



Submission to the NSW Government

***Reforming Aboriginal Culture and Heritage laws in
NSW***

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1. Overview

The New South Wales Aboriginal Land Council (**NSWALC**) welcomes the NSW Government's commitment to reforming legislation to provide proper protections for Aboriginal culture and heritage.

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

NSWALC is concerned that the current reform proposals **do not meet best practice standards** and do not align with NSWALC's endorsed principles for reform. NSWALC submits that overall the Government model proposes mechanisms that **will not effectively protect Aboriginal heritage**, will create inappropriate and unworkable structures, and are unlikely to create more certainty for proponents.

While the stated intent of a number elements of the proposed Government model are potentially positive such as amending the definition of Aboriginal heritage to better reflect Aboriginal people's definitions, and aiming to provide Aboriginal people with decision-making rights about the management and protection of Aboriginal heritage, the model does not appear to provide effective methods to achieve this.

It is also of significant concern that while the Government model outlines some very general proposals aimed at engaging with Aboriginal communities, the NSW Government has largely failed to address key issues of importance to Aboriginal peoples and the Aboriginal Land Rights network as outlined in our previous submissions. We are alarmed that the proposed Government model does not recognise the culture and heritage roles of Aboriginal Land Councils¹ or include Aboriginal Land Councils in the proposed composition of the Local Aboriginal Culture and Heritage Committees which will have key roles in the new system.

It is extremely concerning that the Government model proposes to retain a number of ineffective and inappropriate provisions outlined in current legislation. This includes the due diligence process and the low impact activity regime. These elements are highly contentious and will require significant amendment if these processes are to be carried over in new legislation.

Key recommendations from the Aboriginal Culture and Heritage Reform Working Party (**Working Party**), importantly building on the Land Rights system and establishing an Aboriginal Heritage Commission, have not been incorporated into the Government's model; it is concerning that no detailed explanations have been provided by Government for these decisions.

Furthermore, the lack of detail throughout the proposed Government model raises significant questions about the next steps in the reform process and implementation of any new legislation. There is insufficient detail to properly assess how fundamental elements of the proposed system are intended to work in practice, including aspects related to funding and administration. In addition, the Government have failed to explain how the proposed model will interact with the other current laws and proposed reforms to the planning and Local Government system.

¹ *Aboriginal Land Rights Act 1983* (NSW), section 52(4) and section 106 (7)

The reform process to date has raised significant concerns within our networks. In late September 2013 the NSW Government released their proposals for new standalone Aboriginal heritage legislation on the NSW Office of Environment and Heritage (OEH) website in a document titled 'Reforming the Aboriginal Cultural Heritage System in NSW' (**proposed Government model**).² This was done without prior consultation with peak Aboriginal organisations or other stakeholder groups, one year after the Government received the Working Party recommendations, and two years after initial consultations were held. This has created concerns that the Government is not genuinely committed to this reform process, and is not committed to genuinely engaging with the Aboriginal Land Council network.

NSWALC has consulted with the Aboriginal Land Rights network and a number of key stakeholder groups. While there is broad support for change there is a general concern with the lack of collaboration the government has adopted in the process to date and the lack of detail reflected in the proposals.

Law reform in this area will have major cultural, political, economic and operational implications for the Aboriginal Land Council network and Aboriginal communities across NSW. The protection and promotion of Aboriginal culture and heritage remains a key priority for our network. Consultations conducted by NSWALC on this issue in 2012 clearly expressed that the current laws are continuing to fail to protect Aboriginal heritage and that Aboriginal communities in NSW are calling for genuinely Aboriginal controlled organisations to protect Aboriginal culture and heritage in NSW. Based on the available information, the new system as proposed will have significant impacts on how Aboriginal culture and heritage is managed in NSW and on Local Aboriginal Land Councils (LALCs), particularly those undertaking culture and heritage initiatives and sites work.

Overall, NSWALC is extremely concerned that the NSW Government's proposed model:

- Undermines the culture and heritage roles of Aboriginal Land Councils,
- Fails to provide a genuine Aboriginal controlled process for the protection of Aboriginal culture and heritage by establishing government appointed Local Aboriginal Culture and Heritage Committees,
- Supports the continued significant control and oversight by government in Aboriginal culture and heritage protections, rather than an independent Aboriginal body, and
- Perpetuates a system that focuses on the destruction of Aboriginal culture and heritage, rather than protection.

There is an urgent need for the NSW Government to reconsider the reform proposals and to ensure that peak Aboriginal organisations, including NSWALC and LALCs, and Aboriginal communities are informing the reform process in a meaningful way. Aboriginal Land Councils have a genuine commitment to protecting and promoting Aboriginal culture and heritage, and it is essential for Aboriginal Land Councils to be explicitly recognised in a new legislative system.

We are committed to working in genuine partnership the NSW Government and other key stakeholders to achieve positive reforms to Aboriginal culture and heritage laws and deliver a workable system that both protects Aboriginal heritage and provides certainty for proponents. However it is critical that both the reforms and processes to develop new laws reflect best practice standards and the principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*, including:

² Proposed NSW Government model as outlined in 'Reforming the Aboriginal Cultural Heritage System in NSW' released in September 2013, available at: <http://www.environment.nsw.gov.au/achreform/ACHproposedmodel.htm>

Article 31

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.*³

The recommendations made by NSWALC in this submission are designed to further the protection of Aboriginal culture and heritage in NSW and to better recognise the rights of Aboriginal people to control and manage Aboriginal culture and heritage, while also providing practical solutions in order to achieve a workable system for everyone.

Key Recommendations:

Recommendation 1: Prior to the release of any draft legislation for Aboriginal culture and heritage protections in NSW, there must be further consultation with peak Aboriginal organisations, including NSWALC and NTSCORP. This must include consultation on any revisions of the government's proposed model, and any regulations and associated policies and guidance materials.

Recommendation 2: Aboriginal Land Councils culture and heritage roles must be recognised in any new legislation.

Recommendation 3: Public consultation on draft Aboriginal culture and heritage legislation should allow at least 3 months for comment/feedback.

³ United Nations Declaration on the Rights of Indigenous People, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

2. Summary of recommendations

Key recommendations:

1. Prior to the release of any draft legislation for Aboriginal culture and heritage protections in NSW, there must be further consultation with peak Aboriginal organisations, including NSWALC and NTSCORP. This must include consultations on any revisions of the government's proposed model, and any regulations and associated policies and guidance materials.
2. Aboriginal Land Councils culture and heritage roles must be recognised in any new legislation.
3. Public consultation on draft Aboriginal culture and heritage legislation should allow at least 3 months for comment/feedback.

The current reform process:

4. The schedule for the development of any new Aboriginal culture and heritage legislation must be prioritised in order to ensure meaningful input by Aboriginal peoples and its successful passage through Parliament. Any amendment to the proposed schedule should be discussed with key stakeholders including NSWALC and NTSCORP.
5. The Government must outline clear timeframes for the development and implementation of new Aboriginal culture and heritage laws, regulations and associated policies and guidance materials.
6. Clarification should be provided about what resources will be available to develop new legislation, to what extent existing mechanisms will inform any new legislation, and opportunities for communities to have a say in these processes.
7. Given the significance of the proposed reform of Aboriginal culture and heritage laws in NSW, public consultation on the draft legislation should allow a minimum of three months.

Creation of standalone legislation:

8. Any new Aboriginal culture and heritage law must build upon existing Aboriginal controlled administrative and governance structures; Aboriginal Land Councils and Native Title groups must be incorporated.

Objectives and preamble:

9. New laws and related instruments for Aboriginal culture and heritage must include the following objectives:
 - a. To protect and promote all Aboriginal culture and heritage,
 - b. To promote self-determination, including to provide decision-making and control to Aboriginal people, both at State and local levels,
 - c. To provide an ecologically, economically and socially sustainable framework for the protection of Aboriginal culture and heritage,
 - d. To complement the *Aboriginal Land Rights Act*,
 - e. To complement the *Native Title Act*,
 - f. To vest ownership of Aboriginal heritage in Aboriginal people, not government, and
 - g. To establish an effective system of prosecution, penalties and reparations.

In addition, international human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples*⁴, must underpin new laws.

10. The new laws for Aboriginal culture and heritage in NSW must provide for:
 - a. Specific enforceable mechanisms that operationalise and implement these objectives, and
 - b. Robust and transparent review, appeal and monitoring mechanisms.

Interactions with other legislation:

11. Aboriginal culture and heritage laws must integrate with and complement planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning and development assessment processes
12. Any new system to better protect Aboriginal heritage will require thorough consideration of amendments to planning legislation to ensure that, at a minimum, planning laws include objectives to protect Aboriginal heritage and processes that require engagement with Aboriginal people in the identification and any subsequent decisions about Aboriginal heritage.
13. Existing statutory mechanisms for protecting Aboriginal heritage should be factored in to any new legislation, including Land Rights and Native Title.

Composition and appointment of Local Aboriginal Culture and Heritage Committees:

14. The composition of any Aboriginal Culture and Heritage Committee or body established under a new law must ensure:
 - a. Aboriginal people have genuine decision-making roles and are the sole determiners of Aboriginal cultural heritage,
 - b. Aboriginal Land Councils culture and heritage roles are recognised in any new model, including their advocacy and support roles. Aboriginal Land Councils should be able to provide a body corporate role auspicing and holding assets for the local committees, and
 - c. Sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local committees.
15. NSWALC supports Aboriginal controlled administrative and governance structures, at both the local and state levels, for the management and protection of Aboriginal culture and heritage. NSWALC does not support the use of Ministerial appointed committees as being the appropriate source of cultural authority.
16. NSWALC strongly recommends the Government fund the expansion of the Aboriginal Owners Register under the *Aboriginal Land Rights Act (NSW)* to cover the whole of NSW, to enable Aboriginal Owners to be the authority to speak for Country on Aboriginal culture and heritage issues.

Roles and responsibilities of Local Aboriginal Culture and Heritage Committees:

17. New Aboriginal culture and heritage laws must provide for genuine decision-making powers to be given to local Aboriginal peoples in relation to the day-to-day management and protection of Aboriginal heritage; processes that do not allow Aboriginal people to have meaningful input

⁴ The United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly in 2007 and endorsed by the Australian Government in 2009, identifies international principles that Australian laws and planning should consider in order to close the gap between the lives of Aboriginal peoples.

into activities and developments and/or bypass processes that provide for proper consultation and assessment are not supported.

18. Local Aboriginal Culture and Heritage Committees must be properly resourced and they must be able to attract representatives with the necessary skills to ensure free and informed decision making at the local level.

Funding and remuneration:

19. The Government model fails to identify how the new system will be funded, in particular how the new local Aboriginal Culture and Heritage Committees will be resourced to carry out their functions which are broad, resource intensive and ongoing; proper resourcing and funding of a new system and the administrative structures underpinning this system are required from both government and proponents.
20. The resourcing of a new law for the protection and management of Aboriginal culture and heritage must not be solely reliant upon funds provided from proponents for compensation for the destruction of Aboriginal heritage based upon negotiated agreements; the Government must contribute resources to support the ongoing management and protection of Aboriginal culture and heritage.

Governance:

21. NSWALC supports a state level Aboriginal controlled body, *separate from Government*, to undertake governance, oversight and support functions for a new model for the protection and management of Aboriginal culture and heritage; NSWALC does not support significant governance oversight to continue to be maintained by Government.
22. Any new model to support the protection and management of Aboriginal culture and heritage must build on existing Aboriginal community controlled structures; NSWALC supports building on the Aboriginal Land Rights structures to support a new model for Aboriginal culture and heritage laws.

Role of Local Aboriginal Land Councils (LALCs):

23. NSWALC strongly opposes a Government model for reform that fails to acknowledge the crucial role of Aboriginal Land Councils in the protection and management of Aboriginal culture and heritage in NSW.
24. NSWALC encourages the Government to reconsider the recommendation of the Government Working Party to build upon the land rights network to support new laws for Aboriginal culture and heritage protection and management. A new model for reform must acknowledge the current roles and functions of Aboriginal Land Councils and ensure roles for Aboriginal Land Councils in the new model that are genuinely complimentary to these functions.

Aboriginal Culture and Heritage Advisory Council (ACHAC):

25. NSWALC supports a genuinely independent Aboriginal Culture and Heritage Commission to undertake key oversight, governance, support, advocacy and compliance functions in a new system and not a Ministerially appointed committee. The Commission can be resourced through re-allocating funds from the OEH to the Commission.

Roles for Government:

26. Government roles must be kept to a minimum and the key oversight functions with regard to Aboriginal culture and heritage protection and management must lie with an *Independent* Aboriginal Culture and Heritage Commission with appropriate resourcing.

Consultation:

27. NSWALC does not support a new model for reform of Aboriginal culture and heritage laws that allows proponents to bypass Local Aboriginal Culture and Heritage Committees in relation to potential harm to Aboriginal culture and heritage; Aboriginal communities must be supported to make decisions about matters that affect them.
28. Local Aboriginal Culture and Heritage Committees must have the appropriate community and representative authority and be capable of properly consulting/granting permission on behalf of community with regard to Aboriginal culture and heritage.

Boundaries:

29. Boundaries in a new system should be based on Aboriginal Land Council boundaries, with the development of protocols and agreements to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.

What is protected?

30. NSWALC supports the Government's position that a broad all-encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values must be included in new laws. However this broad definition must be accompanied by enforceable mechanisms to protect Aboriginal heritage, including cultural and intellectual property rights.
31. Mechanisms to identify and record Aboriginal heritage must be based on mandatory and uniformly applied best practice standards for the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information.
32. NSWALC recognises that all Aboriginal heritage including contemporary heritage is important to Aboriginal people and supports decision making by local Aboriginal people about Aboriginal culture and heritage. Proposals to classify Aboriginal heritage as 'low' value are not supported by NSWALC.

