

Draft LGNSW submission to the Aboriginal Cultural Heritage Bill 2018

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Opening

Local Government NSW (LGNSW) is the peak body representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to respond to the proposed Aboriginal Cultural Heritage (ACH) Bill (the Bill) that aims to strengthen the protection and conservation of ACH. We are pleased to provide detailed feedback in collaboration with our members. This submission is in draft form until endorsed by the LGNSW Board. Any revision made by the Board will be forwarded in due course.

LGNSW acknowledges that the proposed Bill provides a valuable opportunity to explore ways in which cultural heritage protection functions can be shared among stakeholder groups such as local government, Local Aboriginal Land Councils (LALCs), NSW Government agencies, landowners, industry, planning authorities, native title groups and developers.

Purpose

LGNSW acknowledges the intrinsic link between culture and heritage. LGNSW agrees the State ACH Authority and local ACH consultation panels will be best placed to advocate and inform local councils and other spheres of government on complex cultural heritage matters such as the identification and maintenance of sacred sites, knowledge of intricate kinship systems, and or gender specific places of significance.

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

The purpose of this submission is to provide detailed feedback on the key issues raised by councils. They relate to the practical aspects of implementing the requirements of the Bill and cover: local government's role, strategic planning, the importance of addressing ACH in planning proposals, access to the online information system and the need for a clear approach to identifying ACH. We also provide specific recommendations on changes to parts of the Bill.

Background

In 2011, the NSW Government announced reforms to the way ACH is protected and managed across the State.

LGNSW acknowledges the consultation timeline undertaken by the NSW Office of Environment and Heritage to ensure the proposed framework is inclusive of stakeholders' interests. Councils are invested stakeholders which currently manage cultural heritage services at a grassroots level and will play a key role in mentoring, advising and coordinating cultural heritage matters, within council functions and with wider community stakeholder groups.

LGNSW supports the Bill's intent to formally recognise that Aboriginal Australians are the custodians of their cultural heritage. LGNSW acknowledges that Aboriginal heritage is complex and multifaceted and directly intertwined with contemporary expression of cultural identity.

Structure of LGNSW's submission

This submission provides a detailed response to key issues for local government that have been raised by our members. The key issues address the practical aspects of implementing the requirements of the ACH Bill and cover: 1. Clarification of local government's role,

2. Strengthening strategic planning, 3. Incorporating planning proposals, 4. Funding the online information system and 5. Clarifying the scope of identifying and managing ACH needs.

Key issues for local government

1. Local government's role – needs to be clarified and strengthened

The ACH Bill will introduce new practices for the identification and management of ACH matters that will be transferred to ACH Authority and associated local consultation panels. We welcome a more informed and culturally sensitive way of delivering better ACH practice across NSW. However, we are aware that there is some confusion as to what will be the implications of these new practices on local government's current responsibilities for managing ACH.

We support a more robust system and are concerned that councils' current responsibilities may be compromised under the new system. Under the *Heritage Act 1977* and the *Environmental Planning and Assessment Act 2018* councils are tasked with identifying, assessing and managing heritage matters for ACH in relation to planning decisions. We are unclear how councils' roles will be integrated with the responsibilities of the ACH Authority and local consultation panels under the Bill.

The Local Coordination and Support role is also unclear. The Bill proposes that LALCs may provide this function but they may not all have the capacity to do so, in which case it may fall to local government to provide this support. This function would need to be adequately funded.

LGNSW suggests that to better integrate the above practice, councils be formally consulted at key times during the preparation of ACH Strategic Plans, Plans undertaken by ACH Authority and draft Plans of Management negotiated between the local consultation panels and applicants. We recommend that the process needs to be transparent for councils and communities so that information on ACH can be incorporated into the local government plan making process.

Recommendations:

1A. LGNSW recommends that councils' role be strengthened.
1B. LGNSW recommends that councils be formally consulted during the preparation of the ACH Strategic Plans, and notified of Draft ACH Management Plans for both planning proposals and development applications that have been lodged with the local consultation panels.
1C. LGNSW recommends the NSW Government explains how the ACH Bill will interact with the Heritage Act (HA) and the Environmental Planning and Assessment Act (EP&AA) to clarify councils' current role and responsibilities in managing ACH matters in the plan making process.
1D. LGNSW recommends that the local coordination function be appropriately defined and funded.

