



**Submission by the New South Wales Aboriginal Land Council and the
NTSCORP Limited in response to the Reform of Aboriginal Culture and
Heritage in NSW**

‘OUR CULTURE IN OUR HANDS’

December 2011

Contents

<u>Executive Summary</u>	<u>2</u>
<u>Summary of recommendations</u>	<u>3</u>
<u>Introduction</u>	<u>5</u>
<u>Role of NSWALC and NTSCORP</u>	<u>6</u>
a. <u>About NSWALC</u>	<u>6</u>
b. <u>About NTSCORP</u>	<u>7</u>
<u>Background on broad reform</u>	<u>9</u>
<u>Concerns with Government reform process</u>	<u>10</u>
<u>Need for urgent reform</u>	<u>11</u>
<u>Consultation with community</u>	<u>13</u>
a. <u>Additional consultation</u>	<u>14</u>
b. <u>Providing adequate notice</u>	<u>14</u>
c. <u>Prioritising Aboriginal input</u>	<u>15</u>
d. <u>Independent facilitators</u>	<u>15</u>
<u>Independent reform process</u>	<u>17</u>
<u>Recognition of Aboriginal rights</u>	<u>18</u>
<u>Key principles for reform</u>	<u>21</u>

Executive summary

The New South Wales Aboriginal Land Council (“**NSWALC**”) is the elected representative body for Aboriginal people in NSW and is the largest member based Aboriginal organisation in Australia. NTSCORP Limited (“**NTSCORP**”) is the native title representative body for NSW. Both organisations have legislative responsibilities to protect and promote the rights of Aboriginal people, including specifically in regards to Aboriginal culture and heritage. As such, both organisations have been long time advocates for the reform of the State’s Aboriginal culture and heritage laws.

Since October 2009, NSWALC and NTSCORP have worked cooperatively under a Memorandum of Understanding (“**MOU**”) to better protect the interests and realise the aspirations of Aboriginal people in NSW.

The current legal regime for the management of Aboriginal culture and heritage in NSW, principally embodied in the *National Parks and Wildlife Act (1974)*, fails to protect Aboriginal culture and heritage and has lead to the wide-scale destruction of the state’s rich Aboriginal heritage. In addition, the continued inclusion of Aboriginal culture and heritage management in legislation concerned with the protection of flora and fauna is a now outdated and distasteful remnant from a time when Aboriginal peoples were considered as merely part of the environment. More alarmingly still, Aboriginal people do not have a recognised right in the current legislation to decide what happens with Aboriginal culture and heritage.

The NSW Government is currently proposing to reform Aboriginal culture and heritage laws in NSW. Public comments have been invited by the Minister for Environment and Heritage and the Minister for Aboriginal Affairs, through the Office of Environment and Heritage and the Aboriginal Culture and Heritage Reform Working Party (“the **Working Party**”). This submission outlines the NSWALC and NTSCORP joint response to the first round of public consultations undertaken by the Government for the reform of Aboriginal culture and heritage laws in NSW.

NSWALC and NTSCORP have previously committed to working in partnership with the NSW Government and key stakeholders to reform Aboriginal culture and heritage laws, and will continue to do so, given an appropriate opportunity, as such reforms are a priority for Aboriginal peoples.

The recommendations made by NSWALC and NTSCORP in this submission are designed to better recognise the culture and heritage rights of Aboriginal peoples.

Summary of recommendations

Consultation with community

- NSWALC and NTSCORP oppose the introduction of culture and heritage law and policy where it has been developed without proper consultation with the Aboriginal community.
- NSWALC and NTSCORP call on the Government to appropriately consult with the Aboriginal community, and Aboriginal community bodies such as NSWALC and NTSCORP, before any legislation or policy relating to Aboriginal culture and heritage is introduced or implemented.

Additional consultations

- NSWALC and NTSCORP call on the Government to ensure meaningful engagement with the Aboriginal community on the reform of culture and heritage laws is provided by more extensive community consultations undertaken with sufficient notice and appropriate scheduling.
- To ensure that the views of the Aboriginal community are appropriately considered and incorporated, options for the reform of Aboriginal culture and heritage laws must not be prepared until after more comprehensive consultation with the Aboriginal community has occurred.

Providing adequate notice

- NSWALC and NTSCORP strongly recommend that a minimum of one month's notice be given for future community consultations, with notifications to be published in accessible media and directly provided to relevant Aboriginal groups and organisations.

Prioritising Aboriginal input

- NSWALC and NTSCORP call on the Government to ensure that Aboriginal views on possible reform of Aboriginal culture and heritage laws are prioritised above that of other stakeholders.
- To ensure the promotion and protection of Aboriginal rights in the reform process, NSWALC and NTSCORP strongly recommend Aboriginal community specific consultations be held to appropriately and clearly capture the views of community.

Independent facilitators

- NSWALC and NTSCORP are mindful of the need to preserve the independence of a broad reform process and strongly recommend that consultations be carried out by independent facilitators, to eliminate the potential for any conflict of interest or bias.

Independent reform process

- To ensure the Working Party remains independent in its views and advice, and to eliminate any potential conflict or interest, NSWALC and NTSCORP strongly recommend the Government engage an independent third party to assist in the preparation of Working Party reports and recommendations, and to undertake future public consultations.

Recognition of Aboriginal rights

- NSWALC and NTSCORP call on the Government to ensure Aboriginal interests are appropriately represented on the Working Party, through the dedication of Aboriginal specific seats on the Working Party. It is unacceptable that only one of the 13 proposed members of the Working Party is specifically identified to represent Aboriginal interests.

- NSWALC and NTSCORP are particularly concerned with the lack of recognition of Aboriginal peoples' rights in the reform process; the reform process must be based on the premise that Aboriginal people have the right to determine and control Aboriginal culture and heritage.

