



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Paul Maher
A/Senior Planner
Hunter & Central Coast Region
Department of Planning & Environment
PO Box 1226 NSW

12 April 2016

Dear Mr Maher,

Re: Draft Hunter Regional Plan

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory organisation created under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their local communities.

NSWALC continues to work with the NSW Department of Planning & Environment (**Department**) to improve the NSW planning system to facilitate the objectives of the ALRA, including furthering the cultural, social and economic interests of Aboriginal people across NSW. A number of these issues are relevant to regional planning processes, including:

- Improving the ability of the planning system and planning bodies to work with Aboriginal Land Councils to strengthen **economic self-determination** of Aboriginal communities;
- Improving **community participation and engagement** with Aboriginal peoples in regional planning;
- Providing **better recognition and protections for Aboriginal cultural heritage** and further exploring the opportunities this presents in line with the aspirations of Aboriginal people; and
- Addressing the specific issues related to **former Aboriginal missions and reserves**.

For your reference, we have **attached** NSWALC's submission to the Inquiry into Regional Planning Processes recently undertaken by the Standing Committee on State Development, which canvasses the above issues in more detail. NSWALC has written a number of previous submissions to the Department on how to improve planning processes to better reflect the interests of Aboriginal people, and these can be provided upon request.

It is positive to see that the Department has identified a number of these issues in the Draft Hunter Regional Plan, reflected through Direction 4.4 which contains a number of actions relating to

strengthening the economic and cultural self-determination of Aboriginal communities. While a good starting point, NSWALC hopes that these actions will be implemented in a way that is both meaningful and consultative with LALCs in the Hunter region.

We look forward to working with the Department to discuss workable solutions to these issues through legislative amendments, policy development and cultural change. If you have questions regarding the content of this letter, or the submission attached, please contact the Policy and Programs Unit on (02) 9689 4444 or policy@alc.org.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Clare', with a stylized flourish at the end.

Clare McHugh
Executive Director - Policy and Programs Unit

12/4/16



The Director
Standing Committee on State Development
Parliament House
Macquarie St
Sydney NSW 2000

5 February 2016

Dear Sir/Madam,

Submission to the Inquiry into Regional Planning Processes in NSW

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to make a submission to the Inquiry into regional planning processes (the **Inquiry**), particularly as it relates to regional development in NSW, being undertaken by the Standing Committee on State Development (the **Committee**).

Regional planning and development initiatives are of key importance to the Aboriginal Land Council network and Aboriginal communities in NSW. The regional planning system including the provisions set out in Part 3B of *Environmental Planning and Assessment Act 1979 (NSW)* provide an important framework for facilitating key objectives of the *Aboriginal Land Rights Act 1983 (NSW)* - *cultural and economic*. NSWALC is keen to work with the NSW Government and other stakeholders to facilitate regional development for Aboriginal peoples in NSW.

While there have historically been significant deficiencies in regional planning, particularly as it relates to Aboriginal peoples, this inquiry represents a significant opportunity to improve on some of the more recent positive initiatives being implemented in NSW.

The inquiry also presents a timely opportunity to canvass new approaches to supporting Aboriginal people's aspirations through planning processes to deliver social, economic and cultural outcomes. The enclosed submission makes recommendations designed to achieve these outcomes, particularly in relation to:

1. Improving the ability of the planning system and planning bodies to work with Aboriginal Land Councils to strengthen **economic self-determination** of Aboriginal communities;
2. Improving **community participation and engagement** with Aboriginal peoples in regional planning;
3. Providing **better recognition and protections for Aboriginal heritage** and further exploring the opportunities this presents in line with the aspirations of Aboriginal people;
4. Address the specific issues related to **former Aboriginal missions and reserves**.

We look forward to working with the Committee to discuss workable solutions to the above issues through legislative amendments, policy development and cultural change. If you have questions regarding the content of this submission, please contact Julia Martignoni (Policy Officer) on (02) 9689 4444 or julia.martignoni@alc.org.au.

Yours sincerely,

Lesley Turner
Chief Executive Officer



Submission to the
Inquiry into Regional Planning Processes

February 2016

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Overview

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory organisation created under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their local communities.

