

19 April 2018

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

By email: ach.reform@environment.nsw.gov.au

Submission to the Public Consultation on Aboriginal Cultural Heritage

Dear Panel Members,

Community Legal Centres NSW (CLCNSW) welcomes the opportunity to make this submission to the public consultation regarding the draft Aboriginal Cultural Heritage Bill 2018.

About Community Legal Centres NSW

CLCNSW is the peak representative body for almost 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres (CLCs) are independent non-government organisations that provide free legal services to individuals and communities, at times when that help is needed most, and particularly to people facing economic hardship.

CLCNSW represents the views of community legal centres to the government and broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community.

CLCNSW is advised on matters relating to Aboriginal and Torres Strait Islander people and communities by our Aboriginal Advisory Group.

General comments

Community Legal Centres NSW endorses the submissions of our member organisations, the Environmental Defenders Office NSW (EDO NSW) and the Arts Law Centre of Australia.

We support reform in this area of law, noting the historic injustice and ongoing systemic discrimination faced by Australia's First Nations peoples. In particular, we believe it is high time that Aboriginal Cultural Heritage (ACH) was removed from the National Parks and Wildlife Act, and that decisions about ACH should be made by Aboriginal organisations.

As such, we support the broad purpose of the Bill: creating a separate Act to deal with ACH and enacting an Aboriginal Cultural Heritage Authority to replace the current role of the Office of Environment and Heritage in Aboriginal Cultural Heritage.

At the same time, we request the government note our recommendations, and those of our member organisations, on this draft legislation and request that a number of amendments be made before the Bill is tabled in parliament.

Summary of recommendations

CLCNSW recommends that:

1. Before the Bill is presented to parliament further consultation with Aboriginal people be undertaken, and details be provided about the resourcing of new Aboriginal bodies.
2. The Bill should be amended to protect ownership of intangible Aboriginal Cultural Heritage (ABH) should be protected by this Bill. Current intellectual property laws should also be amended to reflect this.
3. Intangible ACH rights should be inherent: they should be automatically applied without need for registration.
4. Section 36 should be expanded to include guidance on what is meant by “not widely known”.
5. More decisions should be made by the new Aboriginal Cultural Heritage Authority. Failing that there should be binding criteria for the Minister to consider when declaring Aboriginal Cultural Heritage.
6. To ensure culture safety, the Bill should require the creation of management plans that safeguard the sensitive nature of disclosing Indigenous Cultural Intellectual Property (ICIP).
7. Amend Schedule 1 of the Bill so that there are binding criteria for the Minister to consider when removing a member from office.
8. Amend the Bill to ensure Aboriginal community engagement at all levels of decision making, particularly where major development proposals are concerned; and to ensure that Major Projects are subject to management plans and the harm offences in the Bill.

Consultation on the Bill

We would like to express our concerns regarding the consultation regarding this draft legislation and share the concerns of the EDO NSW regarding whether the eight-week consultation period has provided sufficient opportunity for engagement with and leadership from Aboriginal people and communities on this legislation.

At the same time the Bill contains little information about potential resourcing of new Aboriginal bodies including the ACH Authority and Local Consultation Panels.

Recommendation 1 – we recommend that:

Before the Bill is presented to parliament further consultation with Aboriginal people be undertaken, and details be provided about the resourcing of new Aboriginal bodies.

Recognising intangible Aboriginal Cultural Heritage

Indigenous peoples' cultural heritage is protected under Article 31(1) of the United Nations Declaration of the Rights of Indigenous Peoples:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

CLCNSW appreciates that the proposed legislation attempts to expand the current definition of Aboriginal Cultural Heritage (ACH) in alignment with international standards. We also welcome the formal acknowledgement of the concept of intangible ACH.

Enactment of the proposed legislation will also fulfil our obligations under Article 31(2) of the United Nations Declaration of the Rights of Indigenous Peoples:

In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

We note that the proposed legislation does not consider current intellectual property laws. Ownership of intangible ACH should be automatically vested in the Aboriginal Community, without need for registration. Therefore, the Bill and intellectual property laws should be amended to recognise this.

Recommendation 2 – we recommend that:

The Bill should be amended to protect ownership of intangible Aboriginal Cultural Heritage (ABH) should be protected by this Bill. Current intellectual property laws should also be amended to reflect this.

Proposed registration system

CLCNSW opposes the proposed system of registering intangible ACH. That is, a community's right to maintain, control, protect and develop their cultural heritage should not be determined by whether their ACH is registered or not.

In practice, it would be difficult to register existing Aboriginal Cultural Heritage given that it encompasses 60,000+ years of cultural heritage.

Recommendation 3 – we recommend that:

Intangible ACH rights should be inherent: they should be automatically applied without need for registration.

