

# RESPECT AND PROTECTION

Submission in response to the  
Discussion Paper: *Indigenous  
heritage law reforms*



NEW SOUTH WALES  
ABORIGINAL LAND COUNCIL

[www.alc.org.au](http://www.alc.org.au)



For more information about this submission contact the Land, Policy and Research Unit of the NSW Aboriginal Land Council by phone on 02 9689 4444.

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### a. Introduction

The NSW Aboriginal Land Council (NSWALC) is the peak representative body for Aboriginal people in NSW. The responsibilities of NSWALC and Local Aboriginal Land Councils (LALCs) under the *Aboriginal Land Rights Act 1983* (ALRA) include the protection and promotion of Aboriginal culture and heritage in NSW.

The primary law for the protection and management of Aboriginal culture and heritage in NSW is the *National Parks and Wildlife Act 1974* (**NPW Act**). While the NSW Government has primary responsibility for protecting Aboriginal culture and heritage through the *National Parks and Wildlife Act 1974*, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (**ATSIHP Act**)<sup>1</sup> the Federal Government has significant powers to step in and act where the State has failed to protect Aboriginal culture and heritage.

In August 2009 the Hon. Peter Garrett, Federal Minister for the Environment, Heritage and the Arts, released the discussion paper: *Indigenous Heritage Law Reform* which proposes a range of significant reforms to the ATSIHP Act.

The Federal Government announced that it had decided to review the ATSIHP Act because: “The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects”.<sup>2</sup>

The changes proposed to the ATSIHP Act include:

- The introduction of minimum national standards for the protection of Aboriginal culture and heritage, and
- New processes for applying to the Federal Minister for emergency and longer-term protection of areas and objects.

The attached submission outlines in detail NSWALC’s response to the *Indigenous heritage law reform* discussion paper and the proposed reforms.

While NSWALC supports moves to reform the ATSIHP Act, it is concerned that the review may result in **reduced avenues for Aboriginal people in NSW** to seek emergency protection of cultural heritage which is under threat.

NSWALC’s submission also provides an overview of the state of Aboriginal cultural heritage protection in NSW.

In particular, the submission details how the current NSW regime has led to the **wide-spread destruction of Aboriginal culture and heritage in NSW**, and would **fail to meet even the basic minimum standards** proposed by the Federal Government.

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## Executive Summary

### *b. Past operation of the ATSIHP Act in NSW*

The ATSIHP Act was introduced in 1984 to preserve and protect ‘areas’ and ‘objects’ of significance to Aboriginal people.

The Act provides an avenue for Aboriginal people to apply to the Federal Minister administering the Act to make a declaration to protect an area or object which is under threat of injury or desecration.

However, as outlined in the *Indigenous heritage law reform* discussion paper, the Act has not proved to be an effective means of protecting traditional areas and objects.<sup>3</sup>

Over the last 25 years only 24 declarations have been made. This equates to only 7% of the more than 320 applications made. Of these, there has only been one long-term declaration made in NSW.<sup>4</sup>

While reform of the ATSIHP Act is welcomed, NSWALC is concerned that some of the reforms proposed may decrease the options for protection in NSW. For example, NSWALC has some concerns that the Federal Government’s proposals which are designed to ‘reduce red tape’ may limit the ability of Aboriginal groups in NSW, and particularly Land Councils, to apply for protection of important areas.

NSWALC’s responses to the other specific changes proposed are outlined in more detail in the body of the submission.

NSWALC supports reform of the ATSIHP Act to improve the operation of the Act and to better protect Aboriginal cultural heritage. The proposed reforms must ensure that they do not reduce current protections available under the ATSIHP Act.

### *c. Minimum standards for accreditation*

The Federal Government is proposing to introduce minimum standards for state and territory legislation. Under the proposals, if the Federal Minister accepts that a state has ‘effective’ legislation to protect Aboriginal culture and heritage, that state could receive ‘accreditation’.

If a state becomes accredited an Aboriginal person from that state would no longer be able to apply for emergency or longer term protection to the Federal Minister, even if that state has failed to protect a particular site.<sup>5</sup>

If the Federal Minister were to receive an application for an area or object in an accredited state, the application would be referred back to the state to resolve. The state or territory Government would then only be required to “consider” any information or advice provided by the Federal Minister.

NSWALC does not support the removal of the avenue to apply to the Federal Minister for emergency protection, even where state or territory laws meet a general standard of protection for Aboriginal cultural heritage. Avenues to make an emergency appeal to the Federal Government must remain open for individual cases where a state or territory government has failed to offer sufficient protection.