LALCs are community organisations that undertake a diverse range of activities in line with their functions under the ALRA and in accordance with their Community Land and Business Plan (**CLBP**). LALCs are governed by a Board, democratically elected every 4 years. Under the ALRA, Local Aboriginal Land Councils (LALCs) hold land for the economic, social and cultural benefit of all Aboriginal people living within their boundaries. With the consent of their members, LALCs are able to develop or sell their land and, may also seek to maintain key parcels of land for their cultural or environmental values.

The preamble of the ALRA recognises that ‘*Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples.*’ The ALRA was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims for unused Crown land.¹ The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

Aboriginal peoples in NSW and the network of Aboriginal Land Councils are key stakeholders in relation to regional planning processes. LALCs are significant landowners and managers of lands in regional and rural areas, as well as custodians of expansive cultural heritage assets throughout NSW. It should be noted that the disproportionate impact experienced by Aboriginal Land Councils in respect to strategic planning decisions is not new. In 1980 the NSW Legislative Assembly Select Committee on Aborigines recognised that:

“the Aboriginal people of New South Wales suffer discrimination from various Government decision-makers in relation to land development and planning”.

Ensuring that regional planning processes are both representative of and responsive to the needs of Aboriginal people is crucial in order to support both the economic self-determination of Aboriginal people and regional growth more generally. Throughout our submission, we highlight ways in which regional planning processes can be improved to ensure meaningful engagement with Aboriginal people, to facilitate the economic development of Aboriginal owned lands across NSW and to better protect and manage culture and heritage across the State.

We note that there are a number of initiatives related to regional planning and development underway. We strongly advocate for coordinated, whole of Government approaches and solutions. Too often fractured, poorly planned or poorly executed responses of government and non-government agencies can further reinforce existing failures and ill-informed or flawed decision-making.

Please note that NSWALC has made previous submissions with regard to planning processes in NSW. These submissions are available on NSWALC’s website or can be provided upon request².

¹ Section 36 of the *Aboriginal Land Rights Act 1983* (NSW) further outlines claimable Crown lands in NSW.

² See NSWALC’s submissions to: *Planning Review Panel: Review of NSW Planning System* (November 2011), the *Planning Review Panel*:

Summary of recommendations

Section 1: Engagement and consultation

1. Regional planning instruments must include a set of mandatory requirements for planning authorities to consult and engage with Aboriginal people at a best practice standard;
2. Regional planning instruments and policy should require community consultation with LALCs and Aboriginal people for planning processes such as Community Strategic Plans to be linked to tangible outputs and evaluations of measurable implementation targets;
3. Australia must fulfil its obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* and ensure that Aboriginal people are meaningfully consulted with for regional planning processes that affect Aboriginal people's health, housing and other social and economic priorities;
4. That training and capacity building initiatives in planning processes are developed for Local Aboriginal Land Councils,
5. That opportunities to build planning authorities capacity in engaging with Aboriginal peoples as well as training about land rights and native title processes are developed.

Section 2: Economic development

6. Regional planning processes and plans should broadly integrate the objectives of the *Aboriginal Land Rights Act*; including facilitating the social, cultural and economic development of Aboriginal communities;
7. Local governments should be required to consult with and integrate the strategic priorities of Land Councils when drafting or amending LEPs, and LALCs should be a referral body to review LEPs; and
8. Land Councils should have specific appeal mechanisms for adverse zoning decisions made by local governments which affect the economic development potential of their lands.

Section 3: Aboriginal culture and heritage

9. Regional planning laws must include a mechanism to allow decisions to be made against development proposals on the grounds of existing Aboriginal culture and heritage values in that area;
10. Cumulative impact assessments for Aboriginal culture and heritage must be undertaken for all developments, and mechanisms to refuse developments on this basis incorporated;
11. 'Low-impact' and complying development provisions that allow for the bypass of Aboriginal cultural heritage regulation should be limited;
12. Joint Regional Planning Panels which are referred matters which involve Aboriginal culture and heritage issues must ensure that there is Aboriginal representation on the Panel;
13. Strategic planning should include mandatory minimum requirements for local governments and regional bodies to undertake cultural values mapping in partnership with LALCs and Aboriginal peoples;
14. There should be increased support and guidance for planning authorities undertaking cultural mapping for strategic planning. Importantly:
 - Engagement with Local Aboriginal Land Councils and Aboriginal peoples, rather than desktop surveying, must be the primary input; and
 - Mechanisms to protect the confidentiality and secrecy of cultural knowledge must be developed and implemented.