Timeframes:

33. Any mandatory timeframes set out in legislation must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities.

Aboriginal Culture and Heritage register, mapping and Plans of Management:

34. Maps and plans should be used as guidance 'tools' for proponents, and must not be used as the sole decision-making tools. NSWALC does not support a system that relies on mapping and Plans of Management to make important decisions about Aboriginal culture and heritage management and protection, at the expense of consultation with Aboriginal people.
35. Processes that do not allow Aboriginal people to have a say over activities and developments and/or bypass proper consultation and assessment mechanisms are not supported.
36. Clear requirements for best practice consultation with Aboriginal peoples must be developed in consultation with peak Aboriginal organisations in NSW and Aboriginal communities and enshrined in new laws.

Flexible regulatory processes:

37. Mechanisms that further weigh the system in favor of proponents are not supported. Mechanisms must be developed, including proper criteria and guidelines, to ensure the process of negotiation between Local Aboriginal Culture and Heritage Committees and proponents are fair, equitable and genuine. Proper assessment and consultation processes are needed and must include provisions for assessing cumulative impacts and compensating Aboriginal people for the destruction of Aboriginal heritage.
38. New laws must provide rights for Aboriginal people to refuse an activity or development. There must be processes to refuse a project based on unacceptable impacts to Aboriginal heritage values. This is consistent with Articles 8 and 11 of the United Nations *Declaration on the Rights of Indigenous Peoples* outlining Aboriginal people's rights to practice and revitalise culture, and rights to redress where cultural heritage is harmed without free, prior and informed consent.
39. The proposal to allow proponents to 'proceed with caution' is not supported. Where agreements cannot be reached between a proponent and Local Aboriginal Culture and Heritage Committee an independent Aboriginal heritage commission should have roles here to decide whether or not the project can proceed and any conditions.
40. Consultation must occur with peak Aboriginal organisations including NSWALC and NTSCORP in the development of any draft Regulations, minimum standards and other supporting documents.

Continuation of current flawed process:

41. The due diligence regime should not be carried over in new legislation in its current form. An independent assessment of the due diligence regime and consultation process to determine its effectiveness in protecting Aboriginal heritage should be undertaken.
42. The low impact activity list should be amended to remove a number of activities that are not low impact. An independent assessment of the definitions of low impact activities should be undertaken to ensure that activities are genuinely low impact and do not bypass consultation processes with Aboriginal people where there is a risk of harm to Aboriginal heritage.

Protection of Aboriginal cultural and intellectual property:

43. New laws must include enforceable rights that recognise and protect Aboriginal peoples cultural and intellectual property rights in line with Article 31 of the United Nations *Declaration on the Rights of Indigenous Peoples*.

State of Aboriginal Culture and Heritage Report:

44. New laws for Aboriginal heritage protection must include robust monitoring and reporting, beyond a single state-wide report every 3 years; this reporting must include:
 - a. Operation of the register, maps and Plans of Management,
 - b. Implementation of project agreements,
 - c. Ensuring any due diligence processes are being followed,
 - d. Monitoring cumulative impacts,
 - e. Monitoring illegal destruction,
 - f. Regular compliance checks,
 - g. Operation of administrative structures and decision-makers, and
 - h. Protection outcomes at the local, regional and state levels.

Funding, training and capacity building:

45. A system for managing Aboriginal heritage needs to be appropriately resourced by the Government and proponents in order to properly carry out its functions. Building on the existing structures of the Land Rights Network is supported if properly resourced and funded to reflect the increase in functions performed.
46. The NSW Government must provide the long term funding for programs and initiatives that are necessary to build capacity and generate the sustainable employment and economic development opportunities needed for Aboriginal peoples to engage in a new system for protecting Aboriginal heritage.
47. Any indicative costings, cost benefit analysis and other documents related to the resourcing of this reform process should be publicly released prior to any draft Bill or other consultation materials being publicly released.

Compliance, penalties and enforcements:

48. Mechanisms to actively monitor compliance of the provisions of a new Aboriginal Culture and Heritage Act, coupled with stronger enforcement of breaches of the Act, are needed in a new system.
49. Proper appeal processes and review rights must be incorporated into any new Aboriginal culture and heritage legislation providing mechanisms for Aboriginal peoples to challenge decisions, including merit appeals, and to seek redress where Aboriginal culture and heritage has been damaged or destroyed.

Concerns with the reform process:

50. It is essential that laws and regulations relating to Aboriginal Culture and Heritage in NSW not be adopted without proper consultation with Aboriginal people and peak Aboriginal representative bodies, including the Land Rights network and Native Title groups. This is consistent with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples which states: *"States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."*
51. That when proposing to host consultations Government Departments and Agencies should:
 - a. Contact the relevant LALCs to seek advice about appropriate consultation dates, time and locations, invite LALC staff and members to attend, and enquire about protocols for Welcome to Country ceremonies,
 - b. Contact NSWALC and other peak Aboriginal organisations for advice about appropriate methods for undertaking consultations and any other issues to take into account,
 - c. Provide funding for travel and accommodation for participants to attend meetings where travel will be required,
 - d. Ensure that Government staff undertaking consultations with Aboriginal people are experienced senior staff and have completed cultural awareness training prior to undertaking consultations. This should include training about Acknowledgement of Country and Welcome to Country protocols,
 - e. Provide at least one month's written notice about upcoming consultations to Aboriginal communities and peak Aboriginal organisations. A minimum of two months should be allotted for communities to provide comment.
 - f. Advertise consultations and workshops widely, including via direct post, email, local and Aboriginal media, local radio in addition to providing direct notification to peak local and state Aboriginal organisations. It is insufficient to place details about a consultation

on a government website only. It should be noted that in far west NSW there are often significant delays in communities receiving mail,

- g. Seek advice on and take into account local issues /circumstances and important dates for Aboriginal communities such as NAIDOC week when arranging meetings or consultations,
 - h. Contact details of participants should be recorded so that records of meetings can be circulated to meeting participants, and direct opportunities to correct any meeting minutes can be provided,
 - i. Provide plain English documentation and explanations of what the current issues are / rationale for why changes are needed, the content of the proposed reforms, what any proposed reforms are intended to achieve, and evidence for why the reform proposals are justified,
 - j. Provide ongoing, regular reports back about the process, how people can get involved, and when to expect further opportunities to comment,
 - k. Avoid arranging consultations over holiday periods when many organisations may have a close down period; if consultations are to be held during this period, additional time will be needed to allow comment,
 - l. Ensure that consultation periods are coordinated between other government departments and agencies minimise overlap and avoid over consultation with Aboriginal communities,
 - m. Engage independent Aboriginal facilitators to run consultations including facilitating discussions and taking notes,
 - n. Allow time at the beginning of the consultation for participants to introduce themselves to the forum, for any issues to be addressed upfront, and be flexible in format recognising that issues may be different across the State and dynamics may be different – there are ways to convey the same information but using different formats,
 - o. Ensure that if government staff do attend consultations, their presence and roles are made clear (such as an observer, to answer questions), that they are briefed properly on the proposals and process so any questions can be answered, and that they do not have influence over any feedback that might be provided, and
 - p. Ensure venues are booked that are easy for people to travel to, can accommodate additional people at short notice, and for issues of key importance to Aboriginal communities consideration should be given to hosting one day workshops.
52. All submissions made in response to the reform of Aboriginal culture and heritage laws should be made public.
53. A disclaimer should be added to the workshop notes outlining that the notes have not necessarily captured whether there was support for the statements, that views were not necessarily representative or endorsed as part of the consultation process, and that some people raised issues outside of the group or formal part of the workshop.
54. The next stage of the reform process must provide clear information on timelines for proposed changes and details on transitional arrangements.

3. Urgent need for reform

There has long been recognition from Aboriginal peoples, government, archaeologists and industry that the laws in NSW to manage and protect Aboriginal culture and heritage are outdated and inadequate.

The regime for managing Aboriginal culture and heritage has been outlined in the state's flora and fauna legislation, the *National Parks and Wildlife Act*, since 1969. Since the late 1970's there have been several government inquiries recommending major reforms to Aboriginal culture and heritage laws, including that proper protections for Aboriginal culture and heritage be introduced through a standalone *Aboriginal Culture and Heritage Act*, that control of Aboriginal culture and heritage should be decentralised, and that an independent Aboriginal Commission should be established. However none of these recommendations have ever been implemented.⁵

NSWALC has long been calling for major reforms to the laws in NSW that manage and protect Aboriginal culture and heritage in recognition that current laws are failing to protect Aboriginal heritage.⁶ Key criticisms of the current laws include:

- NSW is the only state to continue to manage Aboriginal culture and heritage through its ***flora and fauna legislation – National Parks and Wildlife Act (NPW Act)***,
- The NSW ***Government maintains much of the control and management*** of Aboriginal heritage, and the ***Crown has ownership of moveable Aboriginal 'objects'***,
- Current laws give the NSW ***government the power to issue permits to 'harm' or destroy*** Aboriginal heritage,
- ***Lack of clear guidance or processes*** to identify Aboriginal people to be consulted on Aboriginal culture and heritage matters,
- The current system allows ***development to go ahead even where important heritage will be destroyed.***

The introduction of the 2010 amendments to the NPW Act have done little to prevent the ongoing destruction of Aboriginal culture and heritage, with the State of the Environment Report 2011 listing the following reasons for the destruction of Aboriginal sites:

- *"lack of listing or recognition,*
- *conscious, informed decisions by development consent authorities,*
- *prioritisation of economic considerations over heritage protection,*
- *little to no assessment or public reporting of the cumulative impact of development—that is, how much of the Indigenous heritage estate has already been destroyed through past activities in the region,*
- *insufficient consultation with Indigenous communities."*⁷

⁵ NSWALC publication *Our Sites Our Rights* (2010) summarises key recommendations of Aboriginal heritage reviews since 1977, available on the NSWALC website at:

<http://www.alc.org.au/media/61784/110215%20our%20sites%20our%20rights%20final.pdf>

⁶ NSWALC has consistently highlighted failings of the current regime, as evidenced in a number of previous submissions to government. See for example *More than Flora and Fauna* available at:

[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), submission in response to the proposed *Community Consultation Requirements*, available at:

<http://www.alc.org.au/media/69351/nswalc%20submission%20-%20deccw%20community%20consultation%20requirements.pdf> and 'Protecting the Past, Guarding the Future' available at:

http://www.alc.org.au/media/80340/protecting%20the%20past,%20guarding%20the%20future_models%20to%20reform%20aboriginal%20c&h%20laws%20in%20nsw_revised%20240512.pdf

In addition to these systemic issues, the NSW State of the Environment 2012 noted that:

“Simplification or streamlining of planning and development processes have the inadvertent result of making it easier to inappropriately modify heritage places or fail to identify them for protection on schedules.”⁸

The NSW Government continues to issue permits to destroy Aboriginal culture and heritage at alarmingly high rates.⁹ One permit, known as an Aboriginal Heritage Impact Permit (**AHIPs**), may allow for the destruction of several hundred Aboriginal sites. In addition, since the introduction of the ‘due diligence’ regime, proponents now have a defence if Aboriginal sites are destroyed but the proponent took steps to see if they could identify Aboriginal heritage sites based on an incomplete and inaccurate government database Aboriginal Heritage Information Management System (**AHIMS**) and considered the landscape. This permit system does not reflect the true extent of approved destruction of Aboriginal sites. The current system is clearly ineffective and the destruction of Aboriginal heritage in NSW cannot continue at this rate.

In addition, NSW planning laws provide mechanisms to ‘switch off’ the need to obtain AHIPs for major projects and state significant developments; this information is not recorded on any public register.

The State of the Environment Report 2011 has highlighted these issues stating that:

“One of the main threats to Indigenous heritage places is conscious destruction through government-approved development—that is, development for which decision-makers are aware of (or obliged to be informed about) Indigenous heritage impacts, yet choose to authorise the destruction of Indigenous heritage. This widespread process, combined with a general lack of understanding of physical Indigenous heritage, means that individual decisions on assessment and development result in progressive, cumulative destruction of the Indigenous cultural resource.”¹⁰

The illegal destruction to Aboriginal sites also continues to be of significant concern. Few figures are available to estimate this damage as the government does not readily publish this information. However, recent budget estimates hearings revealed that only 61% of suspected harm to Aboriginal sites reported to OEHL have or are currently being investigated by OEHL in a 12 month period during 2012-13.¹¹

The 2010 amendments to the *National Parks and Wildlife Act* were clearly ineffective at improving protections for Aboriginal heritage. The continuing high rates of approved destruction along with the

⁷ Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 735, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

⁸ NSW State of the Environment Report 2012, Chapter 1, available at: http://www.epa.nsw.gov.au/soe/soe2012/chapter1/chp_1.8.htm#1.8.42

⁹ Answers to questions on notice in the NSW Parliament (refer to previous NSWALC submissions to the OEHL available at: <http://www.alc.org.au/publications/other-publications.aspx>) and the Aboriginal Heritage Impact Permit register available on the NSW Office of Environment and Heritage website at

<http://www.environment.nsw.gov.au/licences/ahipregister.htm> reveal that over 1000 permits to destroy Aboriginal heritage have been issued since 2004 alone. NSWALC has requested data about AHIPs prior to the introduction of the public register that came into effect in 2010, however this data has not been made available.

¹⁰ Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 721, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

¹¹ Budget Estimates 2013-2014, Answers to Supplementary Questions, Environment portfolio, available at: [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/cc7a2af1c2769eb4ca257be3002d3a3e/\\$FILE/83118337.pdf/Answers%20to%20supplementary%20questions%20-%20Minister%20Parker%20-%20The%20Environment%20-%20Heritage.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/cc7a2af1c2769eb4ca257be3002d3a3e/$FILE/83118337.pdf/Answers%20to%20supplementary%20questions%20-%20Minister%20Parker%20-%20The%20Environment%20-%20Heritage.pdf)

lack of investigation into reports of illegal damage to Aboriginal sites do not provide assurance that the government is committed to improving its record.