Key principles for reform

- The NSWALC and NTSCORP call on the Government to ensure that the reform of Aboriginal culture and heritage laws in NSW are based upon the following principles:
 - International human rights principles as embedded in the United Nations Declaration on the Rights of Indigenous Peoples.
 - Aboriginal peoples are recognised in legislation as the rightful owners of Aboriginal culture and heritage in NSW, and as such are the only determinants of Aboriginal culture and heritage,
 - Aboriginal culture and heritage must be recognised as a part of a broader relationship with the land including spiritual and cultural beliefs and practices, hunting, gathering fishing and other land uses, as well as land rights and native title rights.
 - A legislative system is established that addresses the need to preserve and enhance Aboriginal cultural traditions through effective Aboriginal control mechanisms and the need to deliver social justice to Aboriginal peoples in NSW to redress the significant cultural, economic and social dispossession which Aboriginal people continue to experience.
- NSWALC and NTSCORP call on the Government to support the establishment of an independent Aboriginal Heritage Commission with Aboriginal commissioners who are appointed by the Aboriginal communities of NSW. In accordance with principles of self determination, the Commission must have responsibility for overseeing the protection and management of Aboriginal culture and heritage in NSW, with decentralised control of the day-to-day management responsibilities for Aboriginal culture and heritage vested in the local Aboriginal communities.

Introduction

NSW is home to some of the most important Aboriginal heritage sites in the world, many of which are more than 40,000 years old. Aboriginal culture and heritage sites that exist within NSW are not just an important part of Australia's heritage and history, but are an **essential part of the culture and identity of Aboriginal communities today**.

The adequate protection of culture and heritage is essential for the wellbeing of our communities and the survival of our culture. Unfortunately however, in NSW Aboriginal culture and heritage is not given adequate legal protections.

The main law for the protection and management of Aboriginal culture and heritage in NSW is the *National Parks and Wildlife Act 1974* ("**NPW Act**"). The NPW Act stipulates that all Aboriginal objects are considered to be 'property of the Crown'¹, and gives the NSW Office of Environment and Heritage ("**OEH**") the power to authorise the damage or destruction of Aboriginal objects and places, through the issuing of 'consents' under section 87 and section 90 respectively.

The Aboriginal culture and heritage management regime of the NPW Act has been described quite appropriately as being 'like Dracula being in charge of the blood bank'².

The inclusion of Aboriginal culture and heritage in flora and fauna legislation has long been criticised as outdated and a distasteful and inappropriate remnant from a time when Aboriginal peoples were considered as merely a part of the environment. More alarmingly still, Aboriginal people do not have a recognised right through the current legislation to decide what happens with their culture and heritage.

During the passage through Parliament of the *National Parks and Wildlife Amendment Act 2010* in February 2010, the then Labor Government committed to a two year broad reform process to consider new stand-alone legislation in NSW to protect Aboriginal culture and heritage. At the time, this commitment received bi-partisan support.

In November 2010, the Aboriginal Cultural Heritage Reform Working Party ("**the Working Party**") was established to consider the required broad reforms and report jointly to the Ministers for the Environment and Aboriginal Affairs at the conclusion of the two year reform process.

By March 2011 however, the reform process had stalled and in October 2011 a revised 12 month reform process was announced by the Minister for Environment, the Hon. Robyn Parker MP and the Minister for Aboriginal Affairs, the Hon. Victor Dominello MP.

The new reform proposes to **develop 'options for the protection and management of Aboriginal culture and heritage in NSW'**³ and provides the following stages to be undertaken to achieve this:

Phase 1 – First round of 'comprehensive' Aboriginal and stakeholder public consultation (3 months).

Phase 2 – Collation of input from phase 1 consultations and the development of options (3 months).

Phase 3 – Second round of public consultation on the options paper (3 months).

¹ Limited exceptions exist, include where objects were located in private collections prior to 13 April 1970 and have not been since abandoned, and where objects which are 'real property' (i.e. objects such as rock art, rock carvings or scarred trees that are attached to private land and are legally considered part of that land). Aboriginal objects can also be handed back to the ownership of Aboriginal people. See Part 6 of the *National Parks and Wildlife Act*.

² "Kevin Humphries MP, Second Reading Debate National Parks and Wildlife Amendment Bill 2010, Agreement in Principle 21 April 2010"

<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/0/263E8D7E67261D1DCA257718000272DA>

³ OEH 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform', (October 2011)
<http://www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf>

Phase 4 – Recommendations provided to respective Ministers for a government decision (3 months).

It is currently proposed that the Working Party's recommendations will be provided to the Ministers for the Environment and Aboriginal Affairs with a decision on the reform of Aboriginal culture and heritage legislation due by October 2012.

This submission represents the joint response of the New South Wales Aboriginal Land Council ("**NSWALC**") and NTSCORP Limited ("**NTSCORP**"), to the first round of public consultations undertaken by the Government for the reform of Aboriginal culture and heritage laws in NSW. It is understood and recognised that responses provided to the first round of consultation 'will contribute toward the development of draft recommendations'⁴, and that a further round of stakeholder consultations will be undertaken in respect to such recommendations at a later stage in the reform process.

This submission includes:

- An overview of NSWALC's and NTSCORP roles in relation to Aboriginal culture and heritage,
- Concerns with the current reform process,
- The need for urgent reforms,
- Consultation with community,
- An independent reform process,
- Recognition of Aboriginal rights and interests,
- Key principles which must guide the reform of Aboriginal culture and heritage laws in NSW, and

For an overview of the key recommendations refer to the Executive Summary.

The role of NSWALC and NTSCORP

NSWALC and NTSCORP have legislative responsibilities to protect and promote the rights of Aboriginal people, including specifically in regards to Aboriginal culture and heritage. As peak bodies representing the interests of Aboriginal peoples in NSW, NSWALC and NTSCORP have been long time advocates for the reform of the State's Aboriginal culture and heritage laws, and have engaged constructively and in good faith in the latest inquiry into possible reforms and those that have preceded it.