As outlined in the *Indigenous heritage law reform* discussion paper, the Federal Government hopes that the accreditation process will establish a “best practice standard” for Aboriginal cultural heritage protection.

The proposed standards in order to achieve accreditation would require state and territory laws to offer:

1. Comprehensive protection for all “traditional areas and objects”,
2. Early identification of heritage issues,
3. Independent culture and heritage assessments,
4. Appropriate consultation with “traditional custodians”,
5. Negotiation and mediation opportunities,
6. Avoidance or minimisation of adverse impacts on traditional areas or objects,
7. Protection of sensitive information,
8. Strong penalties for unauthorised destruction,
9. Transparent decision making, and
10. The ability of Indigenous Australians and others to seek legal review by a court or a tribunal.

Unfortunately, the proposed standards fall short of recognising the right of Aboriginal people to own and control Aboriginal cultural heritage. The proposed standards would still allow accreditation, for example, for states whose laws give a government agency the power to damage or destroy Aboriginal cultural heritage - even where this is opposed by the Aboriginal community.

NSWALC supports the establishment of standards for the protection of Aboriginal cultural heritage, across Australian jurisdictions, but is concerned that the proposed standards are not “best practice”.

NSWALC is also concerned that the proposed standards do not properly accommodate the Aboriginal communities in NSW. In NSW there are a number of groups with legislative and traditional responsibilities for culture and heritage in NSW beyond native title claimants, including Local Aboriginal Land Councils.

Minimum standards must be comprehensive to ensure that they work in practice and accommodate the local issues and representative Aboriginal organisations across all jurisdictions, including NSW.

## Executive Summary

### *d. Failure of NSW laws to meet the minimum standards*

Even recognising that the standards proposed by the Federal Government could be higher, it is clear that the current laws in NSW would fail to meet nearly all aspects of the proposed standards.

NSW remains the only state to continue to manage Aboriginal culture and heritage through its flora and fauna legislation – the *National Parks and Wildlife Act*.

Where other jurisdictions have moved forward with various forms of separate Aboriginal culture heritage legislation, in NSW, management (and ownership) of most Aboriginal cultural heritage remains with the government agency which administers National Parks – the Department of Environment, Climate Change and Water (DECCW).

The *National Parks and Wildlife Act* provides the power to DECCW to issue permits to damage and destroy Aboriginal places and objects. These permits are known as Aboriginal Heritage Impact Permits (AHIPs).

Since 1990 the NSW Government has issued over **1000** of these permits. In the last few years between 95% and 100% of applications to damage or destroy Aboriginal cultural heritage have been approved. Of the permits issued, approximately one quarter of the permits were issued by one NSW Government agency (DECCW) to other government agencies, including to DECCW itself.<sup>6</sup>

NSWALC has assessed the operation of the NSW laws against the minimum standards proposed in the discussion paper and found that it fails to meet the requirements proposed in all cases<sup>7</sup>:

**1. Comprehensive protection for all “traditional areas and objects”:** The *National Parks and Wildlife Act*’s protection of Aboriginal cultural heritage is limited to ‘Aboriginal objects’ and ‘Aboriginal places’ declared under the Act. This means that protection is often unavailable to broader areas that are significant to the Aboriginal community where specific objects have not been identified. This includes, for example, massacre sites known to the community where the specific physical locations of remains have not been identified.

In addition, recent changes to NSW planning laws NSW through Part 3A of the *Environmental Planning and Assessment Act 1974* allow for destruction of sites without a permit for developments which are deemed by the Planning Minister to be ‘state or regionally significant’. This undermines even the limited protection offered by the *National Parks and Wildlife Act*.

**2. Early identification of heritage issues:** There are some requirements in the policies of DECCW and the Department of Planning which encourage the early identification of Aboriginal cultural heritage. However, there are no requirements recognised in legislation. The different levels of planning and environmental laws and instruments often have conflicting requirements which mean that Aboriginal culture and heritage issues are not identified at early stages.

**3. Independent culture and heritage assessments:** The *National Parks and Wildlife Act* and related policies developed by DECCW place the emphasis on the developer or other person seeking permission to damage or destroy an Aboriginal place or object to manage the process of consultation with the Aboriginal community and to undertake a culture and heritage assessment. This creates a clear conflict of interest. In addition there are few opportunities for Aboriginal groups to make independent representations if they feel that a cultural heritage assessment is inaccurate.



**4. Appropriate consultation with “traditional custodians”:** The *National Parks and Wildlife Act* does not recognise any rights for Aboriginal people to be consulted. The requirement for consultation to be undertaken before a permit is issued is contained in the DECCW policy (currently under review) – *Interim Community Consultation Requirements for Applicants*.<sup>8</sup> Requirements for consultation by the Department of Planning are also outlined in policy. The DECCW consultation policy in particular has been criticised for failing to identify the right people to be consulted and in several cases failing to ensure that any effective and appropriate consultation is undertaken.