4. Current reform process

In 2010 a bipartisan commitment was made to reforming Aboriginal culture and heritage laws.¹² This commitment was made in recognition that a broader reform process was needed to address a number of significant issues beyond the amendments to the culture and heritage provisions of the *National Parks and Wildlife Act*.¹³

With the change of government at the March 2011 state election, the reform process stalled. In August 2011 NSWALC and NTSCORP wrote jointly to the NSW Premier seeking a commitment to the reform process. In late October 2011 a revised process¹⁴ was announced on the OEH website that included:

- a new terms of reference with a decreased scope for reform,
- a new composition of the Working Party which excluded NSWALC and NTSCORP, had less representation from Aboriginal peoples, and qualifiers that members were appointed on an individual basis, and
- a shortened timeframe for the reform process, including significantly less consultation¹⁵ with Aboriginal communities.¹⁶

Two Ministers were given carriage of this reform process - the Minister for the Environment and Heritage, the Hon. Robyn Parker, and the Minister for Aboriginal Affairs, the Hon. Victor Dominello.

The first round of consultations was comprised of 25 workshops held during November and December 2011. NSWALC has previously highlighted a number of flaws with the manner in which these workshops were arranged, including that less than one week's notice was provided to some communities about the workshops being held in their region.¹⁷ Concerns regarding the most recent round of consultations are outlined in Section 7 below.

The new Working Party held its first meeting in May 2012, several months after community consultations had been held. The proceedings of the Working Party were not transparent with the exception of very short and cursory 'Communiqués' released after some meetings. In late 2012 the Working Party provided recommendations for reform to Government¹⁸ which included:

- a. Establishment of **standalone legislation**, and removing all culture and heritage provisions from the *National Parks and Wildlife Act 1974*,

¹² Hansard, Legislative Assembly, 25 February 2010 in relation to the National Parks and Wildlife Amendment Bill 2010: <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20100225003?open&refNavID=undefined> and Hansard, Legislative Council, 1 June 2010, National Parks and Wildlife Amendment Bill 2010

<http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20100601055>

¹³ More information about the 2010 amendments to the Aboriginal heritage sections of the *National Parks and Wildlife Act* can be found on the NSWALC website www.alc.org.au

¹⁴ More information about the revised reform process and composition of the Working Party can be accessed at:

<http://www.environment.nsw.gov.au/achreform/ACHworkingparty.htm>

¹⁵ Submissions and notes from the first round of consultations are available on the OEH website at:

<http://www.environment.nsw.gov.au/achreform/ACHmedia.htm>

¹⁶ NSWALC has raised a number of concerns with the NSW Minister for the Environment and the NSW Minister for Aboriginal Affairs about the revised reform process. See for example, Joint Submission by NSWALC and NTSCORP to the NSW Government '*Our Culture in Our Hands*', December 2010, available on the 'More than Flora and Fauna' page of the NSWALC website www.alc.org.au

¹⁷ Joint Submission by NSWALC and NTSCORP to the NSW Government '*Our Culture in Our Hands*', December 2010

¹⁸ The Working Party's recommendations for reform are available at:

<http://www.environment.nsw.gov.au/resources/cultureheritage/20130139achrefdiscussion.pdf>

- b. Establishment of an **Aboriginal Heritage Commission** as a statutory body to provide advice to government on all matters relating to Aboriginal culture and heritage in NSW, and take on governance and accountability roles,
- c. Building on the **Aboriginal Land Council network** as structures through which decisions on local Aboriginal culture and heritage matters would be made,
- d. **New definitions** of Aboriginal culture and heritage to better align with Aboriginal peoples definitions,
- e. Focus on **'streamlined processes'** including replacing AHIPS with 'Aboriginal Culture and Heritage (ACH) Approvals' to be negotiated at the local level and approved by the Commission, and
- f. Focus on **'early planning processes'** with an increased emphasis on mapping to provide guidance to planning and developers.

In late September 2013 the OEH released the NSW Government's proposals for reform in response to the Working Party's recommendations.¹⁹ The OEH held 19 consultations around NSW from November 2013 to February 2014. Submissions on the Government proposals are due by the end of March 2014.

The OEH have stated that draft legislation is expected to be released for consultation in late 2014 or early 2015.

As outlined above, it is essential that Aboriginal peoples are provided with opportunities to provide meaningful input into the development of new legislation for Aboriginal culture and heritage. The Government should consider the timeframes for introducing new legislation into NSW Parliament prior to the next election, particularly given that a State Government election is due to be held in March 2015. The timeframes proposed by OEH leave little time for amendments to a Draft Bill to be made prior to government entering a caretaker period.

It is important to get this once in a generation opportunity right, and not rush through legislation that has not been developed in collaboration with Aboriginal people. This issue must be prioritised in the lead up to an election.

As such, it is essential that work on a Bill is prioritised and that any proposed amendments to this schedule are discussed in consultation with key stakeholders, including NSWALC and NTSCORP.

Recommendation 4: The schedule for the development of any new Aboriginal culture and heritage legislation must be prioritised in order to ensure meaningful input by Aboriginal peoples and its successful passage through Parliament. Any amendment to the proposed schedule should be discussed with key stakeholders including NSWALC and NTSCORP.

Recommendation 5: The Government must outline clear timeframes for the development and implementation of new Aboriginal culture and heritage laws, regulations and associated policies and guidance materials.

Recommendation 6: Clarification should be provided about what resources will be available to develop new legislation, to what extent existing mechanisms will inform any new legislation, and opportunities for communities to have a say in these processes.

¹⁹ Proposed NSW Government model as outlined in 'Reforming the Aboriginal Cultural Heritage System in NSW' released in September 2013, available at: <http://www.environment.nsw.gov.au/achreform/ACHproposedmodel.htm>

Recommendation 7: Given the significance of the proposed reform of Aboriginal culture and heritage laws in NSW, public consultation on the draft legislation should allow a minimum of three months.

5. Aboriginal Land Rights in NSW

From its very beginning, the call for land rights in NSW included not only the return of Aboriginal land, but also the return of sacred sites, the right to access sites, and the right to undertake cultural hunting and fishing. The link between Aboriginal land rights and land councils and the need for proper protection of Aboriginal culture and heritage was recognised when the *Aboriginal Land Rights Bill 1983* (NSW) was introduced into Parliament by the Wran Labor Government. The Minister for Aboriginal Affairs, in proposing legislative recognition of Aboriginal land rights, indicated that it was to be only the first step in recognising and recompensing for past injustices suffered by Aboriginal peoples:

“It is my intention to seek the assistance of the new Aboriginal councils that will be formed under the proposed legislation [The Aboriginal Land Rights Act 1983] before introducing an Aboriginal heritage commission bill for the protection and ownership of sacred and significant sites”²⁰.

Since their establishment Aboriginal Land Councils’ have been consistent advocates for the recognition of Aboriginal rights to own, control, manage, practice and protect their culture and heritage.

5.1 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 an Aboriginal Land Council and vote in Land Council elections.²¹

NSWALC provides support to the network of 120 LALCs’ across NSW. LALCs’ are autonomous bodies which are governed by boards elected by local Aboriginal community members every two years.

The *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**) establishes Aboriginal 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 ALRA, 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.*

LALCs have similar culture and heritage responsibilities within their respective boundary areas.

²⁰ The Hon. Frank Walker NSW Parliament Hansard; Legislative Assembly; 24 March, 1983; at 5090

²¹ ALRA, section 54

In 2010 NSWALC endorsed Key Principles to inform NSWALC's approach to the current reform process.²² The Principles highlight the need to ensure that a new legislative system will provide increased protections for Aboriginal heritage, while at the same time affecting a practical balance between competing interests (see **Appendix A**). These principles are based on 1996 *DRAFT NSW Government Green Paper: The Future management of Aboriginal Cultural Heritage in NSW*.

5.2 Initiatives to achieve positive reform

Culture and heritage issues have and continue to be a key priority for the Aboriginal Land Rights network. In line with the NSW Government's announcement that new legislation would be created NSWALC continued to promote the need for change as well as actively consulting with our networks and key stakeholders to canvass possible models for change. Three alternative models for new Aboriginal culture and heritage management laws in NSW were developed based on key principles for reform, views of other key stakeholders and best practice examples for other jurisdictions.

NSWALC did not endorse any of the models as the models were developed to stimulate discussion and debate.²³ The three models, canvassed in detail in the '*Protecting the Past, Guarding the Future*' report, were:

- Model 1: NSW Aboriginal Culture and Heritage Commission and Regional Boards
- Model 2: Two tiered Aboriginal Land Councils
- Model 3: Registered Aboriginal Party model

Common features of each of the models included:

1. Aboriginal heritage provisions removed from the *National Parks and Wildlife Act 1974* and either a new *Aboriginal Culture and Heritage Act* created or amendments to the *Aboriginal Land Rights Act*,
2. Transfer of functions to Aboriginal controlled organisations,
3. Decision-making rights for Aboriginal peoples,
4. Expanded role for the NSW Aboriginal Owners Register²⁴, to identify the right people to speak for Country and heritage, and to complement the native title system,
5. Rights based approach in line with human rights standards and the aspirations of Aboriginal groups,
6. Roles for government only in some limited oversight and compliance, and
7. Common ground with key stakeholders including along with a near universal acceptance of the need for reform and recognition that NSW can do better in terms of protecting and respecting Aboriginal heritage, as well as through creating greater clarity about who needs to be consulted.

There were a number of key messages from consultations held with the Network in 2012 on the three proposed models.²⁵ There was **general support for independent Aboriginal structures** to

²² The Principles are based in those outlined in the 1996 '*DRAFT NSW Government Green Paper: the Future management of Aboriginal Cultural Heritage in NSW*'.

²³ Three proposed model for reform are outlined in '*Protecting the Past, Guarding the Future*' report, Sylvie Ellsmore, 2012, available at:

http://www.alc.org.au/media/80340/protecting%20the%20past,%20guarding%20the%20future_models%20to%20reform%20aboriginal%20c&h%20laws%20in%20nsw_revised%20240512.pdf

²⁴ ALRA, ss 170-175

²⁵ An Outcomes Report summarising key issues and views from the Network Culture and Heritage workshops held in 2012 is available on the NSWALC website at:

http://www.alc.org.au/media/87820/Aboriginal%20Culture%20and%20Heritage%20Reforms%20Proposal_FINAL_lowres.pdf

manage and protect Aboriginal culture and heritage, rather than a government body maintaining responsibility. Some participants expressed disagreement with Model 1 (Commission structure) as it did not incorporate the Aboriginal Land Council network and could be seen as dividing communities.

Overall a number of elements of Model 1 and Model 2 (two-tiered Aboriginal Land Council structure) were broadly supported or viewed as a starting point for a new system. These included:

- The need for genuinely **Aboriginal controlled organisations to operate at both the State and local levels** to ensure proper leadership, oversight and appropriate decision making,
- Benefits of **building on the Land Council network**, as opposed to creating completely new structures, and
- That the **roles of the State Government and Minister/s should be kept to a minimum**.

The majority of participants did not want culture and heritage functions of LALCs removed or reduced, however the **need for increased resources and capacity** was noted as a key issue if LALCs were to gain increased roles and responsibilities. Model 3 (Registered Aboriginal Party structure) was not generally supported as it was expressed that this could be too divisive and replicate problems that exist in the current system.

While there was much support for decentralised control of Aboriginal culture and heritage in the form of LALCs there were differing views on how the right people to speak for Country would be recognised in this system. A number of mechanisms were suggested for **amending the Aboriginal Owners Register process to ensure that the right people are identified and are involved in decision-making**. Suggestions were put forward to promote positive working relationships between Aboriginal Owners and LALCs, such as developing protocols, creating Aboriginal Owner sub-committees within LALCs, or having a percentage of the LALC board represented by Aboriginal Owners. Several participants recommended that close discussions between LALCs and native title claimants occur, and that all Aboriginal people needed to work together.

LALCs provided examples of processes they had already implemented to manage culture and heritage issues, in a way that recognised people with authority to speak on such matters and that complemented the Land Council system. This generally involved the formal establishment of an Elders Council or Culture and Heritage Committee within the LALC to undertake various functions such as site work, mapping or making decisions on Aboriginal heritage matters. LALCs who had developed sub-committees or councils provided these as positive examples of structures that have been formed to address the issue of how LALCs, native title claimants (also referred to as Traditional Owners), Aboriginal Owners and Elders can work together.

Overall, there was a clear message that better recognition and protection of Aboriginal culture and heritage is needed, including better awareness and education. A number of participants also advocated that any new system needed to be better **integrated with local council processes and planning laws**.

The Outcomes Report is attached at **Appendix C**.

6. Response to Government proposals for reform

The NSW Government released proposals for a new Aboriginal culture and heritage system in late September 2013. The Government model proposes a number of broad policy directions for new Aboriginal culture and heritage laws and policies. Goals such as ‘real protection’ for Aboriginal Culture and Heritage’, and providing ‘a stronger voice for Aboriginal people’, are supported by NSWALC.

However, NSWALC is concerned that overall the Government proposals fail to address a number of key concerns with the current system, including poor community consultation and engagement, the inability of Aboriginal people to make decisions about Aboriginal heritage, an emphasis on regulating destruction, and a lack of transparency. There appears to be a greater emphasis on facilitating economic growth and development at the expense of what should be the primary objective of Aboriginal culture and heritage laws – the protection of Aboriginal Culture and Heritage – this includes taking into account sustainable development, as well as social and cultural considerations. A new system must also be transparent and accountable.

NSWALC has serious concerns regarding how the Government model will protect Aboriginal heritage in practice. A number of proposals outlined in the government model appear to undermine the ability of communities to be genuinely engaged in decisions about Aboriginal culture and heritage. This includes proposals to reduce duplication and red tape, streamline approvals, and allow for flexible project agreements. The proposed model also outlines that where agreements cannot be reached, proponents can ‘proceed with caution’ according to pre-developed plans of management.

The centre piece of new legislation must be about creating mechanisms that effectively protect Aboriginal culture and heritage, and provide Aboriginal people with real decision-making rights regarding Aboriginal heritage.