In October 2009, in recognition that collaboratively NSWALC and NTSCORP can better protect the interests and realise the aspirations of Aboriginal people in NSW, NSWALC and NTSCORP formalised our working relationship through a Memorandum of Understanding ("MOU").

Since signing the MOU, NSWALC and NTSCORP have secured a number of improvements to the protection and promotion of Aboriginal peoples' rights, including more recently the amendments to the *National Parks and Wildlife Amendment Act 2010* and the *Fisheries Management Amendment Act 2009*.

About NSWALC

NSWALC is the elected representative body for Aboriginal people in NSW and is the largest member based Aboriginal organisation in Australia. NSWALC is governed by a Council of nine Councillors, who are elected every four years. All Aboriginal people in NSW are eligible to join a Land Council and vote in Land Council elections.

NSWALC provides support to the network of 119 Local Aboriginal Land Councils ("**LALCs**") across NSW. LALCs are autonomous bodies which are governed by boards elected by local Aboriginal community members every two years.

⁴ OEH 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform', (October 2011)
<http://www.environment.nsw.gov.au/resources/cultureheritage/110391issues.pdf>

The *Aboriginal Land Rights Act 1983* establishes Land Councils as the elected representatives for Aboriginal people in NSW. This role extends beyond representation of the interests of Land Council members, to all Aboriginal people living in NSW.

As outlined in section 106(7) of the *Aboriginal Land Rights Act*, NSWALC has particular responsibilities in relation to culture and heritage. These include:

- a. to take action to protect the culture and heritage of Aboriginal persons in NSW (and)
- b. to promote awareness in the community of the culture and heritage of Aboriginal persons in NSW.

NSWALC is represented on numerous state-wide committees which provide advice to the NSW Government on land and culture and heritage matters, including the Aboriginal Cultural Heritage Advisory Council.

Under section 52(4) of the *Aboriginal Land Rights Act*, LALCs have similar functions to protect and promote Aboriginal cultural heritage within their boundaries. The obligation to consult with LALCs on cultural heritage matters is recognised through a range of OEH and other government agency policies.

LALCs culture and heritage activities vary across Councils, but include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, heritage site assessments, management of cultural centres and keeping places, participation in advisory committees and a range of projects in the community to improve awareness and understanding of Aboriginal cultural heritage.

As outlined in previous culture and heritage submissions to OEH,⁵ NSWALC's position is that consultation on culture and heritage matters must include as a minimum those organisations with statutory responsibilities for culture and heritage. These are:

- NSWALC and LALCs,
- Native title claimants and holders, and NTSCORP,
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act*.

NSWALC recognises and respects the role of traditional owner groups in relation to culture and heritage and NSWALC's commitment to work in partnership with such groups is reflected in the *NSWALC Corporate Plan 2008-2012* amongst other NSWALC policy statements.⁶

About NTSCORP

NTSCORP has statutory responsibilities under the *Native Title Act 1993* (Cth) ("the **NTA**") to protect the native title rights and interests of traditional owners in NSW and the Australian Capital Territory ("**ACT**").

NTSCORP is funded under Section 203FE of the Act to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.

In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;
- Notification;

⁵ See for example NSWALC's response to the Review of the *Interim Community Consultation Requirements for Applicants*, as forwarded to Director Mark Gifford of DECC in April 2008.

⁶ Priority Five of the *NSWALC Corporate Plan 2008-2012* includes to develop 'guidelines that identify, protect and preserve cultural heritage in accordance with the traditional customs, obligations and responsibilities of individual Traditional Owner groups in NSW.'

- Agreement making;
- Internal review; and
- Other functions (s203BJ in particular).

Background on broad reform

For more than two decades there have been calls for the development of an Aboriginal Cultural Heritage Bill for NSW.

In 1983, when the *Aboriginal Land Rights Act* was introduced, the then Minister for Aboriginal Affairs, Frank Walker, stated the Government's intention to introduce a culture and heritage bill. He stated:

*"... there is one element missing from what could be considered an essential element of land rights legislation – that is, the provision for the protection of sacred sites and sites of significance. ... It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation before introducing an Aboriginal heritage commission bill for the protection and ownership of sacred and significant sites."*⁷

This Act was never developed and NSW remains the only state without separate legislation with the primary aim of protecting Aboriginal cultural heritage.⁸ Instead there has been a succession of inquiries instigated and supported by both Liberal Coalition and Labor State Governments that have been aimed at reforming the regime for managing Aboriginal culture and heritage in NSW.

With significant reforms again on the Government's agenda, it is important that the Government look to the efforts of past reviews which remain relevant today, and to the efforts and experiences of other jurisdictions. In February 2010, NSWALC released three research papers to stimulate discussion and debate within the Aboriginal community and wider public on the reform of Aboriginal culture and heritage laws⁹:

- **'Our Sites, Our Rights - Returning control of Aboriginal sites to Aboriginal communities: A summary of key recommendations of past Aboriginal heritage reviews in NSW'**: This report provided a succinct summary of the history of reforms to Aboriginal culture and heritage laws in NSW and outlined the key findings and recommendations of previous reform attempts, including the Keane Committee Reports in the early 1980s and the reports by the Aboriginal Cultural Heritage Working Group in the mid-1990s.
- **'Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia'**: This paper examined and analysed some of the strengths and weaknesses in three other legislative regimes – Victoria, Queensland and South Australia. Comprehensive qualitative research was undertaken to establish what Aboriginal people, government representatives, lawyers and heritage professionals' views and experiences of the culture and heritage regimes were in each of the different jurisdictions.
- **'Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation'**: This report, completed by the National Native Title Tribunal, provided an overview of the culture and heritage laws in other Australian states and territories, with a focus on provisions relating to consultation requirements.