**5. Negotiation and mediation opportunities:** The *National Parks and Wildlife Act* contains no rights for Aboriginal people to negotiate an outcome with DECCW or a developer, or to participate in mediation if disagreements arise. While some DECCW policies aim to encourage negotiation and mediation, this is not a requirement and there is little evidence that this is occurring in NSW.

**6. Avoidance or minimisation of adverse impacts on traditional areas or objects:** There are no specific requirements under the *National Parks and Wildlife Act* that damage to Aboriginal culture and heritage must be mitigated or avoided. Whilst one of the aims of the *National Parks and Wildlife Act* is “the conservation of objects, places or features ... of cultural value within the landscape, including, places, objects and features of significance to Aboriginal people”<sup>9</sup>, the Act also provides the contradictory power to issue permits to damage or destroy Aboriginal cultural heritage. While some DECCW policies include references to avoiding or mitigating damage as a goal, this is only one of the many factors considered by the department when it makes a decision.<sup>10</sup>

**7. Protection of sensitive information:** There are few protections for sensitive information under NSW law. Communities are required to pass on sensitive information about a site to a developer preparing the cultural heritage assessment in order to have a site recognised for protection. However, the *National Parks and Wildlife Act* provides no protection regarding how this information can then be used, though DECCW has developed policies regarding how the information will be handled and recorded by DECCW staff.

**8. Strong penalties for unauthorised destruction:** The NSW Government has long recognised that the penalties for illegal destruction of Aboriginal cultural heritage under the *National Parks and Wildlife Act* are weak and ineffective.<sup>11</sup> While there have been several proposals to adopt stronger penalties since 2001, these have never been enacted.

**9. Transparent decision making:** The process of approving permits to damage or destroy Aboriginal cultural heritage is highly secretive. The NSW Government does not publish information about how many permits it issues, and to whom. The limited data available has been collected through questions in NSW Parliament and Freedom of Information requests. The lack of information published by DECCW about the permit process does not allow, for example, any scrutiny as to whether consultation with the community has taken place, or has been effective.

**10. Ability of Indigenous Australians and others to seek legal review by a court or a tribunal:** The increasing number of appeals against permits by Aboriginal people, through the Land and Environment Court, is testament to the failure of the consultation processes established under the *National Parks and Wildlife Act*. These cases have only had limited success as they rely on the recognition of rights contained in the *National Parks and Wildlife Act*<sup>12</sup> and related policies which, as noted above, are very limited.

Further details about the operation of NSW laws can be found in NSWALC’s July 2009 submission to DECCW entitled: *More than Flora and Fauna*<sup>13</sup>, which is available on the NSWALC website at [www.alc.org.au](http://www.alc.org.au).

**IMPORTANT NOTE:** The NSW Government is currently considering significant changes to the *National Parks and Wildlife Act*, including changes to the permit system, through the *National Parks and Wildlife Amendment Bill* (also known as the Omnibus Bill).

While some of the proposed amendments are welcome, such as increased penalties for illegal destruction, several of the proposed changes, such as reducing red tape for permit applications and limiting opportunities for appeal, would move NSW further away from the proposed standards.

As outlined in NSWALC’s detailed submission in response to the proposed changes (*More than Flora and Fauna*) the proposed Bill does not achieve the wide scale and urgent reform needed to end the inappropriate destruction of Aboriginal cultural heritage in NSW.

NSWALC strongly supports the establishment an Aboriginal culture and heritage bill for NSW which would recognise Aboriginal ownership and control of culture and heritage. Until such reforms are introduced it is essential that the Federal Government maintain and strengthen its powers to offer protection where state laws have failed.

## ***e. Summary of Recommendations***

In addition to the key recommendations noted above NSWALC makes the following recommendations in relation to the proposed reforms:

### ***i. Who can apply for protection***

Local Aboriginal Land Councils (LALCs) must be included in the list of groups which are able to apply to the Federal Minister for emergency protection, for areas and objects within their boundaries.

As LALCs are the elected voice for Aboriginal people in NSW, with legislative responsibilities to advocate for the interests of the local Aboriginal community and to protect and promote Aboriginal culture and heritage, it is important that LALCs be invited to participate in discussions about who speaks for Country in an area.

### ***ii. Accreditation and standards***

The processes for applying to the Federal Minister must be retained and strengthened to allow Aboriginal people to have an alternative option for protecting cultural heritage.