While it is recognised that government oversight is a key part of any legislation, there are also roles for bodies independent of and complementary to government to provide oversight and decision-making. The consistent recommendation in this regard in all Aboriginal heritage reviews in NSW since the late 1970’s, has been the establishment of an independent Aboriginal heritage body with its own resources. This is in line with the United Nations Declaration on the Rights of Indigenous People that states:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

In November 2013 NSWALC endorsed an initial policy position on key aspects of the Government’s proposed model (see **Appendix B**). This position is further expended below.

6.1 Creation of standalone legislation

The Government model proposes to establish separate legislation in the form of a new Aboriginal Cultural Heritage Act. Current provisions in Part 6 of NPW Act would be removed. However several criticised elements of the current system including the due diligence system are proposed to be retained in the new law. Current penalties for harming Aboriginal heritage are proposed to be retained.

At consultations held in 2012 with the Land Rights network, there was much discussion regarding whether a separate Aboriginal Culture and Heritage Act should be created, or whether the ALRA should be amended to incorporate additional structures and functions. It was generally expressed that creating new structures could be problematic and could divide Aboriginal communities. Several participants expressed that they did not want another structure on top of what already exists, and felt that in NSW there are already two main groups – Aboriginal Land Councils and Native Title. It was expressed that adding another group to the mix would create more problems. A number of participants felt that the Registered Aboriginal Party (**RAP**) model would cause conflict similar to the current system, which is not working well. Recent experiences with government policies were also drawn upon to express how the creation of new structures by government could divide communities and waste money. Concerns were also raised about creating competition for scarce funding and resources by creating new structures.

Recommendation 8: Any new Aboriginal culture and heritage law must build upon existing Aboriginal controlled administrative and governance structures; Aboriginal Land Councils and Native Title groups must be incorporated.

6.1.1 Objectives and preamble

The Government discussion paper proposes objectives for a new *Aboriginal Culture and Heritage Act*:

The legislation seeks to protect the ACH values identified as important to Aboriginal people in NSW:

- *Aboriginal spiritual and cultural heritage values exist in the land, waters and natural resources of NSW,*
- *Aboriginal people are critical determinants of ACH values,*
- *The wellbeing of Aboriginal people is intimately tied to the wellbeing of their Country,*
- *The social fabric of NSW and Australia is enriched by providing opportunities to share, understand and celebrate ACH values.*²⁶

The objectives as proposed fail to provide strong and binding language regarding the protection of Aboriginal heritage. The language is ambiguous, open-ended and does not require decisive action on the part of decision-makers. In reality, these words allow decision-makers or proponents to bypass or superficially address major issues. It is essential that any Objectives, Purpose and Preamble to a new Act address how the legal definitions of words will be interpreted and translate into the day-to-day activities of proponents and communities. The Objective of new legislation must be to protect and promote Aboriginal heritage, not be a system for destruction. Objectives of new legislation must also reflect the United Nations Declaration on the Rights of Indigenous Peoples, specifically:

Article 11, UNDRIP

1. *Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
2. *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

²⁶ NSW Government model, page 13

Article 12, UNDRIP

1. *Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*

2. *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 peoples concerned.*

The NSW Government has committed to the principle of Ecologically Sustainable Development (ESD) for managing the environment, which includes heritage. The World Commission on Environment and Development in its report 'Our Common Future' published in 1987, defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'²⁷ It is important new laws incorporate ESD into their objectives.

Several laws in NSW currently incorporate ESD in their objectives and functions, including the current *Environmental Planning and Assessment Act 1979* (NSW), the *National Parks and Wildlife Act 1974* (NSW), and the *Protection of the Environment Administration Act 1991* (NSW).

The *Protection of the Environment Administration Act 1991* (NSW) provides an extensive definition of ESD part of which states:

"...ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations..."²⁸

Key objectives must be supported by specific mechanisms to give effect to their full intent and scope. It is important for the vision for the new Culture and Heritage system to be translated into law without over-simplification or unintended consequences. The process of drafting new laws is of key importance in this regard.

Recommendation 9: New laws and related instruments for Aboriginal culture and heritage must include the following objectives:

- a. To protect and promote all Aboriginal culture and heritage,
- b. To promote self-determination, including to provide decision-making and control to

²⁷ Report of the World Commission on Environment and Development: *Our Common Future*, 1987, Chapter 2, available at: <http://www.un-documents.net/wced-ocf.htm>

²⁸ *Protection of the Environment Administration Act 1991* (NSW), Section 6(2)

- Aboriginal people, both at State and local levels,
- c. To provide an ecologically, economically and socially sustainable framework for the protection of Aboriginal culture and heritage,
 - d. To complement the *Aboriginal Land Rights Act*,
 - e. To complement the *Native Title Act*,
 - f. To vest ownership of Aboriginal heritage in Aboriginal people, not government, and
 - g. To establish an effective system of prosecution, penalties and reparations.

In addition, international human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples*²⁹, must underpin new laws.

Recommendation 10: The new laws for Aboriginal culture and heritage in NSW must provide for:

- a. Specific enforceable mechanisms that operationalise and implement these objectives, and
- b. Robust and transparent review, appeal and monitoring mechanisms.

6.1.2 Interaction with other legislation

Local councils and government departments and agencies, including the Department of Planning and Infrastructure, are key approval bodies for proposed development in NSW. NSWALC is concerned the current and proposed planning laws do not adequately address Aboriginal heritage. The Government proposal does not provide a clear outline of how a proposed new ACH Act will interact with the State Significant Development provisions of the *Environmental Planning and Assessment Act (EP&A Act)*. 'Major projects' under the former Part 3A provisions of the EP&A Act and now 'state significant development' (SSD) and 'state significant infrastructure' (SSI) under Part 4 of the EP&A Act 'switch off' the regular requirement to obtain AHIPs under the current system. Instead there are discretionary powers of the Planning Minister to decide whether or not to consider Aboriginal heritage issues, with no transparent assessment or consultation processes outlined. SSD are the kinds of developments that often will have the most impact on Aboriginal heritage sites, however, little consideration appears to be given to this issue in the proposed Government model.

At this time of writing this submission it is not clear whether the Planning Bills in their current format will pass the NSW Parliament which is creating uncertainty regarding how a number of elements of the proposed new system will work in practice. NSWALC has outlined a number of concerns with proposed planning legislation in previous submissions.³⁰ Our key concerns regarding the proposals in the Planning Bills relate to:

- Inadequate and non-binding provisions relating to community participation,
- Discretionary powers of the Minister and Director-General in decision-making processes,
- Limitations on review and appeal processes,
- Expanded code assessment regime removing the public's right to comment, and
- Lack of recognition and inadequate protections for Aboriginal heritage.

It is essential that a new system for protecting Aboriginal heritage is integrated with and complements planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning and development assessment processes. However, the proposed government model does not appear to provide this integration with either current or proposed planning laws and is largely silent on local government. Aboriginal heritage should be a genuine

²⁹ The United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly in 2007 and endorsed by the Australian Government in 2009, identifies international principles that Australian laws and planning should consider in order to close the gap between the lives of Aboriginal peoples.

³⁰ NSWALC submissions to the NSW Planning System Review are available at: <http://www.alc.org.au/publications/other-publications.aspx>

factor in determining the merits of a project in the assessment stage, however, the proposed 'flexible project agreements' appear to prevent this.

Furthermore, the government model proposes to allow rezoning and other planning decisions to be made based upon Aboriginal heritage mapping and registers. This it is of significant concern, particularly given that there does not appear to be any notification or consultation processes for Aboriginal people to be involved in such fundamental decisions that will shape future development in an area.

The Independent Planning Review Panel recommended that Aboriginal heritage be specifically incorporated in new planning legislation including in the objects and preamble as well as better consideration in strategic and local land use planning, and that Aboriginal heritage should be a specific factor taken into account in decision making and during assessment processes.³¹

The discussion paper also states that '*The existing mechanisms to access land and Government programs which support Aboriginal people in accessing, using and protect native vegetation, biodiversity, land, rivers and coastal waterways will be retained and enhanced in the new ACH Act.*'³² However, the discussion paper fails to identify which specific provisions will be 'retained and enhanced' and whether this is limited to provisions in the *National Parks and Wildlife Act 1974*. Furthermore, additional details regarding ownership and access to lands are not outlined; both Native Title and the Land Rights provide mechanisms for this to occur that have not been properly recognised in the discussion paper and these existing arrangements will need to be taken into account. A clear statement is needed as to whether the government intends to consolidate such provisions in a new ACH Act.

It is important to recognise that a number of other statutory mechanisms for protecting Aboriginal sites, in addition to a range of ad hoc funding streams and initiatives, also protect Aboriginal heritage, and that these should not be removed by any new system but should be factored in to any new legislation including:

- Aboriginal Place declarations,
- Voluntary conservation agreements,
- State heritage register listings,
- Initiatives of local governments, including zonings and heritage conservation areas, and also plans of management for public land,
- Initiatives of former Catchment Management Authorities, now Local Land Services,
- Access and use arrangements under the ALRA, and
- Native Title arrangements.

Recommendation 11: Aboriginal culture and heritage laws must integrate with and complement planning and local government laws to ensure that Aboriginal heritage is properly considered in strategic planning and development assessment processes.

Recommendation 12: Any new system to better protect Aboriginal heritage will require amendments to planning legislation to ensure that at a minimum, planning laws include objectives to protect Aboriginal heritage and processes that require engagement with Aboriginal people in the identification and any subsequent decisions about Aboriginal heritage.

Recommendation 13: Existing statutory mechanisms for protecting Aboriginal heritage should be factored in to any new legislation, including Land Rights and Native Title.

³¹ NSW Independent Planning Review Panel, Volume 1, Recommendation 8, 19 and 72 and Volume 2, page 98, reports available at: <http://www.planningreview.nsw.gov.au/>

³² Proposed Government model, page 25

6.2 Administrative framework, roles and responsibilities

The Government model proposes to provide Aboriginal people with decision-making rights about Aboriginal culture and heritage. While this goal is broadly supported, NSWALC has a number of concerns regarding the mechanisms the government model proposes to achieve this and the extent to which Aboriginal people will genuinely be decision-makers is questionable given that the Heritage Division and Minister for Heritage will retain final approval roles.

The exclusions of LALCs from the model is a key concern, particularly as the Aboriginal Land Council network has continued to be a strong advocate for the protection and promotion of Aboriginal culture and heritage for over 30 years and the network has recently reiterated an overwhelming desire to maintain existing culture and heritage functions of Local Aboriginal Land Councils.

6.2.1 Aboriginal control and decision making

Composition and appointment of Local Aboriginal Culture and Heritage Committees

Under the current laws there is a lack of clear guidance or processes to identify and prioritise one nominated Aboriginal group to be consulted on Aboriginal culture and heritage matters; this has been a source of tension and dispute; this is particularly the case for proponents and Government who have found the process of Aboriginal community decision making difficult to navigate and time-consuming.

The Government model proposes that Local Aboriginal Culture and Heritage Committees (**Local ACH Committees**) will be a 'one-stop-shop' for all Aboriginal culture and heritage issues. *"The Local ACH Committee will be responsible for all decision-making processes for Aboriginal Culture and Heritage in the local area."*³³

Membership of the Local ACH Committees is proposed to include 10 people, for a 5 year term, with a balance of males and females from:

- Aboriginal Owners as per section 170 of the *Aboriginal Land Rights Act 1983* (NSW),
- Native Title holders as per the *Native Title Act 1984*,
- Representatives of registered Native Title claimants,
- Representatives of Indigenous Land Use Agreements, and
- Representatives of Elders and family groups with cultural authority.

The Committee does not automatically include Land Council representatives. However, the discussion paper states that *"If the Local ACH Committee was supported by an organisation where a local board exists (e.g. a LALC or a Local Land Service Aboriginal Reference Group) a member of that board or group will be required to be part of the Local ACH Committee to ensure consistency and transparency in decision-making"*.³⁴

We are extremely concerned that the important roles of Aboriginal Land Councils as democratic and accountable community organisations, significant land holders, and long-time advocates for Aboriginal culture and heritage have not been recognised in the proposals.

In line with Article 3 of the United Nations *Declaration on the Rights of Indigenous Peoples* regarding self-determination, Aboriginal people must be the sole determiners of Aboriginal cultural heritage. Traditional owners should be recognised and respected through a system that complements the

³³ Proposed Government model, page 17

³⁴ Proposed Government model, page 17

Aboriginal Land Council network. The role of Aboriginal Land Councils, including their advocacy and support roles must be recognised.

The identification of the right people to speak in relation to Aboriginal heritage can be an issue of considerable sensitivity. Proposed committees will need to have broad support from the Aboriginal community if they are to be successful. A Ministerially appointed committee limited to 10 members, particularly if the committee is responsible for a regional rather than local area, may not be considered representative, and concerns may be raised regarding legitimacy and accountability. If the proposed committees are to be over larger areas (e.g. 11 committees for the whole state), it is unclear how the committees will ensure that only people with cultural authority are making decisions.

The Government proposed ACH Committees appear to prioritise native title groups to be consulted on Aboriginal culture and heritage issues. However there have been circumstances where registered native title claims have not been successful at proving native title, and there may be competing native title claims within an area and therefore this proposal is still problematic. Conversely in other areas people may not have pursued native title processes. It is unclear what is meant by 'Representatives of ILUAs' particularly as ILUAs may or may not include issues relating to Aboriginal heritage. In addition, the Government proposed ACH Committees fail to recognise the knowledge, expertise and experience LALCs' have developed over more than 30 years in exercising their culture and heritage functions.

The current system for managing Aboriginal cultural heritage generally recognises three main groups as speaking for Country and/or representing the Aboriginal community on culture and heritage matters – Native Title holders, 'Aboriginal Owners' and Aboriginal Land Councils. There are also a number of Aboriginal corporations, Elder and nation groups, advisory committees and other groups which manage advice on culture and heritage matters. Consultations carried out by NSWALC with the Land Rights network in mid-2012 identified strong support for any new system to *bring together* existing Aboriginal groups with culture and heritage functions and responsibilities, rather than creating further divisions within Aboriginal communities and that as a minimum these groups must include Aboriginal Land Councils, Native Title and Aboriginal Owners.