2. ACH Strategic Plans supported – needs to be fast-tracked

LGNSW supports the new system that encourages ACH values to be considered at the strategic planning stage with the introduction of ACH Strategic Plans by the ACH Authority. These Plans, which will identify ACH conservation priorities, provide direction for strategic plan making practice at a local government level. However, the development of these plans needs to be fast-tracked by the Authority if they are to be of practical use to councils.

We welcome plans that outlines conservation priorities as early as possible to guide the planning process at the local government level. We recognise that this is a more practical and

effective way of delivering better ACH practice. It is also of benefit to developers, as it provides more certainty at the early stage of a development proposal.

LGNSW is concerned that the likely delivery of ACH Strategic Plans are some years off, so may be ineffective in influencing the local strategic plans that councils are preparing now to deliver housing and employment targets for the next 5 years. These targets, as outlined in the Greater Sydney Region Plan (A Metropolis of Three Cities) and the five associated District Plans of the Greater Sydney Commission, will require councils to release land on greenfield sites, and up-zone land within planned precincts and collaboration zones, as quickly as possible.

Therefore, these ACH Strategic Plans need to be fast-tracked. To address this need, it is recommended that priority is given to developing ACH Strategic Plans in growth areas, based on a risk assessment of the potential impact of future development on the known and likely ACH values of the site.

Recommendation:

2. LGNSW recommends that the new ACH Strategic Plans be piloted in areas of significant growth, such as planned precincts and growth areas.

3. Planning proposals – needs to be added to the ACH Bill

The ACH Bill introduces an assessment pathway that will facilitate the upfront assessment of the ACH values for a proposed development site. While LGNSW supports the early identification of ACH values and negotiation of a ACH Management Plan with the local consultation panels, it is more important to apply this system to planning proposals (applications for re-zoning).

The most important stage for the consideration of ACH values is when the land is being released for housing in a greenfield site or rezoned for another use on a brownfield site. At this point in the development cycle, the protection of ACH values can be more practically and effectively protected and managed. Rezoning locks in the development potential of a site. After the land is rezoned, the ability to manage ACH is more limited and usually compromised.

Recommendation:

3. LGNSW recommends that planning proposals be incorporated into the ACH Bill, similar to DAs, to enable ACH Management Plans to be negotiated and agreed between the proponent and the local consultation panels and ACH Authority, before such proposals are lodged with council.

4. Online information system – needs to be adequately resourced

The ACH Bill will establish a new online information system that will include regulatory maps - the previous Aboriginal Heritage Information Management System (AHIMS)¹ - new ACH strategic plans, registered declared places (tangible and intangible) conservation management plans and agreements.

However, it is unclear how the proponent will be informed if the relevant land is identified on the regulatory map and consequently the need to negotiate a Plan of Management with the local consultation panel.

¹ <http://www.environment.nsw.gov.au/licences/AboriginalHeritageInformationManagementSystem.htm>

LGNSW supports an open information system that provides up-to-date data on ACH matters that is linked to the NSW e-planning portal. All information provided on the new information management system - both open and restricted - should be regularly updated, including the data on the AHIMS and referenced on a zoning certificate.

It is critical for assessment of Complying Development, that this information is provided on planning certificates, as without the notification, private certifiers will not consider ACH in their assessment.

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

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

Recommendations:

4A. LGNSW recommends that zoning certificates reference the regulatory maps, and that access to the regulatory maps are open to councils - both public and restricted information - subject to agreed protocols.

4B. LGNSW recommends that the development and maintenance of the regulatory maps be adequately resourced so that councils, developers and communities have confidence in the information base of the new system.

5. Scope of identifying and managing ACH - needs to be clarified

LGNSW supports a legal framework that provides formal recognition that Aboriginal Australians are the custodians of their cultural heritage. LGNSW acknowledges that Aboriginal identity is complex and multifaceted and directly intertwined with their cultural heritage.

The new definition for ACH is an improvement, however there remains considerable debate around the scope and application of the new definition in relation to the functions of the ACH Bill. It is unclear whether the definition will deliver the ambitions of the ACH Bill to encompass physical, emotional, spiritual, kinship and connection to country and whether it will achieve an holistic interpretation of ACH that embraces the land, sky and waterways. The Bill should take care to adequately reflect the obligation to protect all aspects of Aboriginal heritage which arise under the *Universal Declaration on the Rights of Indigenous Peoples*, to which Australia is party.