The current laws in NSW do not meet the proposed minimum standards, and should not be accredited. The proposed standards should reflect international best practice and be consistent with Australia's international obligations such as the United Nations *Declaration on the Rights of Indigenous People*.

### ***iii. Protecting cultural heritage***

The primary purpose of the ATSIHP Act should be to protect Aboriginal and Torres Strait Islander cultural heritage, reflecting that Aboriginal culture is recognised and respected and that Aboriginal communities have a right to be the key decision makers in relation to the protection and management of culture and heritage. The purposes of the Act must be supported by practical measures.

The proposed new definitions outlining what can be protected should not limit the ability of Aboriginal people to protect places because there is a lack of physical evidence or because the area is of more contemporary significance.

NSWALC supports stronger penalties and the introduction of new offences relating to the display of "sacred objects" and "personal remains". However, it must be ensured that sufficient resources are allocated to the implementation and monitoring aspects of these offences. Local Aboriginal communities must be consulted and consent to the terms of the display of cultural material.

The proposal to protect sensitive information in circumstances where the Minister agrees should be strengthened to fully recognise and protect culturally sensitive information. NSWALC supports the proposal for strong penalties for breaches of confidentiality.

NSWALC supports the proposal that any databases or registers should have rigorous access restrictions due to the need to protect cultural knowledge and respect the wishes of the Aboriginal community. The requirement for proponents to access databases should not replace consultation with the Aboriginal community. Members of the Aboriginal community should also be able to access their cultural information on government registers free of charge.

#### *iv. Applying to the Federal Minister for protection*

The process of making applications to the Federal Minister to protect cultural heritage should be easy and straight forward. The onus of the application process should not be on Aboriginal people to reveal sensitive information. The application process should recognise that there are circumstances where documentation may not be readily available, and that there are instances where it may take time to contact the relevant people in the community about the threats to cultural heritage.

NSWALC supports the establishment of quicker and more effective processes to protect cultural heritage. Any new criteria for applying to the Federal Minister should not place further burdens on the Aboriginal community in order to have cultural heritage protected. This includes allowing for the provision of oral evidence in some cases. NSWALC supports the delegation of powers by the Federal Minister so that matters can be dealt with more quickly.

NSWALC does not support the proposed criteria which pose further threats to Aboriginal cultural heritage.

The list of proposed factors to be considered by the Federal Minister when making decisions must prioritise the protection of Aboriginal cultural heritage.

#### *v. Negotiation between developers and Aboriginal people*

NSWALC supports the recognition that Aboriginal cultural heritage be considered at the earliest stages of planning and development processes. Early 'consideration' requirements should be strengthened to ensure that heritage issues are actively addressed and incorporated into future planning proposals. Resources must be allocated to ensure consultation is supported.

The Federal Government should establish processes to ensure that if developers fail to meet their responsibilities in relation to consultation, the Aboriginal community will not be disadvantaged, or limited from protecting cultural heritage.

Methods of consultation with Aboriginal people, such as meetings and conferences, must be accessible and appropriate to the needs of the Aboriginal community.

## *vi. Penalties and enforcement*

NSWALC supports the proposed higher civil and criminal penalties for disobeying a protection order and the introduction of new powers to issue remediation orders, in consultation with the Aboriginal community.

NSWALC supports the introduction of criminal and civil penalties regarding the display of “secret sacred objects” and Indigenous “personal remains”, and for contravening the Minister’s directions about maintaining confidentiality.

NSWALC supports the proposed removal of the defence that a person or body corporate cannot be prosecuted if they breach a declaration of which they were not aware.

Stronger incentives for developers should be introduced to protect cultural heritage, and to work with Aboriginal communities. Increased resources also need to be allocated to create awareness in the community about cultural heritage laws to ensure that illegal destruction is more effectively investigated and prosecuted.

## *vii. Reviews*

Processes must be established to ensure that state and territory laws are constantly monitored and regularly reviewed in relation to the level of protection they are offering Aboriginal cultural heritage.



## *f. Response to specific proposals*

The *Indigenous heritage law reform* discussion paper includes several key questions and proposals. The following table outlines how the different sections of the NSWALC submission respond to the specific proposals.