In the three proposed models outlined in NSWALC's research the **expansion of the 'Aboriginal Owners' register** under the ALRA was proposed to cover the whole of NSW, and that Aboriginal Owners will be the authority to speak for Country. The Aboriginal Owners register has the capacity to represent members of Aboriginal Land Councils and Native Title groups, but also others that are not captured in either group but still wish to participate in Aboriginal culture and heritage management and protection.

Section 171 of the *Aboriginal Land Rights Act* states:

1. *The Registrar is to use the Registrar's best endeavours to enter in the Register of Aboriginal Owners:*
 - a. *the name of every Aboriginal person who has a cultural association with land in the State, and*
 - b. *the location of the land with which the Aboriginal person has a cultural association, and*
 - c. *the nature of the cultural association that the Aboriginal person has with the land.*
2. *The name of an Aboriginal person must not be entered in the Register unless the Aboriginal person:*

- a. *is directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and*
- b. *has a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land, and*
- c. *has consented to the entry of the person's name in the Register.*

Currently the Aboriginal Owners Register is maintained by the Registrar of the ALRA, who determines who is eligible to join the Register. The Aboriginal Owners Register has currently not yet been applied across the whole of NSW and will require an appropriate level of funding to support such a roll out; it is unclear if funds will be provided by the Government in order to achieve this.

In any case, Aboriginal controlled administrative and governance structures are needed to support decision-making at both the local and state level to ensure proper leadership and oversight. It is recommended that the structure of any local decision-making bodies be determined locally, and that Aboriginal organisations have key roles in such structures and in determining associated regulations and policies to support the new system. This is consistent with Article 4 of the United Nations *Declaration on the Rights of Indigenous Peoples* outlining Aboriginal people's rights to autonomy and self-government.

Recommendation 14: The composition of any Aboriginal Culture and Heritage Committee or body established under a new law must ensure:

- a. Aboriginal people have genuine decision-making roles and are the sole determiners of Aboriginal cultural heritage,
- b. Aboriginal Land Councils culture and heritage roles are recognised in any new model, including their advocacy and support roles; Aboriginal Land Councils should be able to provide a body corporate role auspicing and holding assets for the local committees, and
- c. Sufficient flexibility for local Aboriginal people to be able to determine the structure and composition of local committees.

Recommendation 15: NSWALC supports Aboriginal controlled administrative and governance structures, at both the local and state levels, for the management and protection of Aboriginal culture and heritage. NSWALC does not support the use of Ministerial appointed committees as being the appropriate source of cultural authority.

Recommendation 16: NSWALC strongly recommends the Government fund the expansion of the Aboriginal Owners Register under the *Aboriginal Land Rights Act (NSW)* to cover the whole of NSW, to enable Aboriginal Owners to be the authority to speak for Country on Aboriginal culture and heritage issues.

Roles and responsibilities of Local ACH Committees

The Government discussion paper states that "*Aboriginal people must have an increased role in deciding how ACH is to be managed both now and in the future*".³⁵

The Government model states that the Local ACH Committee will make 'decisions' at the following points:

- Identification of **significance of Local ACH values** using criteria set
- What will be included on **ACH maps**

³⁵ Proposed Government model, page 18

- What will be included in **Plans of Management**, local priorities and any associated programs
- Areas to **nominate** for formal protection (Aboriginal Place of heritage listing)
- Conditions to **negotiate with proponents in project agreements** and impacts to be managed in individual project agreements
- What **cultural values are required to continue practicing culture locally**

The extent to which Aboriginal people will be provided with genuine decision-making roles is questioned, particularly given that the Government model proposes that:

1. The Heritage Division and Minister for Heritage will retain the final decision-making / approval roles at all key points,
2. The focus is on 'negotiation', not decision-making, and
3. The need to obtain agreement from Local ACH Committees can be bypassed through mechanisms that will allow proponents to 'proceed with caution'.

Consultations carried out by NSWALC in May-July 2012 on proposed models for reform identified broad support for local level Aboriginal controlled bodies to carry out decision-making functions and the day-to-day management of Aboriginal culture and heritage. The proposed functions and composition of the Local ACH Committees as currently proposed are of concern. Further detail is needed regarding how the proposed committees will be established and resourced, how any decision-making roles will be guided and discharged and how other issues such as conflicts of interest will be addressed. The continuation of a large role for government and Ministerially appointed bodies is also of concern.

Recommendation 17: New Aboriginal culture and heritage laws must provide for genuine decision-making powers to be given to local Aboriginal peoples in relation to the day-to-day management and protection of their heritage; processes that do not allow Aboriginal people to have meaningful input into activities and developments and/or bypass processes that provide for proper consultation and assessment are not supported.

Recommendation 18: Local Aboriginal Culture and Heritage Committees must be properly resourced and they must be able to attract representatives with the necessary skills to ensure free and informed decision making at the local level.

Funding and remuneration

The functions of the Local ACH Committee outlined in the Government model are broad, resource intensive and ongoing. Some of the tasks the Committees will be asked to complete include the mapping of sensitive Aboriginal heritage values, the development of plans of management and negotiating what could be complicated project agreements with proponents (e.g. developers and mining companies). The Government model has not adequately outlined how the new system will be funded or resourced, or whether the Committees will operate on a voluntary basis or be remunerated. It is not clear if Committees will have access to independent legal advice or other expertise when entering into negotiations with proponents which can raise concerns about equity and balance of power in such negotiations.

The Government model states that *"A non-response from a committee will enable the proponent to proceed with their activity without committee input"*.³⁶ Given that the protection of Aboriginal culture and heritage in the proposed model appears to rely heavily on the efficient functioning of the Committee, it is unacceptable for the Government to propose a model which does not outline sufficient funding for the Committee to carry out their functions.

³⁶ Government proposed model, page 32

Recommendation 19: The Government model fails to identify how the new system will be funded, in particular how the new local Aboriginal Culture and Heritage Committees will be resourced to carry out their functions which are broad, resource intensive and ongoing; proper resourcing and funding of a new system and the administrative structures underpinning this system are required from both government and proponents.

Recommendation 20: The resourcing of a new law for the protection and management of Aboriginal culture and heritage must not be solely reliant upon funds provided from proponents for compensation for the destruction of Aboriginal heritage based upon negotiated agreements; the Government must contribute resources to support the ongoing management and protection of Aboriginal culture and heritage.

Governance and oversight

The Government model proposes that significant governance oversight will be maintained by Government, with the Local ACH Committees to be appointed by the Minister for Heritage, the Heritage Division and the Ministerial appointed Aboriginal Culture and Heritage Advisory Council (ACHAC) having key roles in determining who is selected to participate on these Committees. This model is contrary to the overwhelming consensus provided in response to consultations carried out by NSWALC in 2012. Each of these models support a state level Aboriginal controlled body, *separate from Government*, to undertake a majority of functions currently proposed to be carried out by Government including performing a range of oversight and support functions to support decision making and monitor performance.³⁷

The three alternative models support the majority of decisions about the protection and management of Aboriginal heritage occurring at the local level by Aboriginal groups, with a state level Aboriginal organisation established to undertake roles such as policy, advice, training, community education, research, advice to government agencies, select local Aboriginal heritage groups, review their decisions where appropriate, and resolve disputes. .

Furthermore, the consultations carried out by NSWALC on options for an alternative model for the reform including a general consensus that supported building the need to build on existing Aboriginal community controlled structures. The Aboriginal Land Rights structure has been in operation for over 30 years, is well understood in community and provides rigorous governance structures regulated under the ALRA, and already provides for the function of the protection and promotion of Aboriginal culture and heritage. As such the Land Rights network provides an opportune structure to have key roles in the management and protection of Aboriginal heritage.

Recommendation 21: NSWALC supports a state level Aboriginal controlled body, *separate from Government*, to undertake governance, oversight and support functions for a new model for the protection and management of Aboriginal culture and heritage; NSWALC does not support significant governance oversight to continue to be maintained by Government.

Recommendation 22: Any new model to support the protection and management of Aboriginal culture and heritage must build on existing Aboriginal community controlled structures; NSWALC supports building on the Aboriginal Land Rights structures to support a new model for Aboriginal culture and heritage laws.

³⁷ Three proposed model for reform are outlined in 'Protecting the Past, Guarding the Future' report, Sylvie Ellmore, 2012, available at:

http://www.alc.org.au/media/80340/protecting%20the%20past,%20guarding%20the%20future_models%20to%20reform%20aboriginal%20c&h%20laws%20in%20nsw_revised%20240512.pdf

Role of LALCs

As noted previously, consultations carried out by NSWALC in 2012 on alternative models for reform of Aboriginal culture and heritage laws identified a strong need to build on existing Aboriginal structures to support new laws. In addition, the preferred model was generally identified as being the two-tiered Aboriginal Land Council structure (Model 2) with strong support for Aboriginal Land Councils culture and heritage functions to be *increased and enforceable*.

Under section 52(4) of the ALRA, LALCs have functions to protect and promote Aboriginal cultural heritage within their boundaries. Currently LALCs culture and heritage activities vary across Councils, but include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, 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. The obligation to consult with LALCs on cultural heritage matters is recognised through a range of OEH and other government agency policies.

As outlined in previous culture and heritage submissions to OEH,³⁸ 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 Strategic Plan 2013-2017* amongst other NSWALC policy statements.³⁹

Not only has the Government rejected the Working Party recommendations to build on the Aboriginal Land Council network, with the justification that "*changes to the Aboriginal Land Rights Act are underway and there are many other Aboriginal people who do not belong to a LALC but have a cultural connection to Country*"⁴⁰, the Government model fails to both acknowledge the current roles of LALCs or propose roles for LALCs in the new model that would genuinely be complementary. NSWALC rejects this justification for the exclusion of LALCs and submits that the notion that the Government model aligns with and complements section 82 and 170 of the ALRA are misleading and inaccurate.

Instead of building on existing Aboriginal organisations the Government model proposes to establish a new selective structure controlled by government, which undermines the Government's argument that the Land Rights structure is not appropriate to support new Aboriginal culture and heritage laws because it is not inclusive as every Aboriginal person is not a member of a land council. The alternative models proposed by NSWALC, as outlined above, seeks to address these issues by building on the existing Register to Aboriginal Owners which provides for an inclusive process to identify the appropriate people to speak for Country without the need to create an additional structure.

³⁸ See for example NSWALC's response to the Review of the *Interim Community Consultation Requirements for Applicants*.

³⁹ 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.'

⁴⁰ Proposed Government model, page 15

International and local research indicates that effective and culturally appropriate resolution to internal Aboriginal community conflicts requires establishing processes which allow for Aboriginal communities to resolve these issues themselves, which includes allowing decision making roles for identified Aboriginal groups⁴¹. That is, Aboriginal *control* over the process. The Register of Aboriginal Owners provides a potential solution to identify who speaks for Country, but is currently under-resourced and only extends to a small part of the state.⁴² A number of suggestions were made to improve the operation of the Aboriginal Owners Register in consultations hosted by NSWALC in 2012.

The Government needs to support existing community governance structures and community centred efforts to design and deliver programs. Engaging Aboriginal peoples in the development and implementation of programs is critical for ensuring that programs are successful in addressing community needs and supporting sustainable community development.⁴³

Recommendation 23: NSWALC strongly opposes a Government model for reform that fails to acknowledge the crucial role of Aboriginal Land Councils in the protection and management of Aboriginal culture and heritage in NSW.

Recommendation 24: NSWALC encourages the Government to reconsider the recommendation of the Government Working Party to build upon the land rights network to support new laws for Aboriginal culture and heritage protection and management. A new model for reform must acknowledge the current roles and functions of Aboriginal Land Councils and ensure roles for Aboriginal Land Councils in the new model that are genuinely complimentary to these functions.

Aboriginal Culture and Heritage Advisory Committee (ACHAC)

The Government has rejected the Working Party's recommendation to establish a Ministerially appointed NSW Aboriginal Culture and Heritage Commission with the justification that that this will add red tape, costs and time. NSWALC rejects this explanation and submits that shifting regulatory and compliance functions from a government department to an *independent* Aboriginal Culture and Heritage Commission would be cost-neutral to government.

The Government model instead proposes that the Aboriginal Culture and Heritage Advisory Committee (ACHAC) operate at the state level to "be a state-level advocate on Aboriginal Culture and Heritage matters".⁴⁴ ACHAC are proposed to develop minimum standards, policies and have a role in deciding membership of Local ACH Committees. NSWALC has previously raised a number of concerns with the operation of Ministerially appointed committees.

The government proposals are not in line with creating a model that will support Aboriginal decision-making and by retaining key roles for Government, this undermines the argument that the model is culturally appropriate.

⁴¹ See discussion of 'lateral violence' and examples of successful dispute resolution in Aboriginal and Torres Strait Islander Social Justice Commissioner (2011) *Native Title Report 2011*, Australian Human Rights Commission, as available from http://www.hreoc.gov.au/social_justice/nt_report/index.html (accessed 1 Dec 2011).

⁴² Under section 171 of the *Aboriginal Land Rights Act* the Registrar must give priority to entering the names of Aboriginal people who have a cultural association with land that is listed in Schedule 14 to the *National Parks and Wildlife Act 1974*, or subject to provisions of section 36A of the *Aboriginal Land Rights Act*. That is, lands that are or will be jointly managed as a national park or conservation reserve. To date funding allocations to allow the register to be expanded beyond these areas have been limited.

⁴³ Danielle Campbell, Paul Wunungmurra and Helen Nyomba, 2007, 'Starting where the people are: Lessons from community development from a remote Aboriginal Australian setting', *Community Development Journal* 42(2) at 151.

⁴⁴ Proposed Government model, page 12

NSWALC has consistently advocated for an independent Aboriginal Culture and Heritage Commission in line with recommendations from past reviews. 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.

Recommendation 25: NSWALC supports a genuinely independent Aboriginal Culture and Heritage Commission to undertake key oversight, governance, support, advocacy and compliance functions in a new system and not a Ministerially appointed committee. The Commission can be resourced through re-allocating funds from the OEH to the Commission.