In addition, there is some debate around the application of intangible heritage to land use decisions. It is unclear in the ACH Bill whether the legislation will become the register for stories, lores and practices.

From local government's perspective, councils are unclear how intangible heritage will or should be managed in relation to land based decisions. Will intangible assets provide inspiration and direction for the naming and identification of local places? Will they inform council advice to developers and land owners?

LGNSW supports the emerging role of the ACH Authority and local ACH consultation panels as the new authorities on identifying and managing ACH and look forward to working with these organisations in the future. We recognise that these new organisations will need financial commitment from the NSW Government to deliver the new system in a timely

manner. This will include adequate training in planning processes to enable effective integration of ACH into the planning system and to build the capacity of Aboriginal people to manage ACH.

Recommendation:

5. LGNSW recommends that the emerging governance authorities have adequate funding to build capacity for knowledge transfer, qualifications and employment of Aboriginal people in areas of ACH.

LGNSW specific comments on the ACH Bill 2018

The table below outlines LGNSW's specific recommendations on the ACH Bill.

Part 3	Heritage declarations and information LGNSW concerns/questions
Section 19: Establishment and management of ACH Information System	<p>LGNSW recommends that councils be given open access to the database, including the restricted database, subject to agreed protocols. This is essential for councils to be able to carry out their planning and heritage functions, under the EP&A Act. Amend Section 19 (3) (c) to read:</p> <p><i>“That councils be given access to the restricted database, subject to agreed protocols”</i></p>
	<p>LGNSW is unclear how ‘intangible ACH’ will be registered so that it is a matter of consideration within a land use planning system</p> <p>See Section 19(4) (e)</p>
ACH regulatory maps and processes	<p>Councils have already developed a number of methodologies that are suitable for identifying known and likely ACH Heritage matters. These should be incorporated into the new map.</p>
	<p>LGNSW suggests that councils’ zoning certificates need to reference the regulatory maps. This can be done generally (for restricted matters) and more specifically for other matters. This information is particularly important for all development proposals – planning proposals, DAs and Complying DAs that need a clear understanding of relevant ACH values on the relevant site.</p>
	<p>LGNSW agrees that Ministerial power be limited to ‘signing off’ on the process not the content of the regulatory map. We are unclear how this distinction will be managed.</p>
Councils’ role in interpreting intangible assets	<p>The listing of intangible heritage is unclear for councils. We are unclear on the status and implications of these declared places on strategic land use planning decisions.</p> <p>Will any declared ACH be comparable to conservation areas, where certain values are identified as significant for an area but not a property? For example, could intangible ACH protect views or assist council in interpreting local ACH of an area and if so how? Will these places be akin to a “conservation area” where the intent may be to manage views for example, naming rights and artistic use of stories and place.</p> <p>A set of criteria that can be used by councils to explain to the community why a site is listed as having ACH significance would be useful, for example:</p> <ol style="list-style-type: none"> 1. The place or object contributes to the identification and understanding of local or State ACH. 2. The place or object contributes to understanding a significant local or State Aboriginal person or cultural group. 3. The place or object contributes to the understanding of a significant local or State Aboriginal story, custom or knowledge.
Consultation with local government	<p>It is recommended that the local ACH panels are mandated to consult with councils when preparing ACH Strategic Plan. Amend Section 21 by adding:</p> <p>Section 21 (4)</p> <p><i>“That ACH Authority and local consultation panels are to consult with local government when preparing an ACH strategic plan.”</i></p>