Informed discussion and debate is needed to bring about appropriate and comprehensive reforms that will allow Aboriginal people's across NSW to protect Aboriginal culture and heritage and continue to undertake cultural practices.

⁷ Former Minister for Aboriginal Affairs Frank Walker, 24 March 1983, Second Reading speech for the *Aboriginal Land Rights Bill*, quoted in Hansard at 5090, Legislative Assembly, NSW Parliament, as available from Hansard archive at www.parliament.nsw.gov.au.

⁸ See discussion of culture and heritage law in other states and territories in *EDO Discussion Paper* (2009) as noted above.

⁹ NSWALC research papers on the broad reform process are available on the NSWALC website <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>

Concerns with the Government's reform process

In November 2010, following the bi-partisan support of the NSW Parliament (in February 2010), the Government established an Aboriginal Culture and Heritage Reform Working Party to consider broad reform of Aboriginal culture and heritage laws in the form of separate Aboriginal heritage legislation. The Working Party consisted of government, industry, conservation, heritage and Aboriginal interests and was tasked with reporting upon its considerations in two years.

In recognition of the role of NSWALC and NTSCORP in advocating for Aboriginal interests in Aboriginal culture and heritage, and the expertise of both organisations in this field, NSWALC and NTSCORP were invited to be members of the Working Party. NSWALC and NTSCORP subsequently engaged with the Working Party and the reform process in good faith.

Between November 2010 and February 2011 the Working Party met three times and progressed a number of issues that were scheduled to be endorsed in March 2011. In March 2011, the NSW State election occurred and the reform process stalled. In August 2011, NSWALC and NTSCORP wrote jointly to the new NSW Premier, the Hon. Barry O'Farrell, expressing an ongoing commitment to broader reform and concern that the process had stalled.

A revised reform process was announced on 18 October 2011, with details about the reform process being made available online on the OEH website. No consultation or notification was provided by the Government to key Aboriginal stakeholders, including NSWALC and NTSCORP, regarding the revision and recommencement of the reform process.

NSWALC and NTSCORP wrote to the Government in October 2011 outlining serious concerns with the revised and reduced reform process, in particular:

- The reformation of the Working Party which excluded NSWALC and NTSCORP from the new Working Party;
- Failure of the Government to formally notify NSWALC and NTSCORP regarding this action;
- The commencement of the Government's revised reform process prior to the establishment of the revised Working Party;
- The extremely short and inappropriate "public consultation" process, between 1 November 2011 and 7 December 2011, with only limited notice of its commencement;
- The significantly revised and weakened objectives and terms of reference for the revised reform process; and
- The composition of the Working Party with only the most limited guarantee of Aboriginal community representation.

NSWALC and NTSCORP provided further advice to the Government in November and December 2011 outlining additional concerns with the reform process, including:

- The reduced timeframe for the reform process, from two years to less than 12 months;
- The lack of genuine consultation as a part of the new reform process;
- The removal of references to deliver stand-alone legislation from the terms of reference for the reform process and related OEH documentation;
- The lack of recognition for Aboriginal peoples rights in regards to Aboriginal culture and heritage; and
- The increased focus on industry views and interests at the expense of Aboriginal views and interests.

The need for urgent reform

In July 2009, the NSWALC provided a submission in response to the *National Parks and Wildlife Amendment Bill 2009* (Omnibus Bill) and the Draft Due Diligence Guidelines for the Protection of Aboriginal Objects in NSW, titled '**More than Flora and Fauna**'.¹⁰ This submission called for wide-ranging and urgent reform of the Aboriginal culture and heritage system through the development of an Aboriginal Culture and Heritage Bill and an Aboriginal Culture and Heritage Commission based on recognition that ownership of Aboriginal culture and heritage lies with Aboriginal people.

The submission evidenced how the regime under the NPW Act fails to protect Aboriginal culture and heritage, with the current system of issuing permits to destroy leading to the wide-scale destruction of Aboriginal culture and heritage. Alarmingly it was revealed that the OEH were issuing permits to destroy Aboriginal objects at a rate of five per week, with around one quarter of these being issued to government agencies; and more alarmingly still that the rate at which permits were being issued was rapidly increasing.¹¹ In addition, the submission highlighted how the current regime fails to provide recognition of the rights of Aboriginal people to be directly involved in the process for determining the significance of their culture and heritage, or for determining what happens to Aboriginal places and objects.

When the *National Parks and Wildlife Amendment Act 2010* came into effect in October 2010, along with the *National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 2010*, it was hoped that the significant changes to the Aboriginal heritage provisions of the NPW Act would streamline the processes and improve protections for Aboriginal culture and heritage.¹²

However, while new offences and increased penalties for the illegal destruction of Aboriginal culture and heritage were introduced, recent cases involving the illegal destruction of Aboriginal culture and heritage have revealed that the amended laws continue with the legal regime's failure to provide adequate protection for Aboriginal culture and heritage. In addition to this, there are serious concerns that the OEH is unwilling to take action to prosecute under the new offences and increased penalties.¹³

Furthermore, the introduction of wide-ranging defences to the destruction of Aboriginal culture and heritage, including the 'low impact activities' and 'due diligence', appear to have further complicated the processes and have in many respects facilitated unmitigated destruction of Aboriginal culture and heritage. Prior to the amendments, Aboriginal heritage surveys were necessary to determine whether Aboriginal objects would be disturbed as a result of certain activities. Now where an activity falls within the broad definition of a 'low impact activity', individuals and corporations are required to undertake their own 'due diligence' to avoid harm to an Aboriginal object. There are concerns that a lack of knowledge about due diligence and the laws surrounding Aboriginal objects, and a lack of ability for individuals to identify an Aboriginal object, have led to the further illegal destruction of Aboriginal culture and heritage.¹⁴

¹⁰ See NSWALC website [http://www.alc.org.au/media/9790/More%20Than%20Flora%20and%20Fauna%20\(2009\).pdf](http://www.alc.org.au/media/9790/More%20Than%20Flora%20and%20Fauna%20(2009).pdf)

¹¹ See NSWALC *More than Flora and Fauna* submission (footnote 18); Between 1990-2004 half of the known AHIPs were issued, with the other half being issued in the following three years between 2005-2009.