Roles for Government

Under the current laws, the Director General of the Department of Premier and Cabinet is responsible for the protection of Aboriginal objects and declared Aboriginal places, as well as issuing permits to 'harm' Aboriginal heritage.

The Government proposes that the Minister for Heritage will be responsible for the management of the proposed new ACH Act and that the Heritage Division will retain a large role including:

- Providing oversight,
- Setting minimum standards,
- Maintain a new 'Register' to replace the Aboriginal Heritage Information Management System (**AHIMS**),
- Approving Plans of Management and Project Agreements, and
- Deciding who will be on Local ACH Committees.

Again, having these roles and responsibilities retained by Government does not allow for real decision making by Aboriginal communities in relation to the protection and management of their culture and heritage.

As previously supported by NSWALC in its various submission to the Government on the reform, NSWALC submits that the majority of these roles should instead be transferred to an independent Aboriginal heritage commission.

Recommendation 26: Government roles must be kept to a minimum and the key oversight functions with regard to Aboriginal culture and heritage protection and management must lie with an *Independent* Aboriginal Culture and Heritage Commission with appropriate resourcing.

6.3 Consultation

The discussion paper notes that *"Where legislation requires consultation to occur, the Local ACH Committee will be the one stop shop for consulting on all ACH matters"* and that *"mandatory timeframes will be included in the regulatory process; A non-response from a committee will enable the proponent to proceed with their activity without committee input."* The Government model proposes a fundamental shift in how consultation on Aboriginal heritage matters is to occur:

1. Where the proponent has identified that there may be harm to Aboriginal heritage, the proponents will only be required to consult with the Local ACH Committees, with the Local ACH Committees will be responsible for undertaking consultation with the broader Aboriginal community on behalf of the proponent, and

2. Where the Local ACH Committee has been unable to meet a mandatory timeframe to respond to a request to negotiate an agreement with a proponent, the proponents activity can proceed.

NSWALC has previously provided detailed feedback to various government law and policy reform processes in respect to consulting with Aboriginal people. As well as moving beyond the singular round of consultations that typify current attempts at engaging Aboriginal communities, an effective engagement process must incorporate community approaches and timeframes. As the Auditor-General's Report accurately acknowledges, "*government timetables are not necessarily community timetables*"⁴⁵.

The Government model also proposes that the Local ACH Committee will have functions of consulting more broadly with Aboriginal people on a range of Aboriginal culture and heritage matters including:

- Mapping
- Plans of management
- Project agreements

The discussion paper states that "*the level of consultation required will match the significance of the ACH value that may be impacted*" and "*Project Agreements will only be required for activities that occur in area with high or incomplete ACH values*".⁴⁶ Therefore, depending on the level of significance placed upon Aboriginal culture and heritage as outlined in the maps, proponents can bypass consulting with Local ACH Committees in relation to potential harm to Aboriginal heritage.

It is not clear what community or representative authority members of the Local ACH Committees will have, what resources the committee will have, and to what extent they are therefore capable of properly consulting or granting permission on behalf of, that community with regard to the management and protection of local Aboriginal culture and heritage. Aboriginal Land Councils appear well situated to provide suitably governed community representation for ongoing government engagement with local Aboriginal communities across NSW.

It has become a generally accepted principle in international law that Indigenous peoples should be consulted on decisions affecting them⁴⁷. Where this principle is put into practice effectively, it is apparent that the benefits for both governments and Indigenous peoples alike extend well beyond the confines of the legal imperative. While there are some brief proposals included that mention community participation and engagement, the details of these are largely unspecified and fall far short of meeting robust and best practice criteria.

Another concern is that the proposed Government model does not appear to create any obligations of planning authorities in respect to engaging with Aboriginal people or ensuring that community consultation processes have been followed.

Recommendation 27: NSWALC does not support a new model for reform of Aboriginal culture and heritage laws that allows proponents to bypass Local ACH Committees in relation to potential harm to Aboriginal culture and heritage; Aboriginal communities must be supported to make decisions about matters that affect them.

⁴⁵ NSW Auditor-General's Report, Performance Audit, *Two Ways Together Aboriginal Affairs Plan*, May 2011 page 23

⁴⁶ Government proposed model, Page 32

⁴⁷ James Anaya, 2005, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources', *Arizona Journal of International & Comparative Law*, 22(1) at 7.

Recommendation 28: Local ACH Committees must have the appropriate community and representative authority and be capable of properly consulting/granting permission on behalf of community with regard to Aboriginal culture and heritage.

6.4 Boundaries

The Government discussion paper states that “*the Government prefers to utilise and build on existing structures and operational boundaries*”⁴⁸. Aboriginal Land Councils are only proposed to have a role if the options relating to ALC boundaries are supported.

At consultations conducted with the Aboriginal Land Council network during 2012, utilising existing Aboriginal Land Council boundaries was seen as a workable system, with protocols or agreements to be developed where boundaries may not align with recognised cultural boundaries or areas that are shared.

Other benefits of building on existing Land Council boundaries include that they are clearly defined, that the government already holds the mapping and spatial data and that they are legislated.

Recommendation 29: Boundaries in a new system should be based on Aboriginal Land Council boundaries, with the development of protocols and agreements to manage areas wherever cultural boundaries may cross over or where there are shared cultural interests.

6.5 What is protected?

One of the criticisms of the current laws is that there is too much focus on archaeology and protecting ‘Aboriginal objects’. Previous Aboriginal heritage reviews have argued strongly for legislation which recognises both tangible and intangible Aboriginal culture and heritage, including broad recognition of Aboriginal hunting, fishing and gathering practices, in addition to cultural knowledge.

In current laws there are some limited provisions to recognise broader cultural values, such as the protection of ‘Aboriginal places’ under the *National Parks and Wildlife Act*.⁴⁹ However these provisions only apply to places that have been gazetted by the Minister for the Environment in circumstances where, in the opinion of the Minister, the place is or was of special significance to Aboriginal culture. Currently there are 96 declared Aboriginal Places.

Furthermore, issues have been raised about how more recent Aboriginal heritage can be recognised and protected, such as former Aboriginal missions and reserves. Under the current laws, a small number of places have been listed on the State Heritage Register under the *Heritage Act 1977* for their Aboriginal heritage significance, including former missions, former children’s homes, and protest sites.

The government model proposes to expand the definition of Aboriginal culture and heritage to include both tangible and intangible aspects, that would more closely align with Aboriginal peoples definitions, rather than only focusing on ‘objects’ and ‘places’ as is currently in the NPW Act. While the intent of broadening the definitions of Aboriginal heritage is supported, the mechanisms proposed in the model to protect the broader definitions remain insufficient.

⁴⁸ Proposed Government model, page 19

⁴⁹ Section 84, *National Parks and Wildlife Act*

In practice, the proposed model appears to classify Aboriginal culture and heritage values in a rudimentary way via a tiered system, with a corresponding scale of consultation and assessment required:

- Low or no ACH value: No consultation, no project agreement (see below) required,
- Incomplete ACH value: consultation and project agreement required, or
- High ACH value: consultation and project agreement required.

NSWALC's position is that all Aboriginal heritage is important and decisions relating to the protection and management of Aboriginal heritage must be made by those local Aboriginal people. Proposals to classify Aboriginal heritage as 'low' value are not supported.

Furthermore, Aboriginal cultural and intellectual property is a fundamental part of Aboriginal culture and heritage, however this issue has been largely excluded from the proposed model. The paper wrongly states that there are currently laws in place which protect languages and "*associated intellectual property rights*". Copyright (a federal system) does not protect Aboriginal people's cultural and intellectual property, including languages, traditional knowledge and cultural heritage.

In addition, concerns remain about sensitive cultural information being held by a government agency, particularly where this information is available for use and inspection by the broader public. Some Aboriginal sites, areas, or landscapes may be inherently sensitive, while in other cases, custodian communities may wish to keep information about sites from the public for risk of vandalism or harm.

As a minimum, guidance must be developed in consultation with peak Aboriginal organisations and Aboriginal communities regarding how Aboriginal heritage information is to be sought, recorded and stored by planning authorities and proponents. It is recommended that guidance materials include advice about the need for government authorities to be aware of restrictions required for sensitive information, and mechanisms that promote free, prior and informed consent.

The use of formal agreements and protocols that seek to address how cultural information is to be recorded and stored must be underpinned by the principles espoused in international human rights instruments, including the Nagoya Protocol,⁵⁰ including fair and equitable benefit-sharing, are encouraged.

Recommendation 30: NSWALC supports the Governments position that a broad all-encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values must be included in new laws. However this broad definition must be accompanied by enforceable mechanisms to protect Aboriginal heritage, including cultural and intellectual property rights.

Recommendation 31: Mechanisms to identify and record Aboriginal heritage must be based on mandatory and uniformly applied best practice standards for the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information.

Recommendation 32: NSWALC recognises that all Aboriginal heritage including contemporary heritage is important to Aboriginal people and supports decision making by local Aboriginal people about Aboriginal culture and heritage. Proposals to classify Aboriginal heritage as 'low' value are not supported by NSWALC.

⁵⁰ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, available at: <http://www.cbd.int/abs/text>

6.6 Protection of Aboriginal Culture and Heritage

The current NSW laws have been criticised as a reactive system that regulates destruction rather than actively protecting Aboriginal culture and heritage. In practice the current system largely relies on a person or company (proponent) who may ‘impact’ on an Aboriginal heritage site to identify whether Aboriginal sites are present; there is no requirement for Aboriginal people to be consulted at this stage. The proponent will then need to determine whether they will harm that site and whether they can avoid the ‘harm’ or whether they need to apply for a permit to authorise the destruction of the site.

The model that the Government has proposed does not address the failures of the current system. Instead the Government model continues to provide a reactive process with few rights for Aboriginal people, which includes:

- Very short timeframes for Aboriginal communities to respond to proponents,
- An emphasis on upfront mapping that bypasses the rights of communities to have a say on individual developments,
- No mechanisms for Aboriginal people to prevent destruction,
- Lack of best practice standards for managing Aboriginal heritage, including the proposed unexpected find process,
- Continuation of flawed processes from current laws including ‘due diligence’ and ‘low impact’,
- Allowing proponents to ‘*proceed with caution*’ where an agreement has not been reached with Aboriginal communities, and
- No detail about review and appeal processes.

Timeframes

As previously noted, the Government model proposes that Local ACH Committee will have very short mandatory timeframes to respond to requests from proponents where damage or destruction to Aboriginal heritage is likely. If the Local ACH Committee does not respond to the proponent within the 10 day timeframe the proponent can proceed with the activity without any further assessment or consultation. This clearly does not meet any best practice standards to protect heritage.

If the Local ACH Committee does respond the model proposes that the Committee and must adhere to the following timeframes:

- Negotiate and agree on assessment actions required – 10 days
- Undertake assessment work – negotiated
- Finalise a Project Agreement – 20 days⁵¹

These timeframes are not realistic and do not accommodate for circumstances where further assessments or consultations may need to be undertaken, that the Local ACH Committee may wish to obtain further advice, or that projects that may be proposed over large areas.

Recommendation 33: Any mandatory timeframes set out in legislation must allow for meaningful consultation and genuine input by Aboriginal people; timeframes must be culturally appropriate with allowances for cultural priorities.

⁵¹ Proposed Government model, page 32

Aboriginal culture and heritage register, mapping and Plans of Management

The Government model proposes that Local ACH Committees will undertake cultural mapping of their area. These maps are proposed to show areas of high, low, no or incomplete cultural value. These maps are then proposed to inform the development of 'Plans of Management' (**PoM**) for the local area. PoM are proposed to document descriptions, significance, access, values and management strategies for each site, with the maps and PoM to be reviewed by the Heritage Division to ensure they comply with as yet unspecified minimum standards and be placed on public exhibition. This is extremely inappropriate given the sensitivity of many Aboriginal sites, in addition to the risks of vandalism to sites. Furthermore there does not appear to be a process for Aboriginal people to have another say on the maps once the public exhibition period closes. Final approval of maps and PoM is the responsibility of Minister for Heritage. There is no guarantee that the final PoM will not be significantly different from a PoM prepared by the Aboriginal community.

The Government model proposes to place all Aboriginal culture and heritage information into a new 'Aboriginal Culture and Heritage Register' that the Heritage Division will be responsible for managing and maintaining, replacing the current flawed AHIMS database. It is proposed that this register is linked with the e-planning system proposed under the planning reforms, that information entered into the register will be controlled by minimum standards and that access to culturally sensitive information will be restricted from the public. It is difficult to assess this proposal given that no further details are provided and that no resources appear to have been allocated to ensuring that the information the database will hold will be accurate.

There are a range of practical challenges with mapping and PoM. These processes all rely on a significant amount of resourcing – there will be a high cost to undertake mapping properly for the whole state. In addition, the process relies on asking Aboriginal communities to put comprehensive information about Aboriginal culture and heritage onto a government managed database. The ability of maps and plans to anticipate different types of development over time will also be limited.

The Government model also proposes that no consultation with Aboriginal people needs to occur where there is an unexpected find,⁵² instead all the proponent need do is check the maps and PoM for guidance. This is grossly inadequate, not only given that it is unlikely that, based on the current system, the PoM will be comprehensive, up to date or able to anticipate all kinds of development activities. While the discussion paper states that the PoM may state that the Local ACH Committee should be contacted to develop a management strategy, however it only allows 10 days for this to occur. This process fails to create a mechanism to protect Aboriginal heritage as it will allow proponents to proceed and destroy Aboriginal heritage if the PoM has not anticipated certain issues or development in that area.

Another key concern is how the PoM will be utilised, and their use as a default option for managing Aboriginal heritage where a proponent and Local ACH Committee do not agree, allowing the proponent to proceed anyway according to the PoM. This raises significant concerns, particularly if a PoM has not yet been complete, does not contain detailed information about all sites, is out of date, or if the PoM has not anticipated certain types of development or activities. This focus on 'upfront planning' appears to reduce Aboriginal peoples rights to have a say on individual activities or projects.