Sections in NSWALC submission		Corresponding section in Discussion paper
2.	Representing the Aboriginal people: The Land Council network in NSW,	Proposal 5: Traditional Custodians Proposal 6: Indigenous Land Use Agreements (ILUAs)
5.a.	Who can apply for protection	
<b>Executive Summary</b> - Minimum Standards for Accreditation		Proposal 3: Accreditation Proposal 4: Standards
5.b.	Accreditation and standards	
5.c.	Protecting cultural heritage	Proposal 1: Purposes of the Act Proposal 2: New definitions Proposal 7: 'Indigenous remains' Proposal 8: displaying 'secret sacred objects' and 'Indigenous remains' Proposal 11: sensitive information
5.d.	Applying to the Federal Minister for protection	Proposal 9: Applications Proposal 12: interim protection Proposal 13: longer term protection
5.e.	Negotiation between developers and Aboriginal people	Proposal 10: Conferences
5.f.	Penalties and enforcement	Proposal 14: Penalties and enforcement
5.g.	Reviews	Proposal 15: Reviews

## 1. Background

The Aboriginal and Torres Strait Islander Heritage Protection Act (**ATSIHP Act**) was first introduced as an interim measure in 1984 to preserve and protect from injury or desecration “*areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition*”.<sup>14</sup>

The Federal Minister has rarely used this power to protect cultural heritage. According to the Federal Government, approximately 92 per cent of *valid* applications made by Aboriginal and Torres Strait Islander people to the Federal Minister to protect ‘areas’ or ‘objects’ have not resulted in declarations.<sup>15</sup> This equates to approximately 24 declarations in 25 years.<sup>16</sup> Some of the declarations made by the Federal Minister have been overturned by the Federal Court.

There have only been five long-term declarations to protect areas made by the Federal Minister. The only long-term declaration made in NSW was at Boobera Lagoon.<sup>17</sup> In this instance the Federal Minister took over 6 years to make a declaration to restrict the use of power boats in the area from 2002 – 2004.

There is only one long term declaration still in place: for Junction Waterhole in Alice Springs, which will expire in 2012.<sup>18</sup> It is unclear what steps will be taken to protect this area once this declaration has expired.

Reform to the ATSIHP Act has been a recommendation of several inquiries and reports<sup>19</sup> to the Federal Government. The Federal Government has also long recognised that “*more effective heritage protection legislation*” is required.<sup>20</sup>

The most recent comprehensive review of the ATSIHP Act was undertaken in 1996 by Justice Elizabeth Evatt. The Evatt Review<sup>21</sup> identified many problems with the ATSIHP Act including its lack of detail about the procedures to be followed, lack of Aboriginal involvement and lack of respect for Aboriginal customs.

The Evatt Review also made a comprehensive list of recommendations aimed at addressing some of the key problems with the ATSIHP Act. None of these recommendations have been implemented.

In August 2009 The Minister for the Environment, Heritage and the Arts, the Hon. Peter Garrett, announced a review of the ATSIHP Act.<sup>22</sup>

The Minister released the discussion paper: *Indigenous heritage law reform*, which proposes a range of specific reforms to the ATSIHP Act including:

- the introduction of national standards,
- new processes and criteria for applying to the Federal Minister for protection,
- changes to who can apply for a declaration,
- amendments to the types of objects and areas can be protected,
- changes to when declarations can be made,
- new offences relating to “secret sacred objects” and “personal remains”, and
- increased penalties for breaches of declarations.

The Federal Government has suggested that the primary aims of the proposed changes are to:

1. Ensure that Indigenous Australians will have the best opportunities to protect their heritage, and
2. Cut duplication and red tape.<sup>23</sup>

The two key changes which the Federal Government are proposing are the introduction of a national accreditation scheme, and changes to the procedures to apply to the Federal Minister for protection.

The Federal Department of Environment Water Heritage and the Arts (DEWHA) held a series of 'information sessions' across Australia in August and September 2009. In NSW seven information sessions were held between 21 -29 September 2009 in areas where Indigenous Coordination Centres are located.<sup>24</sup>

The 'information session' format was not designed to seek feedback on the proposed reforms. Rather, the DEWHA representatives advised that the information sessions were solely to provide the community with information.

Consistent feedback from the community to date indicates that there is a high level of concern about whether the proposed reforms are capable of achieving the stated outcomes to ensure that Indigenous Australians will have the best opportunities to protect their heritage.

Concerns have also been raised as to the future progress of the proposed law reforms. NSWALC encourages the Federal Government to report back to the community about the outcomes of the submission process and that feedback is sought on any future proposals and a draft amendment bill.

## 2. Representing Aboriginal people: The Land Council Network in NSW

The New South Wales Aboriginal Land Council (NSWALC) is the largest member based Aboriginal organisation in Australia.

NSWALC was established 25 years ago with the introduction of the *Aboriginal Land Rights Act 1983* (NSW) (ALRA). The ALRA was enacted to provide a mechanism for compensating Aboriginal people of NSW for the loss of their land, and to provide Aboriginal people with a representative voice.