Section 1. Meaningful engagement and consultation with Aboriginal people

NSW has the largest population of Aboriginal people in Australia.³ Meaningful, responsive and on-going engagement and consultation processes are the foundation of effective and inclusive planning systems. Unfortunately, the regional planning system in NSW has failed to effectively incorporate the needs of Aboriginal people and communities. Aboriginal people in NSW have specific needs, priorities and interests which require targeted approaches in regional planning instruments. We submit that regional planning processes need urgent reform in order to ensure best practice engagement and consultation rights for Aboriginal people, in order for Aboriginal people to meaningfully participate and inform regional planning processes for their communities, and to deliver better outcomes.

Engagement and consultation between local and regional planning authorities and Aboriginal Land Councils and Aboriginal peoples must be a key component in regional planning. Inadequate engagement and consultation in planning processes affects the economic development of Aboriginal lands, along with creating conflict with regard to the protection and management of Aboriginal culture and heritage. As such, it is critical that regional planning processes integrate improved engagement and consultation standards across all local and regional levels and planning instruments. Supporting Aboriginal people's engagement in regional planning processes offers significant benefits for the Aboriginal community as well as the broader community in terms of economic opportunities, and celebrating Australia's unique Aboriginal culture.

The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, to which Australia is a signatory is a significant international mechanism that encapsulates Aboriginal people's rights. The UNDRIP states:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. (Article 23)

Article 23 of the UNDRIP directly relates to the importance of Aboriginal people being *actively involved* in the planning system and sets a high standard for the processes and regulatory systems of signatory states such as Australia.

Unfortunately, community consultation and engagement opportunities in the NSW regional planning system fall below this best practice benchmark. Reforms to support genuine and meaningful participation by LALCs and Aboriginal peoples in strategic and regional planning decisions are needed.

We recommend that consideration is given to how the *Local Government Act 1993* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW) along with related regulations and policies could be amended to require a higher standard of community consultation and engagement with Aboriginal people. Consultation processes should include, at a minimum:

- Opportunities to provide views on preferred solutions, designs and alternatives in initial phases of decision-making processes, and for these inputs to be given fair consideration;
- Notification, information and engagement processes to consult with LALCs and Aboriginal people,
- Face-to-face consultation processes are generally preferred. Notification and submission-seeking processes should allow ample time in which to submit feedback.

³ Dr Nicholas Biddle, 'The Aboriginal population in NSW: Analysis of the 2011 Census'

http://www.alc.org.au/media/86737/The%20Aboriginal%20population%20of%20NSW_Analysis%20of%20the%202011%20Census.pdf

Including legislative minimum requirements for community consultation with Aboriginal people would improve consistency between approaches taken across Local Government Areas (LGAs) when drafting regional planning instruments. There is substantial variation between the quality, depth and effectiveness of local government's approaches to community engagement with Aboriginal people in their LGA. We submit a legislative obligation to meet the required standard is needed.

For example, a key planning instrument used to plan for community and strategic goals of a local government area are Community Strategic Plans (CSPs). Local Governments are required to have CSPs under section 402 of the *Local Government Act 1993* (NSW). Their purpose is to *"identify the main priorities and aspirations for the future of the local government area,"* for 10 years. The plans are to be *"based on social justice principles of equity, access, participation and rights."* Furthermore, each local council is to prepare a Community Engagement Strategy (CES) for making the CSP.

Guidance for local governments emphasise the importance of these principles, along with the need to involve and protect the interests of people in vulnerable circumstances and direct planning authorities to *"specifically consult with those groups whose voice is often not heard in community discussions."*⁴ Limited guidance is provided regarding the importance of demographic analysis and taking into consideration the needs Aboriginal peoples.

A review of various local governments' CSPs illustrates a dramatic variety in quality of engagement and consultation with Aboriginal communities. NSWALC reviewed various CSPs in LGAs with an Aboriginal population above 25%. In some instances, Aboriginal communities had been approached in a limited and tokenistic way. As a result, the CSPs, did not address the Aboriginal communities' specific needs, priorities and interests. While some LGAs had taken positive steps such as developing Aboriginal Engagement Strategies which provided detail of the needs of local Aboriginal communities, others only made limited references to Aboriginal peoples in that area.