Recommendation 34: Maps and plans should be used as guidance 'tools' for proponents, and must not be used as the sole decision-making tools. NSWALC does not support a system that relies on mapping and Plans of Management to make important decisions about Aboriginal culture and heritage management and protection, at the expense of consultation with Aboriginal people.

⁵² Proposed Government model, pages 35-36

Recommendation 35: Processes that do not allow Aboriginal people to have a say over activities and developments and/or bypass proper consultation and assessment mechanisms are not supported.

Recommendation 36: Clear requirements for best practice consultation with Aboriginal peoples must be developed in consultation with peak Aboriginal organisations in NSW and Aboriginal communities and enshrined in new laws.

Flexible regulatory processes

The Government model proposes a number of mechanisms for 'streamlined consultation and assessments' and for more flexibility, but that do not provide increased protections for Aboriginal heritage. This includes allowing activities in areas of 'no or low Aboriginal culture and heritage values' or categorised as 'low impact' to proceed without any assessment or consultation with any Aboriginal people. This is similar to current system which supports certain classes of activities as being exempt from consultation and assessment requirements.

The Governments proposal to replace the current Aboriginal Heritage Impact Permit (**AHIP**) process with 'flexible project agreements' raises a number of significant concerns, including:

- Project agreements are proposed to be legally binding agreements negotiated locally between the Local ACH Committee and a proponent,
- Project agreements will only be required for activities that occur in 'high' or 'incomplete' Aboriginal culture and heritage value areas,
- Project agreements may also be used on a broader scale to address 'socio-cultural outcomes', and
- There are no minimum standards proposed to be included in legislation to guide how project agreements are developed between Local ACH Committees and proponents.

There are a number of inequities and risks in establishing a system that relies on negotiations between a proponent and a committee. Furthermore, given the short timeframes the Aboriginal community will have to respond to a proponent, taken with the ability of proponents to proceed with caution as well as the Aboriginal community's inability to refuse a project, it is difficult to see how the project agreements process is fair, equitable and genuine. No mechanisms are proposed for Local ACH Committees to refuse a development or activity. Where a Committee and proponent disagree either party may seek assistance from a mediation service, however, if the dispute is not resolved within 35 days the proponent may 'proceed with caution' without the consent of the Committee.

The entire process appears to value the needs of the proponent above the rights of Aboriginal communities to have meaningful input into decisions about Aboriginal heritage protection.

Recommendation 37: Mechanisms that further weigh the system in favor of proponents are not supported. Mechanisms must be developed, including proper criteria and guidelines, to ensure the process of negotiation between Local ACH Committees and proponents are fair, equitable and genuine. Proper assessment and consultation processes are needed and must include provisions for assessing cumulative impacts and compensating Aboriginal people for the destruction of Aboriginal heritage.

Recommendation 38: New laws must provide rights for Aboriginal people to refuse an activity or development. There must be processes to refuse a project based on unacceptable impacts to

Aboriginal heritage values. This is consistent with Articles 8 and 11 of the United Nations *Declaration on the Rights of Indigenous Peoples* outlining Aboriginal people's rights to practice and revitalise culture, and rights to redress where cultural heritage is harmed without free, prior and informed consent.

Recommendation 39: The proposal to allow proponents to 'proceed with caution' is not supported. Where agreements cannot be reached between a proponent and Local ACH Committee an independent Aboriginal heritage commission should have roles here to decide whether or not the project can proceed and any conditions.

Recommendation 40: Consultation must occur with peak Aboriginal organisations including NSWALC and NTSCORP in the development of any draft Regulations, minimum standards and other supporting documents.

Continuation of current flawed system

NSWALC submits that the current due diligence regime is failing to protect Aboriginal heritage. The emphasis on allowing non expert and non-Aboriginal people to determine the presence of Aboriginal sites is extremely problematic and undermines the role of Aboriginal people in protecting Aboriginal heritage. The current standards outlined in the due diligence regime fail to set a best practice processes for proponents to follow.

Similarly NSWALC remains concerned regarding the current definitions of low impact activities. The new laws must provide strong rights to ensure consultation is undertaken with Aboriginal people, including through Land Councils, prior to any activities or works being undertaken.

Aboriginal sites officers must be employed to undertake surveys. It is important that this work be undertaken upfront to ensure that proper consultation during the planning phase of proposed works or activities, and that protections for Aboriginal heritage become part of any conditions of approval. The new system needs to complement planning and local government processes to ensure this.

Recommendation 41: The due diligence regime should not be carried over in new legislation in its current form. An independent assessment of the due diligence regime and consultation process to determine its effectiveness in protecting Aboriginal heritage should be undertaken.

Recommendation 42: The low impact activity list should be amended to remove a number of activities that are not low impact. An independent assessment of the definitions of low impact activities should be undertaken to ensure that activities are genuinely low impact and do not bypass consultation processes with Aboriginal people where there is a risk of harm to Aboriginal heritage.

Protection of Aboriginal cultural and intellectual property

NSWALC is concerned that the government proposals do not include any details about how Aboriginal peoples knowledge will be protected. The new system must provide for proper protections for Aboriginal peoples cultural and intellectual property rights, particularly if the proposed new system will emphasise mapping and Plans of Management.

Recommendation 43: New laws must include enforceable rights that recognise and protect Aboriginal peoples cultural and intellectual property rights in line with Article 31 of the United Nations *Declaration on the Rights of Indigenous Peoples*.

State of Aboriginal Culture and Heritage Report

The Government proposes to increase monitoring and reporting. This is an important and positive step. However NSWALC submits that there must be additional requirements for monitoring and reporting beyond a single state-wide report every 3 years. Robust monitoring and reporting is required in a number of areas, including, but not limited to:

1. Operation of the register, maps and Plans of Management,
2. Implementation of project agreements,
3. Ensuring any due diligence processes are being followed,
4. Monitoring cumulative impacts⁵³,
5. Monitoring illegal destruction,
6. Regular compliance checks,
7. Operation of administrative structures and decision-makers, and
8. Protection outcomes at the local, regional and state levels.

Recommendation 44: New laws for Aboriginal heritage protection must include robust monitoring and reporting, beyond a single state-wide report every 3 years; this reporting must include:

- a. Operation of the register, maps and Plans of Management,
- b. Implementation of project agreements,
- c. Ensuring any due diligence processes are being followed,
- d. Monitoring cumulative impacts,
- e. Monitoring illegal destruction,
- f. Regular compliance checks,
- g. Operation of administrative structures and decision-makers, and
- h. Protection outcomes at the local, regional and state levels.

6.7 Funding, training and capacity building

Four options for funding and resourcing of the new system are proposed – Flexible project agreements, Development Levy, Offsets and Cost recovery plus conservation. It appears that ad hoc funding from proponents is intended to cover the operational costs of the Local ACH Committees, new mapping, Plans of Management as well as any other assessments and consultations the Committee will be required to undertake. This appears to indicate a move away from Government funding projects to protect and conserve Aboriginal heritage. It is of significant concern that the Government appears to be abrogating funding responsibilities to protect Aboriginal heritage. Ad hoc funding is not conducive to future and strategic planning. Many ad hoc grants and funding initiatives do not fund staffing, administrative costs or other basic requirements such as computers and electricity. Furthermore, it is difficult to retain staff and build up and maintain capacity in organisations when funding is inconsistent.

New administrative and funding arrangements would need to reflect the increased functions of new groups, and the decreased functions of Government, to ensure that costs of these new functions are adequate to address capacity issues. Some of these costs could include:

- Staffing
- Establishing and maintaining local and state offices
- Costs of maintaining registers, mapping systems
- Training

⁵³ Schnierer, E, Ellsmore, S and Schnierer S, *State of Indigenous Cultural Heritage Report 2011*, Report prepared for the Australian Government Department of Sustainability, Environment, Water, Population and Communities on behalf of the State of the Environment 2011 Committee, page 12, available at <http://www.environment.gov.au/soe/2011/report/heritage/pubs/soe2011-supplementary-heritage-state-of-indigenous-cultural-heritage.pdf>

- Regulation, compliance, enforcement costs
- Other functions such as education and public awareness
- Costs of undertaking site surveys
- Costs of assessing permit applications or equivalent
- Costs of undertaking consultation with relevant Aboriginal groups
- Dispute resolution

As all of the models propose an expansion of the Aboriginal Owners Register, it is estimated that there would be some costs associated with this as well as time to register individuals.

Economic development initiatives, training schemes, and employment strategies should be developed in conjunction with a new system for protecting Aboriginal heritage. This should include providing funding for Aboriginal people to undertake relevant training courses. In addition, strategies for increasing Aboriginal rangers in national parks and Aboriginal sites officers should be developed.

Recommendation 45: A system for managing Aboriginal heritage needs to be appropriately resourced by the Government and proponents in order to properly carry out its functions. Building on the existing structures of the Land Rights Network is supported if properly resourced and funded to reflect the increase in functions performed.

Recommendation 46: The NSW Government must provide the long term funding for programs and initiatives that are necessary to build capacity and generate the sustainable employment and economic development opportunities needed for Aboriginal peoples to engage in a new system for protecting Aboriginal heritage.

Recommendation 47: Any indicative costings, cost benefit analysis and other documents related to the resourcing of this reform process should be publicly released prior to any draft Bill or other consultation materials being publicly released.

6.8 Compliance, penalties and enforcement

The *National Parks and Wildlife Act* currently contains some offences for harming or desecrating Aboriginal objects or places that have been in force since 1 October 2010. They are:

- A 'strict liability' offences for harming or desecrating Aboriginal objects or places. This does not require someone to know that it is an Aboriginal object or place they are causing harm to in order for them to be prosecuted
- An offence for 'knowingly' harming and Aboriginal object

Certain 'circumstances of aggravation' such as previous convictions for harming Aboriginal objects or places, or causing harm in the course of a commercial activity, may double the penalties for individuals who harm Aboriginal objects.

There are also offences for:

- Failing to notify OEH of the location of an Aboriginal object
- Contravening any condition of an Aboriginal Heritage Impact Permit (AHIP)

Some of the penalties are as follows:

The maximum penalties for 'knowingly' harming or desecrating an **Aboriginal object** are:

- For individuals, \$275,000, or imprisonment for 1 year, OR \$500,000 or imprisonment for 2 years in circumstances of aggravation

- For corporations, \$1.1 million

The maximum penalties for harming or desecrating an **Aboriginal object** (strict liability offence) are:

- For individuals, \$55,000, OR \$110,000 in circumstances of aggravation
- For corporations, \$220,000

The maximum penalties for harming or desecrating an **Aboriginal place** (strict liability offence) are:

- For individuals, \$550,000, or imprisonment for 2 years, or both
- For corporations, \$1.1 million

Under the previous provisions, between 2005 and 2010, 10 prosecutions were made for damaging or destroying Aboriginal heritage, with maximum fines of \$1,600 issued. The current laws also include provisions for the stop work orders and interim protection orders to be issued, however, the OEH appear reluctant to use these powers.

Although the laws were amended in 2010, with government promoting the notion that increased fines and penalties would act as a deterrence to the destruction of Aboriginal heritage, in practice this has not occurred. There has only been one prosecution⁵⁴ since the increased penalties came into force. This case demonstrated a number of clear failings of the current laws:

- a. The time taken to investigate a matter is unacceptable, given the OEH took 2 years to investigate and decide to prosecute the proponent,
- b. Fines continue to be too low and do not reflect the level of harm caused,
- c. The low fine amounts do not act as a deterrence,
- d. Power inequities where government departments and communities are not resourced to the same extent as big companies, and
- e. The system of fining does not benefit the Aboriginal community who has suffered the harm. Instead the fine is directed back to government, where instead it could be directed to the Aboriginal community as compensation, to rehabilitate the site, undertake other work to protect and promote Aboriginal heritage.

The Government model states that appeals may be made to the Land and Environment Court for judicial review, and indicates that merit appeals will not be allowed. This is a major concern. Proper appeal processes must be incorporated into a new legislative regime that allow for merit appeals and for Aboriginal peoples to take action where harm to Aboriginal heritage has occurred or is under threat, including stop work and interim protection orders.

Consistent messages were raised at consultations in respect to penalties and enforcement, particularly that:

- Stronger enforcement/monitoring provisions are needed,
- Consideration should be given to allowing local Aboriginal people to have a say in what penalties should be applied to people who destroy Aboriginal heritage, and
- That a system should allow for any monetary fines or compensation to be made to the local Aboriginal community who has had their Aboriginal heritage destroyed, perhaps by recommending that civil proceedings be part of the new laws.

Local Aboriginal communities should have key roles in determining penalties for individuals or organisations that have damaged or destroyed Aboriginal heritage. In addition, any fines should be directed to the local Aboriginal community where the offence occurred. It is important strong penalties for harming or desecrating Aboriginal cultural heritage are set out in new legislation.

⁵⁴ <http://www.environment.nsw.gov.au/media/OEHMedia13042302.htm>

NSWALC advocates that merit appeals be available in new laws and Aboriginal communities be able to bring about proceedings where Aboriginal heritage has been unlawfully harmed. Appeal and review rights should be incorporated that provide mechanisms to seek redress where Aboriginal heritage has been damaged or destroyed, with civil enforcement provisions and open standing to act against breaches. New laws should also allow for other innovative orders to be made (a useful precedent is set by section 250 of the *Protection of the Environment Operations Act 1997*).

Recommendation 48: Mechanisms to actively monitor compliance of the provisions of a new Aboriginal Culture and Heritage Act, coupled with stronger enforcement of breaches of the Act, are needed in a new system.

Recommendation 49: Proper appeal processes and review rights must be incorporated into any new Aboriginal culture and heritage legislation to providing mechanisms for Aboriginal peoples to challenge decisions, including merit appeals, and to seek redress where Aboriginal culture and heritage has been damaged or destroyed.

7. Concerns with reform process

NSWALC is committed to work with Government to achieve positive reforms to Aboriginal culture and heritage laws. However, a range of concerns have been raised about the current reform process. It is deeply concerning that, while NSWALC have previously highlighted a number of significant concerns with the reform process⁵⁵ these issues have continued to be a source of tension and distress in community.