Part 5	Aboriginal cultural heritage regulatory system LGNSW concerns/questions
ACH needs to be addressed at the planning proposal stage	<p>Division 5 needs to be amended to apply also to planning proposals not just DAs, as rezoning applications (PPs) set the scene for future redevelopment of planned precincts or land release area. Providing information at this stage means it is possible to avoid harming ACH places. It also provides certainty for developers.</p> <p>LGNSW recommends amending Section 60 by inserting:</p> <p>Section 60 (3): <i>“That this Division applies to an application for a planning proposal referred to in this Division as a relevant planning proposal”.</i></p>
Pre-DA meetings	<p>Councils support the upfront assessment and preliminary approval of the ACH Management Plan before the DA is lodged. Will the new system promote pre-DA meetings that also involve some representation from the local consultation panel?</p>
Level of assessment based on the scale of development	<p>The level of heritage assessment required for a planning proposal should be categorized as ‘complex’- the highest level. However, for any subsequent DA the heritage assessment level could be substantially lowered, or even exempted, where the DA is in accordance with the approved ACH Management Plan, that was attached to the planning proposal.</p> <p>Councils agree with a tiered system of heritage assessment. It is recommended that the decision about the level of heritage value be based on the strategic context of the ACH values, scale of development, level of disruption of land below ground level, underground car parking etc.</p>
Major Development and Part 5 Projects	<p>LGNSW is concerned that the new assessment process of ACH will not apply to major development. It is unreasonable that a new system is established that exempts the most significant development from protecting ACH.</p> <p>LGNSW recommends the Local ACH Consultation Panel should have a role in the same manner as other Government Agencies during the Secretary’s Environmental Assessment Requirements (SEARs) process.</p>
Assessment time frames	<p>Councils are required to approve a DA within a statutory time period or the applicant has a right of appeal to the Land and Environment Court. While the approval times of ACHMPs of 5, 15 and 20 days appear reasonable, the bigger problem is where there are variations to the Plan that may be required for other reasons than ACH. LGNSW therefore supports a process where councils are notified pre-DA so that other issues may be raised.</p>
ACH Management Plan	<p>LGNSW recommends that council be advised when an applicant is negotiating an ACH Management Plan with the local consultation panel before a DA is lodged.</p>
DA processes and requirement for a ACHMP	<p>Councils are unclear how to process a DA where the applicant has not sought or been able to successfully negotiate an agreed ACH Management Plan.</p> <p>Schedule 1 of the EPA Regulations identifies information to be submitted with a DA. This needs to be amended so that an DA cannot be submitted without an ACH Management Plan, where the site has known ACH values. This would give council the power to reject such a DA.</p> <p>Where an applicant has attempted to work with the Local Consultation Panel to obtain an ACH Management Plan but has not been able to negotiate such a Plan, it would be the applicant’s responsibility to address any reasons as to why an ACH Management Plan is not required.</p>

Conclusion and Recommendations

LGNSW strongly supports a more robust and up-front development process that considers the ACH values of the site at the earliest stages of the local plan making process. Councils believe this will reduce some of the conflict in the system where this information is not known or the implications are not understood by a proponent for development.

Given the pressure on councils to approve development as quickly as possible, these changes in the ACH Bill are important and urgent. The new ACH Strategic Plans are needed now and the register must be implemented as soon as possible. While councils may be unclear how their roles as managers of ACH will continue, we will support the emerging ACH authority and local consultation panels.

Local government is aware that decisions around protecting ACH rarely occur in isolation to other planning functions and we call for funding to be available to develop the regulatory maps and associated ACH Strategic Plans as soon as possible.

We recognise the importance of the Aboriginal people taking on the role as custodians of ACH and the critical timing of this action. We commend the NSW Government for delivering an ambitious and important piece of legislation for NSW and encourage the Government to provide adequate training to support Aboriginal people to undertake this role.

Local government looks forward to working alongside the new governance structures to deliver a fairer more equitable system for the Aboriginal people. We believe this system will be more effective if the NSW Government considers and applies our recommendations below.

LGNSW recommends that:

- 1A. Councils' role be strengthened.
- 1B. Councils be formally consulted during the preparation of the ACH Strategic Plans, and notified of Draft ACH Management Plans for both planning proposals and development applications that have been lodged with the local consultation panels.
- 1C. The NSW Government explains how the ACH Bill will interact with the Heritage Act (HA) and the Environmental Planning and Assessment Act (EP&AA) to clarify councils' current role and responsibilities in managing ACH matters in the plan making process.
- 1D. The local coordination function be appropriately defined and funded.
2. The new ACH Strategic Plans be piloted in areas of significant growth, such as planned precincts and growth areas.
3. Planning proposals be incorporated into the ACH Bill, similar to DAs, to enable ACH Management Plans to be negotiated and agreed between the proponent and the local consultation panels and ACH Authority, before such proposals are lodged with council.
- 4A. Zoning certificates reference the regulatory maps, and that access to the regulatory maps are open to councils - both public and restricted information - subject to agreed protocols.
- 4B. The development and maintenance of the regulatory maps be adequately resourced so that councils, developers and communities have confidence in the information base of the new system.
5. The emerging governance authorities are given adequate funding to build capacity for knowledge transfer, qualifications and employment of Aboriginal people in areas of ACH.

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