¹² See Parliament of NSW website, *NPW Amendment Bill 2010*

<http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/60eed5c6afd5dbd6ca2576d3001c232e>

¹³ In late 2010, a rock engraving in Cromer NSW was destroyed by a subcontractor of a Government owned energy company during the laying of energy lines. The site was identified during the AHIP process and should have been protected. The OEH is currently investigating the matter, to determine whether or not to prosecute as well as who to prosecute. Prosecution could result in a fine of up to \$1.1M for the corporation under the new strict liability offence. However, the OEH have stated the case has been complicated by the *number of parties involved* and it is unclear if the OEH will implement its powers under the new strict liability offence. <http://tracker.org.au/2011/04/power-shift-corporate-vandals-face-1-1m-fine-for-cultural-destruction/> and <http://tracker.org.au/2011/06/sydney-rock-art-destruction-case-stalled/>

¹⁴ In September 2011 the OEH were formally advised of damage to a midden during earth works on a private property in the Sutherland Shire Council (SSC) area. Subsequently the individual was issued an 'official caution letter', however the OEH failed to

With the ongoing failure of the current regime to protect Aboriginal culture and heritage, and the apparent unwillingness of the OEH to take action in response to the known illegal destruction of Aboriginal culture and heritage, wide-ranging reform is still urgently needed. It is vital that the reform to Aboriginal culture and heritage legislation focuses on improving the processes and protections associated with Aboriginal culture and heritage in NSW, the only state or territory without stand alone legislation, and that the reform increase Aboriginal people's control over that heritage.

take action to protect the midden by not issuing a 'stop work order' and taking eight days to investigate the site damage. While the individual received DA approval for the construction, no AHIP was required as the activity fell within the definition of a 'low impact activity'. It is not clear if the individual undertook due diligence, or was even aware of the need to undertake due diligence. It understood that Aboriginal cultural sensitivity mapping had been carried out by the SCC in 2009 which clearly outlined the potential for Aboriginal objects to be present, but whether this information was readily available or known to the property owner is also unclear.

Consultation with community

NSWALC and NTSCORP have serious concerns regarding the **limited notice provided to communities and the extremely short public consultation** undertaken as a part of the current culture and heritage reform process. Furthermore, NSWALC and NTSCORP have serious concerns regarding the **appropriateness of the consultation dates**, for example the first public consultation took place on Melbourne Cup Day in Redfern and had an extremely low attendance rate. NSWALC and NTSCORP make the following remarks regarding the consultation process. These comments have been previously made directly to the relevant Ministers:

- **Locations of consultations:** NSWALC and NTSCORP note that the first round of consultations in relation to the reform of Aboriginal culture and heritage laws in NSW were carried out in 25 locations across NSW over a one month period. A second consultation period of three months is proposed to undertake community and stakeholder consultation on an 'options paper' developed from stakeholder input generated from the initial round of consultations¹⁵. This is considerably less than was proposed under the earlier reform process, which included a first round of consultation over a nine month period, extending to 47 communities across NSW, followed by a second consultation period proposed to be held over a four month period on options for reform.
- **Length of consultation rounds:** The first round of public consultations was identified to take place over a three month period. However the public consultations cover a period of approximately one month only (commenced on 1 November and finished on 7 December 2011).
- **Submission to the OEH:** The OEH invited comments and submissions on the 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform' paper to be submitted by 1 December 2011. This deadline was extended to 31 December, however, the OEH website was not been updated to reflect this extension.

NSWALC actively promoted community responses to the Government on the first round of public consultation to the reform through the production of fact sheets, network messages, website updates and presentations to its network and interested groups. Similarly, NTSCORP provided information including verbal briefings to their clients. The consistent feedback from the Aboriginal community has focussed on the limited notice and the extremely short public consultation process; **the rushed nature of the consultations raises concerns about the commitment to meaningfully engage with the Aboriginal community in the reform process.**

The current process seems inconsistent with commitments made by the OEH to the cultural rights and self-determination of Aboriginal people, as recognised in the *DECC Corporate Plan 2008-2012*. The process also does not seem consistent with the OEH's commitment to community consultation as outlined in existing policies.¹⁶

The reform of Aboriginal culture and heritage laws in NSW, to create stand-alone legislation, is a critical and long outstanding issue for Aboriginal peoples of NSW. NSWALC and NTSCORP remain committed to working with the Government to finalise broader reform of Aboriginal culture and heritage laws, however NSWALC and NTSCORP cannot support any reform of Aboriginal culture and heritage laws where Aboriginal peoples have not been properly engaged or consulted.

NSWALC and NTSCORP oppose the introduction of culture and heritage law and policy where it has been developed without proper consultation with the Aboriginal community.

¹⁵ See OEH website, the reform process <http://www.environment.nsw.gov.au/achreform/ACHreformprocess.htm> (18 Oct 2011)

¹⁶ See for example OEH website *Aboriginal cultural heritage consultation requirements for proponents 2010* <http://www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf> and *Threatened species recovery planning and Aboriginal community involvement, section 10 Involving Aboriginal communities* (November 2007). <http://www.environment.nsw.gov.au/threatenedspecies/tscominvmanten.htm>

NSWALC and NTSCORP call on the Government to appropriately consult with the Aboriginal community, and Aboriginal community bodies such as NSWALC and NTSCORP, before any legislation or policy relating to Aboriginal culture and heritage is introduced or implemented

a. Additional consultations

NSWALC and NTSCORP wrote jointly to the Minister for Environment and Heritage in December 2011 recommending that best practice community consultation is required to support the reform process, and that additional and more extensive consultation with Aboriginal community is needed.

