construction of rural infrastructure (such as dams and fences),

(c) construction of roads, trails and tracks (including fire trails and tracks and walking tracks),

(d) clearing of vegetation,

(e) construction of buildings and the erection of other structures,

(f) construction or installation of utilities and other similar services (such as above or below ground electrical infrastructure, water or sewerage pipelines, stormwater drainage and other similar infrastructure),

(g) substantial grazing involving the construction of rural infrastructure,

(h) construction of earthworks associated with any thing referred to in paragraphs (a)–(g).



## Glossary

Term	Definition
ACH	Aboriginal cultural heritage
ACHMPs	Aboriginal cultural heritage management plan
AHIMS	Aboriginal Heritage Information Management System
AHIP	Aboriginal Heritage Impact Permit
ALR Act	<i>Aboriginal Land Rights Act 1983</i>
DPE	Department of Planning and Environment
EIS	Environmental Impact Statement
Judicial review	Judicial reviews can be requested for most administrative decisions to make sure that the decision-maker followed the proper processes. In a judicial review, the court does not remake the original decision but determines whether the decision was lawful, considered relevant information and excluded irrelevant matters.
LALC	Local Aboriginal land council
Merit appeal	Merit appeal only exists where legislation specifically provides for it. In a merit appeal, the appeal body (in this case, the Land and Environment Court) remakes the original decision.
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NPW Regulation	National Parks and Wildlife Regulation 2009
NSWALC	New South Wales Aboriginal Land Council
OEH	Office of Environment and Heritage
Planning authority	The term 'planning authority' encompasses local council, joint regional planning panel, planning assessment commission, Department of Planning and Environment and the Minister. It is a person who issues development consent or development approval.
Proponent	A person undertaking, or proposing to undertake, an activity. Unless specified otherwise, the term proponent is used to refer to development proponents ( <i>Environmental Planning and Assessment Act 1979</i> ) and land managers (under the <i>Local Land Services Act 2013</i> ).
RAP	Registered Aboriginal party
SHR	State Heritage Register
Strict liability	For a 'strict liability' offence there is no need to prove a person knowingly harmed Aboriginal cultural heritage.