NSWALC is governed by a Council of nine Councillors, which is elected every four years. All Aboriginal adults in NSW are eligible to join a Land Council and vote in Land Council elections. NSWALC provides support to the network of 121 Local Aboriginal Land Councils (LALCs).

LALCs are autonomous bodies which are governed by boards elected by local Aboriginal community members, every 2 years. This role extends beyond representation of the interests of Land Council members, to all Aboriginal people living in NSW.

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

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

Under section 52(4) of the *Aboriginal Land Rights Act*, LALCs have similar functions to protect and promote Aboriginal cultural heritage within their boundaries.

The obligation to consult with LALCs on cultural heritage matters is recognised through a range of NSW Government policies. LALCs' culture and heritage activities vary across councils, but include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, heritage site assessments, management of cultural centres and Keeping Places, participation in advisory committees and a range of projects in the community to improve awareness and understanding of Aboriginal cultural heritage.

While LALCs have an important culture and heritage role, NSWALC also recognises and respects the role of traditional owner groups in relation to culture and heritage.

As outlined in previous NSWALC culture and heritage submissions<sup>25</sup> NSWALC's position is that consultation on culture and heritage matters must include all relevant organisations with statutory responsibilities for culture and heritage.

In NSW these groups are:

- NSWALC and LALCs,
- Native title claimants and holders, and the peak native title body in NSW NTS Corp,
- Aboriginal Owners and the Registrar of the *Aboriginal Land Rights Act* which maintains the Registrar of Aboriginal Owners.

NSWALC's commitment to work in partnership with traditional owner groups is reflected in NSWALC policies and strategic documents, including the NSWALC *Corporate Plan 2008-2012*.

### 3. Key recommendations

This submission outlines in detail the NSWALC’s response to the culture and heritage reforms proposed through the DEWHA discussion paper: *Indigenous heritage law reform*, including:

- Recommendations relating to the particular proposals in the discussion paper, and
- An overview of why NSW laws would fail to meet the proposed minimum standards.

NSWALC agrees that the small number of successful applications to the Federal Minister indicate that the ATSIHP Act is failing to be effective, and that reforms are urgently needed.

Essentially, NSWALC supports moves to reform the ATSIHP Act, but is concerned that the review may result in the removal of the current avenue of appeal to the Federal Minister. The availability of a mechanism to apply to the Federal Minister for emergency protection, where a state or territory has failed to protect against a threat to Aboriginal cultural heritage is vitally important, particularly given the high rate of destruction of Aboriginal cultural heritage in NSW.

NSWALC supports the establishment of ‘best practice standards’ for the protection of Aboriginal cultural heritage across NSW. However, it is important that:

- The standards are established at best international standards, and
- The establishment of an accreditation process for those states and territories whose laws meet the standard does not remove the opportunity for Aboriginal groups to appeal to the Federal Minister in individual cases where a state or territory has failed to act, or has acted to allow inappropriate destruction of Aboriginal cultural heritage.

‘Best practice standards’ must be consistent with Australia’s international obligations and the commitments made by the Federal Government to *Close the Gap*.

The United Nations *Declaration on the Rights of Indigenous Peoples*,<sup>26</sup> which has recently been signed by the Australian Government,<sup>27</sup> is very clear that the “free, prior, and informed consent” of Indigenous peoples is required for any activity that is geared towards commercial gains on their traditional territories.

Article 32 of the Declaration states:

*Indigenous people have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

The proposed ‘minimum standards’ outlined in the discussion paper do not include recognition of the *Declaration* and are inconsistent with Australia’s international obligations in several cases. This includes allowing for proponents to have their activities, for example developments, to proceed “*despite the requirements to protect traditional areas and objects*”.<sup>28</sup> This implies that destruction is an acceptable outcome.

The standards proposed also do not reflect other commitments made by the Federal Government to Indigenous self-determination and to increase Aboriginal decision making. This includes the Federal Government’s commitments made in February 2009 to ‘respectful and collaborative’ partnerships in ‘Closing the gap on Indigenous disadvantage: the challenge For Australia’.<sup>29</sup>



The Steering Committee for the Review of Government Service Provision on Overcoming Indigenous Disadvantage recently recognised that the “*things that work*” or “*success factors*” include:

- cooperative approaches between Indigenous people and government (and the private sector)
- community involvement in program design and decision-making — a ‘bottom-up’ rather than ‘top-down’ approach
- good governance
- on-going government support (including human, financial and physical resources).<sup>30</sup>

NSWALC is also concerned that proposed reforms have been developed with a limited focus on traditional owners and those groups who have been formally recognised through the native title system.