In this correspondence, NSWALC and NTSCORP proposed that an additional 37 consultations be undertaken between late January and the end of February 2012, allowing for adequate notice to be given to Aboriginal communities and respecting that many Aboriginal organisations and communities will be unavailable to attend consultations over the Christmas and New Year period. The following locations were identified for a range of reasons, including: areas where limited consultation was previously carried out and where low attendance was recorded at the first consultation; where a high population of Aboriginal peoples reside; and where there were geographical limitations to attending previous consultations.

- Armidale
- Bega
- Bourke
- Brewarrina
- Campbelltown
- Casino
- Cobar
- Coonabarabran
- Dareton
- Deniliquin
- Forbes
- Goolooga
- Gosford
- Griffith
- Hay
- Inverall
- Lismore
- Maitland
- Mclean
- Mount Druitt
- Nambucca
- Narrabri
- Newcastle
- Orange
- Peak Hill
- Penrith
- Port Macquarie
- Quirindi
- Redfern
- Tamworth
- Taree
- Tenterfield
- Tumut
- Tweed Heads
- Ulladulla
- West Wyalong
- Wilcannia

In addition, NSWALC and NTSCORP urged the Government not to reduce the time allocated to the second phase of consultation on the proposed models for reform as a result of extending the first round of consultation. Instead more resources should be allocated to collating feedback from the first and second rounds of consultation, so that this exercise can be undertaken in a shorter timeframe. Similarly, it is critical that the options paper outlining proposed models for reform is not prepared until additional and more comprehensive consultation is carried out with Aboriginal communities.

NSWALC and NTSCORP call on the Government to ensure meaningful engagement with the Aboriginal community on the reform of culture and heritage laws is provided by more extensive community consultations undertaken with sufficient notice and appropriate scheduling.

To ensure that the views of the Aboriginal community are appropriately considered and incorporated, options for the reform of Aboriginal culture and heritage laws must not be prepared until after more comprehensive consultation with the Aboriginal community has occurred.

b. Providing adequate notice

The insufficient notice provided for the first round of consultations has been a contributing factor to the low level of attendance at consultations. NSWALC and NTSCORP reiterate to Government that the **standard minimum period that should be provided by Government for notifying community members of consultations is one month's notice.**

Best practice in relation to notifying Aboriginal communities regarding consultations includes publishing notices in accessible media and providing direct notification to relevant community organisations. NSWALC and NTSCORP recommend that notification is provided to community members through the following channels:

- Advertisements to be published in Aboriginal media including Tracker, Koori Mail and National Indigenous Times,
- Advertisements to be published in local community newspapers,
- Notification letters should be sent to all Local Aboriginal Land Councils,
- Notification letters should be sent to Aboriginal organisations operating in the locations where consultations are being held including the Aboriginal Medical Service, Aboriginal Legal Service, Elders Councils and Aboriginal Corporations registered with the Office of Indigenous Corporations,
- Details of the consultation meetings and process to be featured on the homepage of the OEH website, and
- Details of the consultation meeting times and locations to be provided to NSWALC and NTSCORP for distribution through their networks, however we note that this should not be seen as a substitute for the other notification practices.

NSWALC and NTSCORP strongly recommend that a minimum of one month's notice be given for future community consultations, with notifications to be published in accessible media and directly provided to relevant Aboriginal groups and organisations

c. Prioritising Aboriginal input

The consultation process carried out to date has included public consultations and stakeholder roundtables. However, while NSWALC and NTSCORP support maximised input from all stakeholders, given the nature of the proposed reform, **Aboriginal community input must be prioritised.**

Aboriginal people must be recognised as the main stakeholders for the reform of laws which relate to Aboriginal culture and heritage. As such it is appropriate for Government to hold Aboriginal specific consultations for Aboriginal communities only.

NSWALC and NTSCORP will be undertaking a series of additional consultations and workshops with our networks and supporting groups regarding reform to Aboriginal culture and heritage laws in NSW. These consultations and workshops are anticipated to be carried out before 30 June 2012. The outcomes of these consultations will be provided to the office of the Minister of the Environment and are intended to help inform the development of the second round of consultations on a proposed model for new legislation. NSWALC and NTSCORP call on the Government to ensure that Aboriginal views on possible reform of Aboriginal culture and heritage laws are prioritised above that of other stakeholders

To ensure the promotion and protection of Aboriginal rights in the reform process NSWALC and NTSCORP strongly recommend Aboriginal community specific consultations be held to appropriately and clearly capture the views of community.

d. Independent facilitators

It is essential that **independent facilitators undertake subsequent consultations.** NSWALC and NTSCORP have previously raised concerns with the Government regarding the need for facilitators to remain independent to ensure the reform process remains objective and the findings reflect what community

members express during the consultations. This issue has also been raised by community members who have attended consultations and who have expressed apprehension regarding disparaging comments made in relation to Aboriginal representative bodies. Consultations facilitated with bias have the potential to significantly and negatively affect the reform process.

NSWALC and NTSCORP are mindful of the need to preserve the independence of a broad reform process and strongly recommend that further consultations be carried out by independent facilitators, to eliminate the potential for any conflict of interest or bias.

Independent reform process

It is of concern to NSWALC and NTSCORP that the Government **commenced the reform process without an established Working Party in place**. Past committees established for the purpose of broader reform of Aboriginal culture and heritage laws have been tasked with the preparation of reports and discussion papers and undertaking extensive public review. Instead the OEH has assumed these responsibilities. We note that a wide-ranging reform process may lead to recommendations that could affect the work of OEH staff, and that this creates the potential for issues of conflict of interest to arise.