The process to date has not been transparent with few opportunities to provide meaningful input. The current consultation period has been scheduled during the busy end of year and holiday periods, at times when Land Councils, Aboriginal communities and the public more broadly are engaged with a range of other commitments and activities. While we appreciate the consultation period has been extended, and that commitments have been made to undertake consultation on a draft Bill, a number of concerns have been raised about the consultation process to date. In the spirit of providing constructive feedback in order to inform the next stage of the reform process, a number of issues regarding previous consultations are highlighted below.

The NSW Government has made clear commitments to more transparent and accountable processes including in the NSW State Plan, NSW 2021 and in Premier's Memoranda. These include:

- To *'Improve government transparency by increasing access to government information'* (Goal 31, NSW 2021)
- To *'Involve the community in decision making on government policy, services and projects'* (Goal 32, NSW 2021),⁵⁶ and
- That the NSW Government will be:
 - a. **Open** in our work for the people of NSW
 - b. **Open** to participation in the policy process
 - c. **Open** to collaboration on how we do business⁵⁷

⁵⁵ See Joint NSWALC and NTSCORP submission to the first stage of the reform process *'Our Culture in Our Hands'*, December 2011, available at:

http://www.alc.org.au/media/78829/120112%20nswalc_ntscorp%20broad%20reform%20submission%20final.pdf

⁵⁶ NSW 2021 available at: http://www.2021.nsw.gov.au/sites/default/files/NSW2021_WEBVERSION.pdf

⁵⁷ The Premiers Memorandum on Open Government M2012-10, available at:

http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-10

As such, it is unclear why there appears to have been an unwillingness from the Government to provide ongoing opportunities for input and regular updates to communities about this reform process. A commitment to good faith cooperation, collaboration and transparency is required in this reform process.

The latest round of government workshops raised significant concerns. Only 11 workshops were initially scheduled. While 19 workshops in total were held across the state due to strong feedback that 11 was insufficient, workshops were still held at end of the year when many organisations had already closed for the holiday period, and were arranged during the Summer holiday period. The government had failed to take into account that this issue is a significant priority for the Aboriginal Land Council network. However, the Aboriginal Land Council network has been through a series of important reform consultation processes during 2013, including both government consultations on the *Aboriginal Land Rights Act*, OCHRE, planning and local government reforms, in addition to NSWALC consultations on economic development and sustainability to name but a few.

No consultation with peak Aboriginal organisations was held prior to arranging workshops. Peak organisations can provide expert advice on appropriate dates, time locations, and venues where workshops could be held, in addition to facilitating and promoting workshops. Some Land Councils advised they had not received notice or insufficient notice that consultations were occurring. This demonstrates the poor process used to communicate with Aboriginal organisations and communities. It appears government has largely relied on communication via email and that people will check the OEH website.

Unfortunately a range of other concerns have also been raised regarding OEH workshops. At some consultations Aboriginal community members were advised they had to wait outside and may not be able to participate as they had not 'registered' while there was a number of government staff in the room. Some consultations were fully booked, however no alternatives were arranged. When additional consultations were arranged they were not in the same region.

At several workshops when further information was requested about the reform proposals community members were told that there was not enough time and that Government had to stick to their agenda. A three hour workshop format did not allow sufficient time for OEH staff to provide detailed explanations of the Government proposals or how the proposals were developed. Consultations should be in the nature of negotiations and should include the provision of all relevant information in an accessible way.

Given that Aboriginal people are the key 'stakeholders' in this reform process, it was unfortunate that many consultations were attended predominately by government staff as well as industry and archaeologists. This is not to undermine the important role of other groups in this reform process, however, it must be recognised that the format of workshops was not conducive to participants providing detailed and informed feedback. Concerns were also raised about the role of some OEH staff at the consultations as some staff advocated for certain positions rather than facilitating discussions. The OEH should ensure that there is not an over representation of Government staff in attendance at consultations. When Government staff attend consultations it is important to ensure that this attendance is not at the expense of community members who wish to attend and participate. In addition, if Government staff do attend consultations, it is essential that their presence and roles are made clear (for example as observers, to answer questions), that they are briefed properly on the proposals and process so any questions can be answered, and that they do not have influence over any feedback that might be provided.

Other concerns raised included that some participants were told they were only allowed to raise issues specific to the table they were on, effectively shutting down important discussions and debates. It is important for workshop facilitators to recognise that questions are feedback in themselves. While NSWALC continues to promote face-to-face consultations as a key feedback mechanism, it is important that recordings of such meetings reflect attendance, noting the wide range of groups represented in the room, and that statements made by individuals were not necessarily endorsed or supported by other workshop participants.

An Analysis Report prepared by consultants engaged by the OEH to conduct the first round of government workshops held in late 2011 also noted community concern with the reform process including poor notification, inadequate timeframes, and concerns regarding the composition of the Working Party.⁵⁸ This feedback should have been considered in arranging consultations.

The Aboriginal and Torres Strait Islander Social Justice Commissioner outlined some of the key elements of 'meaningful and effective engagement' with Aboriginal peoples.⁵⁹ These are as summarised as follows:

- a) Consultation processes should be products of consensus
- b) Consultations should be in the nature of negotiations
- c) Consultations need to begin early and should, where necessary, be ongoing
- d) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- e) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- f) Adequate timeframes should be built into the consultation process
- g) Consultation processes should be coordinated across government departments
- h) Consultation processes need to reach the affected communities
- i) Consultation processes need to respect representative and decision-making structures
- j) Governments must provide all relevant information and do so in an accessible way

Recommendation 50: It is essential that laws and regulations relating to Aboriginal Culture and Heritage in NSW not be adopted without proper consultation with Aboriginal people and peak Aboriginal representative bodies, including the Land Rights network and Native Title groups. This is consistent with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples which states: "*States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*"

Recommendation 51: That when proposing to host consultations Government Departments and Agencies should:

- a. Contact the relevant LALCs to seek advice about appropriate consultation dates, time and locations, invite LALC staff and members to attend, and enquire about protocols for Welcome to Country ceremonies,
- b. Contact NSWALC and other peak Aboriginal organisations for advice about appropriate methods for undertaking consultations and any other issues to take into account,
- c. Provide funding for travel and accommodation for participants to attend meetings where travel will be required,

⁵⁸ See 'Reform of New South Wales Aboriginal Culture and Heritage Legislation: Stream 2 Workshop Collation Report', January 2012, Markwell consulting, available at:

<http://www.environment.nsw.gov.au/resources/cultureheritage/AnalysisReport.pdf>

⁵⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010, Native Title Report 2010, Chapter 3 and Appendix 4, available at: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/index.html

- d. Ensure that Government staff undertaking consultations with Aboriginal people are experienced senior staff and have completed cultural awareness training prior to undertaking consultations. This should include training about Acknowledgement of Country and Welcome to Country protocols,
- e. Provide at least one month's written notice about upcoming consultations to Aboriginal communities and peak Aboriginal organisations. A minimum of two months should be allotted for communities to provide comment,
- f. Advertise consultations and workshops widely, including via direct post, email, local and Aboriginal media, local radio in addition to providing direct notification to peak local and state Aboriginal organisations. It is insufficient to place details about a consultation on a government website only. It should be noted that in far west NSW there are often significant delays in communities receiving mail,
- g. Seek advice on and take into account local issues /circumstances and important dates for Aboriginal communities such as NAIDOC week when arranging meetings or consultations,
- h. Contact details of participants should be recorded so that records of meetings can be circulated to meeting participants, and direct opportunities to correct any meeting minutes can be provided,
- i. Provide plain English documentation and explanations of what the current issues are / rationale for why changes are needed, the content of the proposed reforms, what any proposed reforms are intended to achieve, and evidence for why the reform proposals are justified,
- j. Provide ongoing, regular reports back about the process, how people can get involved, and when to expect further opportunities to comment,
- k. Avoid arranging consultations over holiday periods when many organisations may have a close down period; if consultations are to be held during this period, additional time will be needed to allow comment,
- l. Ensure that consultation periods are coordinated between other government departments and agencies to minimise overlap avoid over consultation with Aboriginal communities,
- m. Engage independent Aboriginal facilitators to run consultations including facilitating discussions and taking notes,
- n. Allow time at the beginning of the consultation for participants to introduce themselves to the forum, for any issues to be addressed upfront, and be flexible in format recognising that issues may be different across the State and dynamics may be different – there are ways to convey the same information but using different formats,
- o. Ensure that if government staff do attend consultations, their presence and roles are made clear (such as an observer, to answer questions), that they are briefed properly on the proposals and process so any questions can be answered, and that they do not have influence over any feedback that might be provided, and
- p. Ensure venues are booked that are easy for people to travel to, can accommodate additional people at short notice, and for issues of key importance to Aboriginal communities consideration should be given to hosting one day workshops.

Recommendation 52: All submissions made in response to the reform of Aboriginal culture and heritage laws should be made public.

Recommendation 53: A disclaimer should be added to the workshop notes outlining that the notes have not necessarily captured whether there was support for the statements, that views were not necessarily representative or endorsed as part of the consultation process, and that some people raised issues outside of the group or formal part of the workshop.

Recommendation 54: The next stage of the reform process must provide clear information on timelines for proposed changes and details on transitional arrangements.

8. Conclusion

In 1980 the first report to Parliament by the *NSW Legislative Assembly Committee upon Aborigines* (the Keane Committee),⁶⁰ 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, the Hon. 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.

NSWALC, in partnership with NTSCORP, have previously stated a commitment to work 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.

⁶⁰ 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.

Appendix A – NSWALC endorsed principles for reform

Principles for reform.⁶¹

1. Recognition that Aboriginal communities are the rightful owners of Aboriginal cultural heritage in NSW.
2. The establishment of a legislative system which affects a practical balance between:
 - the recognised need to preserve and enhance Aboriginal cultural traditions;
 - the need to deliver social justice to Aboriginal people in NSW to redress the significant cultural, economic, and social dispossession which they have suffered;
 - the need for Government to ensure the economic, social and cultural advancement of other (non-Aboriginal interests) in NSW.
3. Respect for Aboriginal cultural connections, authorities for Country, and contemporary beliefs, values and practices.
4. Recognition that Aboriginal cultural heritage is part of a broader Aboriginal relationship with the land including:
 - land rights;
 - land use and sustenance: hunting, gathering and fishing practices;
 - religious, spiritual and cultural beliefs and practices; and
 - intangible cultural property: dance, drama, art, music.
5. Provision for the protection and management of culturally significant areas on private and public lands.
6. The establishment of management processes which:
 - recognise cultural rights and responsibilities of local Aboriginal communities, traditional owners and custodians;
 - allow for the advocacy of Aboriginal interests; and
 - are clear, transparent and accountable.
7. The identification and mapping of cultural areas/zones in NSW, as a basis for the operation of an Aboriginal Heritage Commission. Such mapping should:
 - be consistent with native title interests; and
 - recognise the diversity of Aboriginal interests across the State.
8. Every opportunity should be given to Aboriginal communities and other land users to discuss, negotiate and resolve land use proposals at community levels.
9. The establishment of:
 - centralised and co-ordinated monitoring of inter-agency policies and programs which affect Aboriginal cultural heritage; and
 - a co-ordinated and consultative approach between all levels of Government on the development of policies and programs affecting Aboriginal cultural heritage.
10. Support and encouragement for greater understanding of Aboriginal cultural heritage and management and protection policies through a range of education programs and research work.
11. Recognise the need for clearly defined accountability to Aboriginal communities as well as an effective appeal process.
12. The establishment of an effective system of prosecution, penalties and reparations.
13. Support international standards and instruments including the United Nations *Declaration on the Rights of Indigenous Peoples*, as the basis for broader reform of Aboriginal heritage management in NSW.

⁶¹ The Principles are based in those outlined in the 1996 'DRAFT NSW Government Green Paper: the Future management of Aboriginal Cultural Heritage in NSW'.

Appendix B – Initial NSWALC response to proposed Government model

Aboriginal control, management and decision-making

1. Aboriginal people must be the sole determiners of Aboriginal cultural heritage.
2. The role of Aboriginal Land Councils, including their advocacy and support roles must be recognised. LALCs should be able to provide a body corporate role auspicing and holding assets for the local committees.

Funding and resourcing

3. Structures and mechanisms need to be appropriately resourced by the Government and proponents. Building on the existing structures of the Land Rights Network is supported if properly resourced and funded.

Boundaries

4. Boundaries in a new system should be based on Aboriginal Land Council boundaries. Protocols and agreements will need to be developed where cultural boundaries may cross over.

Administrative structures

5. Support for genuinely Aboriginal controlled organisations to operate at both the State and local levels to ensure proper leadership, oversight and decision-making.
6. An independent Aboriginal Culture and Heritage Commission should undertake key roles including decision making powers. The Commission should have reporting and compliance functions.
7. Proper administrative and governance structures are needed to support decision-making, and also need to take into account cultural values.

Roles for Government

8. Roles for Government should be kept to a minimum. Key oversight functions to lie with the Independent Aboriginal Culture and Heritage Commission with appropriate resourcing. Functions of Commission include oversight of Committees, approval of plans and approval of any project agreements.

Methods of protection

9. All Aboriginal heritage is important. Classifying Aboriginal heritage as 'low' value is not supported.
10. Processes that do not allow Aboriginal people to have a say over activities and developments and/or bypass proper consultation and assessment mechanisms are not supported.
11. Processes that further weigh the process in favor of development are not supported. Proper criteria and guidelines must be developed. Proper assessment and consultation processes are needed and must include provisions for assessing cumulative impacts and compensating Aboriginal people for the destruction of Aboriginal heritage.
12. Any timeframes must allow for meaningful consultation and must be culturally appropriate with allowances for cultural priorities such as sorry business.
13. New laws must empower and support the rights of Aboriginal peoples. Aboriginal people must have the right to refuse an activity or development.

Compliance, penalties and enforcement

14. Active monitoring and compliance is needed in a new system.
15. Proper appeal processes that allow Aboriginal peoples to challenge decisions are needed including merit appeals.

Appendix C – Outcomes Report from NSWALC Culture and Heritage workshops