While NSWALC supports and encourages consultation with native title claimants and holders (as previously outlined) in NSW the LALCs have key culture and heritage responsibilities for areas within their boundaries through the *Aboriginal Land Rights Act*.

It is essential that the proposed reforms recognise the role that LALCs play in relation to Aboriginal culture and heritage in NSW, and do not exclude LALCs from the process.

## 4. Overview of the culture and heritage system in NSW

Culture and heritage laws, planning laws and land rights laws in NSW operate differently to legislative regimes in other states and territories.

### a. National Parks and Wildlife Act

NSW does not have comprehensive heritage legislation for the management of Aboriginal cultural heritage. In NSW, the ***National Parks and Wildlife Act 1974*** is the primary source of legal protection for Aboriginal cultural heritage. The *National Parks and Wildlife Act* is administered by the NSW Department of Environment, Climate Change and Water (DECCW).

Sections 87 and 90 (Part 6) of the *National Parks and Wildlife Act* provides for the issuing of permits authorising damage or destruction to Aboriginal cultural heritage (also known as Aboriginal Heritage Impact Permits, or AHIPs).

The Director General of DECCW is responsible for issuing AHIPs after assessing whether a proposed activity will impact on an Aboriginal object or place. In practice, the Director General delegates the processing of AHIPs to staff working within DECC’s Environmental Protection and Regulatory Group.

The consistent feedback from the Aboriginal community is that there is a high level of ‘approved’ destruction of important Aboriginal cultural heritage through the issuing of AHIPs, and that the AHIP process is not protecting important sites.<sup>31</sup>

While information about the number of permits issued is not made generally available by the NSW Government, through Questions on Notice in NSW Parliament to the Minister for the Environment and Climate Change it is known that:

- Between 1990 and July 2007 approximately **800** section 90 consents (i.e. permits which authorise destruction of Aboriginal objects or places) were issued;
- The rate of issue of AHIPs has been increasing over the years, with around half the s90 consents issued in the fourteen years from 1990 to 2004, and the other half issued in the following three years 2005 to 2007;
- Between 2004 and 25 May 2009 approximately **958** s87 permits and s90 consents were issued;

*Note – the figures prior to 2004 do not include s87 consents (ie consents to damage or deface cultural heritage). If s87 consents were included the figures would be much higher.*

- In the first five months of 2009 already **103** s87 and s90 permits have been issued. This is a rate of 5 a week; and
- Around a quarter of the permits issued between 2007 and 2009 were issued to Government agencies. Of these the largest number were issued to the Roads and Traffic Authority, with the second largest number to DECC itself.<sup>32</sup>

In addition to the high rate of authorised destruction, the *National Parks and Wildlife Act* does not currently include provisions for Aboriginal people to be *directly* involved in the process for determining the significance of their cultural heritage, or determining what happens to Aboriginal places or objects.

It does not include a right for Aboriginal people to be consulted or informed about permits to damage and destroy their cultural heritage. Aboriginal people do not have a recognised right through the legislation to direct what happens with their cultural heritage or to take action if it is under threat.

It is important to recognise that this system in NSW has created a significant lack of trust between the Government and developers and the community. The Federal discussion paper focuses on *negotiation* between developers and Aboriginal people. NSWALC recognises that this is an important goal, but must be supported by practical measures.

## b. Environmental Planning and Assessment Act

The main planning law, the *Environmental Planning and Assessment Act 1979*, further undermines the protection of Aboriginal cultural heritage in NSW by removing even the requirement for a permit to be issued before destruction or damage is allowed, in many cases.

**Part 3A** of the *Environmental Planning and Assessment Act 1979* allows the Minister for Planning to designate particular developments as 'state significant', and remove the requirements for a range of assessments, including Aboriginal cultural heritage assessments.<sup>33</sup> Projects approved under Part 3A cannot have certain approvals refused including aquaculture permits, mining leases and pollution licences.<sup>34</sup>

Part 3A developments do not require an Aboriginal Heritage Impact Permit (or AHIP) to be issued. However, the Director General of the Department of Planning may choose to require proponents to assess Aboriginal cultural heritage. It is not known what percentage of Part 3A projects include a requirement for a culture and heritage assessment, as this data is not published.

During 2007-08, the Minister for Planning determined 296 projects under Part 3A. Of these, 295 were approved and only 1 was refused.<sup>35</sup>

## c. Heritage Act

Some limited protection of Aboriginal culture and heritage is offered by the NSW *Heritage Act 1977*. The *Heritage Act 1977* establishes the Heritage Council and the State Heritage Register, and is administered by the Department of Planning. Items of heritage value can be added to the State Heritage Register by the Minister for Planning with advice from the Heritage Council.