To ensure the Working Party remains independent in its views and advice, NSWALC and NTSCORP strongly recommend that the Working Party is tasked with undertaking the preparation of any future reports and discussion papers, and particularly the preparation of final recommendations for the Ministers. The Working Party must be properly resourced and supported in these activities.

To further ensure **the independence and integrity of the working party** it is further recommended that an independent person be engaged to assist the working party in the preparation of reports and discussion papers.

In NSWALC and NTSCORP's opinion the ultimate goal of broader reform is to return control and ownership of Aboriginal control and heritage to Aboriginal people outside of the Government. As such employees of the OEH involved in the broader reform process, and those who are currently engaged in the management and protection of Aboriginal culture and heritage, may be seen to have a **potential conflict of interest**. This conflict of interest extends to representation of OEH employees on the working party. The control and ownership of Aboriginal culture and heritage should lie with Aboriginal peoples themselves and not with government departments or agencies or OEH employees.

The **engagement of a third party** who reports directly to the Working Party and assists the working party in the preparation of reports and recommendations to the Ministers, and to assist the working party undertake future consultation, will ensure conflicts of interests are sufficiently mitigated.

To ensure the working party remains independent in its views and advice, and to eliminate any potential conflict or interest, NSWALC and NTSCORP strongly recommend the Government engage an independent third party to assist in the preparation of Working Party reports and recommendations, and to undertake future public consultation.

Recognition of Aboriginal rights

Australia has international obligations in the area of Aboriginal culture and heritage protection, primarily through its endorsement in April 2009 of the United Nations *Declaration on the Rights of Indigenous Peoples* (the “Declaration”). The Declaration states that:

Indigenous people have the right ... to maintain, protect and develop the past, present and future manifestations of their cultures... (Article 11)

Indigenous people have the right ... to use and control of their ceremonial objects ... (and) States shall seek to enable the access and/ or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous people concerns. (Article 12)

This is consistent with the OEH’s policies which recognise the status of Aboriginal peoples to Aboriginal culture and heritage as ‘rights holders, not merely stakeholders’,¹⁷ and in particular that:

As the first people of Australia, Aboriginal people have inherent rights that were never given away. These rights exist in addition to general citizenship rights, and include:

- *the right to self-determination – that is, the right of Aboriginal people to determine the direction of their own social, cultural, economic and political development*
- *the right to maintain culture, language, knowledge and identity*

The reform of Aboriginal culture and heritage laws presents an important opportunity for the Government to implement the Declaration. It is critical that any reform of Aboriginal culture and heritage laws is based on the principles enshrined in the Declaration.

In accordance with the underlying principles of the Declaration, the Government has an obligation to ensure meaningful participation, engagement and consultation with Aboriginal peoples and local communities concerning the reform of Aboriginal culture and heritage laws to ensure that they comply not only with customary law, but community level procedures and protocols.

The Aboriginal culture and heritage reform process must deliver the best protections for Aboriginal people’s culture and heritage. It is paramount that genuine engagement and consultation occurs with Aboriginal communities and that options are based on the premise that Aboriginal ownership and control of Aboriginal culture and heritage in NSW lies with Aboriginal people.

NSWALC and NTSCORP have serious concerns regarding **the lack of recognition of Aboriginal rights and interests in the new reform process**, particularly as the reform relates specifically to Aboriginal peoples’ culture and heritage.

The composition of the new Working Party will be dominated by ‘experts’ appointed by the Government and does not ensure appropriate representation of Aboriginal interests, with only one of the 13 proposed members of the Working Party specifically identified to represent Aboriginal interests – *ex-officio member* from the Coalition of Aboriginal Peak Organisations. Previously the Working Party consisted of three Aboriginal specific positions out of a total of eight seats.

Conversely, on other committees established by the new government key industry representatives and peak bodies have been automatically appointed in recognition of the expertise held by such organisations in their various fields. It is extremely disappointing that the Government has not recognised NSWALC and

¹⁷ OEH *Aboriginal People, the Environment and Conservation: Principles to incorporate the rights of Aboriginal people into the work of the Department of Environment and Conservation NSW (2006)*
<http://www.environment.nsw.gov.au/resources/whoweare/APECPrinciples.pdf>

NTSCORP, as the State's peak Aboriginal representative bodies, as being significant organisations to be represented on the Working Party.

It is unacceptable for a working party established to guide reforms relating to Aboriginal peoples culture and heritage, not to provide an appropriate level of Aboriginal representation.

NSWALC and NTSCORP call on the Government to ensure Aboriginal interests are appropriately represented on the Working Party established for the reform of Aboriginal culture and heritage laws, through the dedication of Aboriginal specific seats on the Working Party. It is unacceptable that only one of the 13 proposed members of the Working Party is specifically identified to represent Aboriginal interests.

While the Minister for Environment has committed to deliver stand-alone legislation for the protection of Aboriginal culture and heritage¹⁸, it is unclear why the Terms of Reference (TOR) for the Working Party do not reflect this. Where the earlier Working Party were to '*lead the development of new stand-alone legislation to protect Aboriginal culture and heritage*', the new Working Party is tasked with providing '*advice to Government on options for the management and protection of culture and heritage*'.

In addition to this, further analysis reveals the TOR provides significantly less recognition of Aboriginal peoples' rights than the earlier TOR:

- References to *stand-alone legislation* are removed and replaced with options for the *management and protection* of Aboriginal culture and heritage,
- Reference to *recognising in new legislation* Aboriginal peoples roles in relation to their culture and heritage are removed, and
- Reference to identifying the *nature and ownership* of Aboriginal culture and heritage that should be captured in new legislation are removed and replaced with *processes to identify significant Aboriginal cultural heritage items*.

Similarly, the earlier 'Goals of Reform' when compared to the now 'Objects of Reform' reveal¹⁹:

- Reference to *increase the role* of Aboriginal people in the management of their culture and heritage are removed and replaced with *delineate the role* only,
- Reference to *promoting greater awareness and understanding of Aboriginal culture and heritage* are removed entirely.
- Additional reference has been included to *balance the protection of Aboriginal culture and heritage with the economic development needs of Aboriginal communities and NSW generally*.