A key issue is the difficulty in evaluating the 'success' or implementation of CSPs, partially due to the self-reporting nature of the Integrated Planning and Reporting framework. As such, it is unclear whether local governments are following through with commitments in their CSPs, and whether engagement strategies with Aboriginal communities are succeeding in identifying goals and achieving tangible outcomes in these communities.

While a flexible approach allows for local governments to work within the context of their circumstances, the ad hoc and discretionary nature of consultation and engagement in regional planning processes is problematic and inequitable.

We submit that this could be addressed through providing stronger and more detailed legislative requirements regarding consultation and engagement with Aboriginal people based on best practice community consultation benchmarks. Creating on-going structures for communication between planning authorities and Aboriginal communities, as well as implementation and evaluation of effectiveness, are important factors. Including LALCs in the monitoring and evaluation of regional planning initiatives related to their communities may also be a useful way to increase participation in planning processes.

⁴ Ibid, page 38.

Recommendations:

1. Regional planning instruments must include a set of mandatory requirements for planning authorities to consult and engage with Aboriginal people at a best practice standard;
2. Regional planning legislation and policy should require community consultation with LALCs and Aboriginal people for planning processes such as Community Strategic Plans to be linked to tangible outputs and evaluations of measurable implementation targets;
3. Australia must fulfil its obligations under the UNDRIP and ensure that Aboriginal people are meaningfully consulted with for regional planning processes that affect their health, housing and other social and economic priorities.

Improving capacity

As noted above, LALCs are community organisations with a wide range of functions and responsibilities. Providing training and capacity building initiatives for LALCs is an important step in assisting LALCs to engage in planning processes.

In addition, although it is acknowledged that Aboriginal people face financial, geographical and organisational barriers to participation⁵, it is apparent that many local governments, regional bodies and planning authorities lack cross-cultural skills, training and/or the capacity to effectively engage with Aboriginal communities. Several local governments have reported avoiding consultation because of a lack of understanding or experience in how to effectively engage in cross-cultural contexts⁶.

Consultation and engagement processes could benefit greatly if planners develop cross-cultural competencies, including communication skills and stronger ethical orientations⁷. Options to employ Aboriginal liaison officer or Aboriginal community facilitator to consult specifically with the Aboriginal community in an area could also be considered.

Recommendations:

4. That training and capacity building initiatives in planning processes are developed for Local Aboriginal Land Councils,
5. That opportunities to build planning authorities capacity in engaging with Aboriginal peoples as well as training about land rights and native title processes are developed.

Section 2. Economic development

The ALRA is a parliamentary promise that related not just to the return of land but the ability and option to develop land for the betterment of the Aboriginal Community. Unfortunately, the planning regime and Government policy have impeded the delivery of that Parliamentary promise.

In his Second Reading Speech the then Minister for Aboriginal Affairs Frank Walker stated:

'In recognising prior ownership, the Government thereby recognises Aboriginal rights to obtain land.'

⁵ Lane MB, above n 7.

⁶ Australian Centre of Excellence for Local Government, *Local Government and Community Engagement in Australia* (2011) Working Paper No. 5, at page 25.

⁷ Lane MB, above n 7.

The Government believes the essential task is to ensure an equitable and viable amount of land is returned to Aborigines.’⁸

He also explained:

‘...[the] Government has made a clear, unequivocal decision that land rights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time it lays the basis for a self-reliant and more secure economic future for our continent’s Aboriginal custodians...’⁹

The Aboriginal land claims process works through a mechanism in the ALRA that allows an Aboriginal Land Council to claim Crown land that is not lawfully used or occupied and is not needed or likely to be needed for an essential public purpose, amongst other criteria¹⁰. The objectives of the ALRA include providing a land base for the social, cultural and economic development of Aboriginal communities. When introducing the *Aboriginal Land Rights Bill 1983* into the NSW Parliament, the then Minister for Aboriginal Affairs, the Hon. Frank Walker identified that *‘...land rights has a dual purpose – cultural and economic’¹¹*. It is clear that the ALRA envisioned the ability of Aboriginal communities to determine strategies for the development of their lands to provide for the needs of local Aboriginal communities.

As one of the largest private land holders across the state of NSW with a large community base, LALCs present an opportunity to stimulate local and regional economic development through working in genuine partnership with the Aboriginal Land Rights network. However, some local government authorities have a tendency to view land owned by the Aboriginal community as public environmental assets; effectively parklands. This process of ‘downzoning’ for environmental conservation purposes, eliminates the development potential of those lands and undermines the social and economic mechanisms of the ALRA.