Clarity required in conditions for registration

Section 36(2) of the Bill outlines the conditions for registration of ACH:

The ACH Authority may only register intangible Aboriginal cultural heritage if:

- a) it is satisfied that the heritage is not widely known to the public and should be protected from unauthorised commercial use, and
- b) it complies with the registration requirements of the regulations.

There is no guidance for what is meant by “not widely known”. This also implicates that an ACH is not registrable if it is well known.

Recommendation 4 – we recommend that:

Section 36 should be expanded to include guidance on what is meant by “not widely known”.

Ministerial discretion

Generally, we believe that it should be an Aboriginal body making decisions in relation to Aboriginal Cultural Heritage, rather than the Minister. This includes particularly in relation to ACH declarations, interim protection orders, codes of practice and Aboriginal Cultural Heritage maps.

Section 18(1) of the Bill gives the Minister absolute discretion in declaring ACH registered by the ACH Authority:

The Minister may, on the recommendation of the ACH Authority, declare that for the purposes of this Act:

- a) land that is part of a landscape or other place having Aboriginal cultural heritage significance comprises Aboriginal cultural heritage (including land containing or otherwise connected with an Aboriginal object or Aboriginal ancestral remains whose removal from the land would reduce the Aboriginal cultural heritage significance of the object or remains or of the land), or
- b) any specified object, article or material evidence is an Aboriginal object, or

- c) any bodily remains are Aboriginal ancestral remains, or
- d) any other tangible material relating to Aboriginal life or historical events comprises Aboriginal cultural heritage.

We note that the Bill gives the Minister a high level of discretion in pivotal decisions, with no binding criteria to consider. This undermines the aims of this Bill: “to establish a legislative framework that reflects Aboriginal people’s responsibility for and authority over Aboriginal Cultural Heritage”.

Generally, we believe that it should be an Aboriginal body determining what is a ‘declared’ area, landscape, etc., rather than the Minister. If this is not to be the case, we recommend binding criteria for the Minister.

Recommendation 5 – we recommend that:

More decisions should be made by the new Aboriginal Cultural Heritage Authority. Failing that there should be binding criteria for the Minister to consider when declaring Aboriginal Cultural Heritage.

Issues with disclosing Indigenous Cultural and Intellectual Property (ICIP)

CLCNSW appreciates that the proposed register will be restricted-access. However, due to the requirement of disclosing ICIP, we are concerned that any misuse by those with access will compromise the cultural safety of Aboriginal communities.

Recommendation 6 – we recommend that:

To ensure culture safety, the Bill should require the creation of management plans that safeguard the sensitive nature of disclosing Indigenous Cultural Intellectual Property (ICIP).

ACH Authority membership

We welcome the community-driven process proposed by the Bill for electing members of the ACH Authority. However, CLCNSW is concerned about a termination clause in Sch 1 of the Bill:

Sch 1 Clause 5

(2) The Minister may remove a member from office at any time

The ACH Authority, local panel members and support bodies are appointed to represent the views of various Aboriginal communities. CLCNSW is concerned that the Minister’s ability to remove a member from office at their discretion will compromise the Aboriginal trust in the Authority.

This clause effectively undermines the Bill’s objective to empower Aboriginal communities.

Recommendation 7 – we recommend that:

Amend Schedule 1 of the Bill so that there are binding criteria for the Minister to consider when removing a member from office.

Major Development Proposals

Although any major development proposals must go through consultation with the ACH Authority, the Bill does not detail any processes for community consultation. We are concerned that without proper community engagement, ACH will remain vulnerable. It is crucial that any proposed legislation concerning Aboriginal communities should mandate Aboriginal participation in decision-making at all levels.

CLCNSW believes that Major Projects should be subject to management plans and the harm offences in the Bill. The Bill is currently unclear about how State Significant Infrastructure (SSI) and Developments (SSD) are dealt with.

Additionally, there are concerns regarding the effectiveness and transparency of the assessment and consultation processes under the Environmental Planning and Assessment Act. We suggest that the Aboriginal Cultural Heritage Bill is an opportunity to improve processes in these areas, as opposed to simply deferring to pre-existing legislation. This may require amendments to improve the Environmental Planning and Assessment Act.

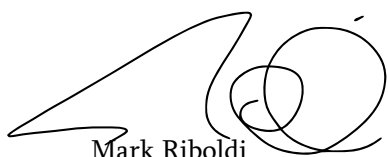
Recommendation 8 – we recommend that:

Amend the Bill to ensure Aboriginal community engagement at all levels of decision making, particularly where major development proposals are concerned; and to ensure that Major Projects are subject to management plans and the harm offences in the Bill.

More information

Thank you for taking the time to consider our submission. If you have any questions or require further input, please contact us via clcnsw@clcnsw.org.au or on 9212 7333.

Yours faithfully,



Mark Riboldi

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Community Legal Centres NSW