The 'Objects for Reform' also include significant reference to defining and delineating responsibilities for government agencies, heritage professionals and industry. While NSWALC and NTSCORP agree that widespread awareness and understanding of new stand-alone legislation and the obligations this will entail across sectors, any reform of Aboriginal culture and heritage laws must recognise Aboriginal control and ownership of Aboriginal culture and heritage.

NSWALC and NTSCORP are particularly concerned with the object which seeks to 'protect and manage NSW Aboriginal culture and heritage through a streamlined and flexible regulatory system which balances the protection of Aboriginal culture and heritage with the economic development needs of Aboriginal communities and NSW generally'. While NSWALC and NTSCORP always acknowledged that Aboriginal interests would need to be balanced with industry and other interests, the **reforms appears to focus more on the needs of government and industry than Aboriginal peoples' rights**.

¹⁸ Estimates [Environment and Heritage] General Purpose Standing Committee 5, pg 45 (27 Oct 2011)

¹⁹ The 'Goals of Reform' were released as part of the 2010 TOR for the Aboriginal culture and heritage working party [http://www.sectorconnect.org.au/assets/pdf/newsletter/MacUnity/Heritage_Legislation_-_Issues_Paper_Final_draft_-_21march_2011\[1\].pdf](http://www.sectorconnect.org.au/assets/pdf/newsletter/MacUnity/Heritage_Legislation_-_Issues_Paper_Final_draft_-_21march_2011[1].pdf) ; for the 'Objects of Reform' see pg 1 of OEH 'Aboriginal heritage legislation in NSW: Public consultation on issues for reform', (October 2011)

Given the significant weakening of Aboriginal rights and interests in the reform process, NSWALC and NTSCORP have serious concerns that even if stand-alone legislation is produced, it will result at best with the current level of protection provided to Aboriginal culture and heritage, which is unacceptable to Aboriginal peoples.

NSWALC and NTSCORP are particularly concerned with the lack of recognition of Aboriginal peoples' rights in the reform process; the reform process must be based on the premise that Aboriginal people have the right to determine and control their own culture and heritage.

Key principles for reform

NSWALC and NTSCORP are concerned that the current reform effort has failed to capture the issues and ideas reflected in the Keane Reports,²⁰ the principles and proposals outlined in the last reform attempt, the *1996 DRAFT Green Paper*, or incorporate the principles contained in the *Declaration on the Rights of Indigenous Peoples*.

The NSWALC and NTSCORP call on the Government to ensure that the reform of Aboriginal culture and heritage laws in NSW are based upon the following principles:

- International human rights instruments as embedded in the United Nations Declaration on the Rights of Indigenous Peoples. These principles must underpin any reform of Aboriginal culture and heritage laws,
- Aboriginal peoples are recognised in legislation as the rightful owners of Aboriginal culture and heritage in NSW, and as such are the only determinants of Aboriginal culture and heritage,
- Aboriginal culture and heritage must be recognised as a part of a broader relationship with the land including land rights; native title rights; land use; and sustenance (hunting, gathering and fishing), spiritual and cultural beliefs and practices, and
- A legislative system is established that addresses the need to preserve and enhance Aboriginal cultural traditions through effective Aboriginal control mechanisms and the need to deliver social justice to Aboriginal peoples in NSW to redress the significant cultural, economic and social dispossession which Aboriginal people continue to experience.

In 1980 the first report to Parliament by the *NSW Legislative Assembly Committee upon Aborigines* (the Keane Committee), spoke of an independent Aboriginal Heritage Commission to return control over Aboriginal sites to Aboriginal people. This sentiment was echoed when the then Minister for Aboriginal Affairs, Frank Walker, introduced the *Aboriginal Land Rights Act* into Parliament outlining that land rights was the first step in Government recognition of past dispossession, with the establishment Aboriginal Heritage Commission to be the second step.

There have been a number of reviews and inquiries into the reform of Aboriginal culture and heritage laws in NSW since 1978. All of the reviews have supported:

- Aboriginal ownership and the right of Aboriginal people to control their culture and heritage recognised in separate stand-alone legislation,
- An independent Aboriginal Heritage Commission, with decentralised control of Aboriginal culture and heritage where the day-to-day management responsibilities are invested in local Aboriginal people, and
- Aboriginal understandings and definitions of what is culture and heritage.

After a succession of committees and working groups formed to explore in more detail the structure of an Aboriginal Heritage Commission, the time is now to deliver Aboriginal culture and heritage back into the hands of Aboriginal people in NSW.

²⁰ In 1978 the NSW Government established the cross-party *'Select Committee of the Legislative Assembly upon Aborigines'*, chaired by Labour Member for Woronora, Maurice Keane. The Committee produced two reports (1980 and 1981) referred to as the Keane Committee Reports, which made wide ranging findings on land rights and the protection of sacred and significant sites based on evidence and submissions made during the inquiry process, including the establishment of the land rights system and an Aboriginal Heritage Commission.

NSWALC and NTSCORP call on the Government to support the establishment of an **independent Aboriginal Heritage Commission** with Aboriginal commissioners who are appointed by the Aboriginal communities of NSW. In accordance with principles of self determination, the Commission must have responsibility for overseeing the protection and management of Aboriginal culture and heritage in NSW, with decentralised control of the day-to-day management responsibilities for Aboriginal culture and heritage vested in the local Aboriginal communities.

NSWALC and NTSCORP have previously stated a commitment to work in partnership with the Government and other key stakeholders on the development of legislation and policies impacting on Aboriginal people. This includes the reform of Aboriginal culture and heritage laws, which is a priority issue for Aboriginal communities and our networks.