Furthermore, despite LALCs often being the single biggest land owner in a local government area, and despite the unique status of Aboriginal peoples as the First Peoples of NSW and owners of Aboriginal culture and heritage, the Aboriginal Land Council network consistently reports low levels of engagement by local councils. This is particularly evident in the development of strategic initiatives, such as the development of LEPs and assessment of major development proposals.

Unfortunately, processes and procedures in the NSW regional planning system are severely stymieing the intention of the ALRA, creating substantial barriers to the ability of Land Councils to deal with and develop their lands. This affects both the capacity of Aboriginal people to fulfil social, cultural and economic goals in their communities and hinders regional development more generally.

Effective engagement with Aboriginal communities requires specific measures above the general public consultation process. This was recognised in the year following passage of the *Environmental Planning and Assessment Act 1979* when the NSW Legislative Assembly Select Committee on Aborigines made the recommendation that *“there should be a positive requirement on local and State government authorities to consult with Aboriginal communities”*.

⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089(Frank Walker).

⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).

¹⁰ See section 36 of the *Aboriginal Land Rights Act 1983* (NSW).

¹¹ The Hon. Frank Walker, NSW Parliament Hansard, Legislative Assembly, 24 March 1983, at 5090

<[http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/\\$file/473LA046.PDF](http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/$file/473LA046.PDF)>

It was also recommendation of the Keane committee that:

- *Land owned by Aboriginal communities be governed by special planning provisions of the Planning and Environment Commission which would permit Aboriginal communities to develop projects that may otherwise be contrary to local planning ordinances, provided such projects were of special importance to the Aboriginal community and did not adversely affect adjoining residents.*
- *Where Aboriginal owned land is likely to be affected by the zoning or development of adjacent areas the following processes be followed:*
 - ✧ *notice be served the relevant local or State government authority, or private developer, upon the local Aboriginal Regional Land Council of details of the proposed development immediately upon submission of any proposal likely to affect an Aboriginal community's enjoyment of their land;*
 - ✧ *Aboriginal opinions be heard in respect of the proposed development;*
 - ✧ *If the issues are unresolved, a final determination be made by the Planning and Environment Commission.*

Land Councils use their land assets in a variety of ways, including, economic development projects and commercial enterprises. These can include housing developments, commercial ventures, construction/engineering services, and providing facilities for hire for social and community activities in the local area. Many of these land uses partner with or offer benefits for the broader community as well as the Aboriginal community. If even a small percentage of Land Council lands are affected by restrictive zoning provisions, consequentially a substantial amount of economic activity may be hindered across NSW.

While there are currently significant gaps in the regional planning system, there have been some more recent positive initiatives that are encouraging. However, these are a first step and there are many opportunities to improve. Regional plans set the strategic direction for Local Environmental Plans (LEPs). Therefore they are a key instrument in ensuring economic, social, and cultural outcomes are delivered.

These issues may be partially addressed by better engagement and consultation between local governments, regional planning panels and Land Councils. However, a more systematic approach is needed – including the creation of processes, protocols and mechanisms which allow for the broad integration of the objectives of the ALRA with regional planning processes. This will ensure that Land Councils and Aboriginal communities are able to have detailed and sustained input into regional strategic planning processes.

The Illawarra Shoalhaven Regional Plan includes as one of its key directions to “*strengthen the economic self-determination of Aboriginal communities.*”¹² The Draft Hunter and Central Coast Regional Plans¹³ both include “strengthen the economic self-determination of Aboriginal communities” as a key direction, and the regional plans commit to conducting a strategic assessment of land held by Land Councils to “*identify sites for further investigation of their economic opportunities.*”

This is a step in the right direction towards broadly integrating land rights and regional planning. However, there are further opportunities to expand on these initiatives.

¹² Department of Planning and Environment, *Illawarra Shoalhaven Regional Plan*, (2015)

<http://www.planning.nsw.gov.au/~media/Files/DPE/Plans-and-policies/illawarra-shoalhaven-regional-plan-2015-11.ashx>

¹³ Department of Planning and Environment, *Draft Central Coast Regional Plan and Draft Hunter Regional Plan* (2014), currently on exhibition, available at < <http://www.planning.nsw.gov.au/Plans-for-Your-Area/Regional-Plans>>.

It is recommended that:

1. All Regional Planning instruments are required to include provisions to strengthen the economic self-determination of Aboriginal communities. This could be achieved through Amendments to Part 3B Strategic Planning of the *Environmental Planning and Assessment Act 1979*;
2. That further strategies and initiatives are developed to promote this objective;
3. All LEPs include provisions to facilitate economic self-determination of Aboriginal communities.¹⁴

Strategic planning initiatives must not undermine the compensatory mechanisms of the ALRA. The ALRA is the only form of compensation given to Aboriginal peoples in NSW as a result of dispossession. Local Aboriginal Land Councils must be engaged in strategic planning initiatives.

Recommendations:

6. Regional planning processes and plans should integrate the objectives of the *Aboriginal Land Rights Act*; including facilitating the social, cultural and economic development of Aboriginal communities;
7. Local governments should be required to consult with and integrate the strategic priorities of Local Aboriginal Land Councils when drafting or amending LEPs, and LALCs should be a referral body to review LEPs; and
8. Land Councils should have specific appeal mechanisms for adverse zoning decisions made by local governments which affect the economic development potential of their lands.

Section 3. Protection and promotion of Aboriginal culture and heritage

Aboriginal culture and heritage in NSW provides immeasurable value for the cultural identity and wellbeing of Aboriginal communities, as well as being of broader value to NSW and Australia as a whole. Aboriginal people have long advocated for reform of the way culture and heritage is regulated in NSW. The current system fails to protect Aboriginal culture and heritage and is in fact facilitating widespread harm and destruction of these precious assets. NSWALC has written extensively about the wide-spread destruction of Aboriginal heritage in NSW.¹⁵ However, the regional planning system provides key opportunities to protect Aboriginal culture and heritage as well as ensure strategies are developed to celebrate and promote the region's Aboriginal culture.

The current regulatory framework for Aboriginal culture and heritage¹⁶ only includes recognition of and protection for a narrow scope of Aboriginal culture and heritage *objects* and *places*¹⁷. Aboriginal culture and heritage much broader than this, and can include intangible values such as mythologies and dream time stories reflected in landscape features, totemic animal species and living cultural practices such as traditional gathering of resources and hunting¹⁸. Presently, regional planning processes do not provide recognition of the

¹⁴ The strategic objectives of Land Councils are generally contained in their Community Land and Business Plans.

¹⁵ NSWALC has extensively outlined our position with regard to culture and heritage and the NSW planning system in previous submissions to the NSW Government – see NSWALC, *More than Flora and Fauna* (2009) Submission in response to the National Parks and Wildlife Amendment Bill 2009 (The Omnibus Bill); NSWALC and NTSCORP, *Our Culture in Our Hands* (2011) Submission in response to the reform of Aboriginal Cultural Heritage in NSW, along with submissions listed in note 2, available at NSWALC's website <<http://www.alc.org.au>>

¹⁶ Primarily the *National Parks and Wildlife Act 1974* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW) and guidelines and regulations under these.

¹⁷ *National Parks and Wildlife Act 1974* (NSW) Part 6.

¹⁸ This was partially recognised in the amended definition of culture and heritage proposed under the NSW Government's proposed model: see NSW Environment and Heritage, *Reforming the Aboriginal Cultural Heritage System in NSW: A NSW Government model in*

importance of these features, which are critical to the integrity and maintenance of Aboriginal identity and wellbeing¹⁹.

This is a stark indication of system failure in regional planning processes for the Aboriginal community. Regional planning processes need urgent reform in order to ensure the protection of Aboriginal culture and heritage. Reforms should target: decision-making where Aboriginal culture and heritage values exist, cumulative impacts on Aboriginal culture and heritage, limiting 'low-impact' or complying development provisions, inclusion of culture and heritage values in strategic plans in line with the wishes of the Aboriginal community, Aboriginal representation in strategic planning processes, and Aboriginal representation on Joint Regional Planning Panels for matters where culture and heritage issues are present. A consistent approach across regions should be encouraged.

At present, integration of Aboriginal culture and heritage values are ad hoc and vary significantly across local and regional planning processes. For example:

- The Draft Hunter and Central Coast Regional Plans commit to a process of identifying and mapping culture and heritage values in those regions. However, more detail is needed regarding what methodologies will be used and what engagement processes will be undertaken with regard to the local Aboriginal community;
- There is a low incidence of local governments' applying Aboriginal culture and heritage provisions in the drafting of LEPs and there are variations in the methodologies adopted for this purpose; and
- Cultural mapping undertaken by some local governments on their own initiative, but failing to undertake this in partnership with LALCs and Aboriginal peoples.

These processes could be improved by the inclusion of mandatory minimum requirements regarding the inclusion of culture and heritage values in strategic planning initiatives, and through the provision of increased support and guidance for such activities for planning authorities undertaking them.

Fundamentally, strategic planning of culture and heritage values must ensure:

- The central importance of engaging with local Aboriginal people for any cultural mapping processes, as opposed to reliance of desktop surveying tools such as the Aboriginal Heritage Information System and the Aboriginal Sites Decision Support Tool. Desktop surveying tools and predictive modelling are widely regarded as limited in their application and accuracy²⁰.
- Any initiatives must ensure that they engage with the local Aboriginal community, including Local Aboriginal Land Councils and registered native title groups in that area. Processes which do not follow cultural protocols regarding identifying appropriate persons with the authority to disclose cultural knowledge may fail or face backlash from Aboriginal communities.
- That there is a mechanism to protect the confidentiality of culture and heritage information provided for strategic planning initiatives, as requested by the local Aboriginal community with regard to information disclosed. This is required for a number of reasons, including ensuring that harm/damage is not done to sacred sites. For example, a way to do this may be to provide standard 'culture and

response to the ACH Reform Working Party's recommendations and public consultation (2013) <

<http://www.environment.nsw.gov.au/resources/cultureheritage/20130760achrefgov.pdf>> page 13.

¹⁹ Australian Institute of Health and Welfare, *What works to overcome Indigenous Disadvantage* (2011).

²⁰ Land and Property Management Authority, *Assessing the Values and Management of the NSW Travelling Stock Reserve for Biodiversity and optimal management in the Hunter Valley: Report on methodology and findings*, August 2009, page 18.

heritage zones’ but not to list any details or specific locations for where the area, item or object is located. Mapping and database software adapted specifically for culture and heritage projects may be available to provide varying levels of access for these purposes.

Recommendations:

9. Regional planning laws must include a mechanism to allow decisions to be made against development proposals on the grounds of existing Aboriginal culture and heritage values in that area;
10. Cumulative impact assessments for Aboriginal culture and heritage must be undertaken for all developments, and mechanisms to refuse developments on this basis incorporated;
11. ‘Low-impact’ and complying development provisions that allow for the bypass of Aboriginal cultural heritage regulation should be limited; and
12. Joint Regional Planning Panels which are referred matters which involve Aboriginal culture and heritage issues must ensure that there is Aboriginal representation on the Panel.
13. Strategic planning should include mandatory minimum requirements for local governments and regional bodies to undertake cultural values mapping in partnership with LALCs and Aboriginal peoples;
14. There should be increased support and guidance for planning authorities undertaking cultural mapping for strategic planning. Importantly:
 - Engagement with LALCs and Aboriginal peoples, rather than desktop surveying, must be the primary input; and
 - Mechanisms to protect the confidentiality and secrecy of cultural knowledge must be developed and implemented.

Section 4. Former Aboriginal missions and reserves

Historically, Aboriginal missions and reserves were developed and regulated outside of state and local government planning controls. There are currently 59 former reserves and missions existing in NSW which are owned and managed by 49 LALCs, the majority of which are located in regional areas. Past government policies have created a number legacy issues. Planning issues for former missions and reserves include the areas being inappropriately zoned, whole reserves with various residential and infrastructure existing on a single title and burdensome responsibility for provisions of services and maintenance falling on LALCs.

The Planning Review Panel chaired by Tim Moore and Ron Dyer convened by the NSW Government in 2011 to investigate changes to the planning system acknowledged that *“dealing with these former reserves and missions is a fundamental **issue of social justice** for the Aboriginal people generally and for the Aboriginal communities living on or associated with these sites in particular”*.²¹

NSWALC is seeking to work closely with the NSW Government to address these ongoing issues.

This submission has been prepared by the New South Wales Aboriginal Land Council. If you have any questions regarding the content of this submission, please contact the Policy and Programs Unit on policy@alc.org.au or 9689 4444.

²¹ Independent Planning Review Panel, Volume 2, page 119