Listing on the State Heritage Register provides objects and places with a higher level of protection than under the *National Parks and Wildlife Act 1974*, because listed places cannot generally be demolished, redeveloped or otherwise altered without the approval of the Heritage Council. However, the Minister for Planning can approve Part 3A projects that cause damage to heritage listed places.

There are currently only 9 places listed for their significance for Aboriginal people on the State Heritage Register, from a total of around 1500 listings.<sup>36</sup> The Heritage Council has indicated its intention to add more items of Aboriginal heritage significance by identifying Aboriginal heritage as one of its four 'themes' in 2009-2010.<sup>37</sup>

## d. Reform in NSW

It is clear that the current system for the protection of Aboriginal cultural heritage in NSW has failed to protect Aboriginal culture and heritage, and is in urgent need of reform.

NSWALC has called for the NSW Government to commit to wide-ranging and urgent reform of the Aboriginal culture and heritage system through the development of an **Aboriginal Cultural Heritage Bill** and an **Aboriginal Cultural Heritage Commission** based on recognition that the ownership of Aboriginal cultural heritage lies with Aboriginal people.

Until the NSW Government enacts the major reforms needed, it is essential that avenues such as applying to the Federal Minister for emergency and long term protection remain open.

It is also essential that the accreditation standards proposed set a standard significantly higher than that currently in operation in NSW. As outlined in the Executive Summary for this submission, it is clear that NSW laws would not meet the minimum standard proposed in the discussion paper.

It is unclear, however, whether NSW would be considered to meet the standard if there were amendments to the National Parks and Wildlife Act or to another one of the key laws, such as the *Heritage Act*.

The lessons from the past and current failures of the system in NSW should be factored in to any accreditation scheme and standards to ensure that the system endorsed by the Federal Government is rigorous enough to offer effective protection to Aboriginal culture and heritage.

## 5. Recommendations in response to proposed reforms

### a. Who can apply for protection

Currently any Aboriginal or Torres Strait Islander person can apply to the Federal Minister for a declaration to protect a significant area or object.<sup>38</sup>

The Federal Government is proposing to limit who can apply for protection to “legally recognised traditional custodians” in areas where they have been recognised. The discussion paper states that “*Where there are no Indigenous people who clearly have a statutory responsibility for the land...any Indigenous person could apply for protection.*”<sup>39</sup>

In terms of determining who speaks for Country in a particular area, NSWALC appreciates that there may be differing views, and that circumstances vary in different regions.

In NSW traditional owner groups, native title claimants, native title holders and Aboriginal Owners which are recognised on the Register of Aboriginal Owners under the *Aboriginal Land Rights Act* (NSW) may exist in an area. These groups may be linked to, or separate from, Local Aboriginal Land Councils (LALCs). The culture and heritage responsibilities of these groups may, and often do, overlap.

It is not clear if the proposed definition of groups that can apply to the Federal Minister will include Local Aboriginal Land Councils, which are elected from the wider Aboriginal community and do not include specific positions for traditional owners on their boards.

As previously outlined in Section 2 of this submission, LALCs have important responsibilities under the *Aboriginal Land Rights Act* as the representative body for Aboriginal people within their boundaries, and for protection of culture and heritage within their boundaries. These responsibilities continue even where an area is subject to an Indigenous Land Use Agreement or other form of agreement signed with a traditional owner group.

While NSWALC recognises and respects the role of traditional owners, native title and Elders groups in relation to issues of land and culture and heritage, it is important that the role of LALCs is also recognised. This includes by:

- Including LALCs in the list of groups who can make an application to the Minister,
- Notifying LALCs when an application is made over an area within their boundaries, and
- Involving the LALC in discussions regarding the significance of an area and the appropriate action in relation to an area.

In determining whether an applicant has the right to speak on a particular culture and heritage issue or in relation to an area over which an application has been made, it is important that the Aboriginal community be given the opportunity to resolve any disagreements about this amongst themselves. This discussion must prioritise the involvement of the key parties with traditional and legislative responsibilities for culture and heritage in NSW, as outlined in Section 2. The proposed reforms should not reflect that it would be sufficient for proponents or governments to decide who should be consulted or to consult based on lists kept by governments that are not transparent.<sup>40</sup>

Local Aboriginal Land Councils (LALCs) must be included in the list of groups which are able to apply to the Federal Minister for emergency protection, for areas and objects within their boundaries.

As LALCs are the elected voice for Aboriginal people in NSW, with legislative responsibilities to advocate for the interests of the local Aboriginal community and to protect and promote Aboriginal culture and heritage, it is important that LALCs be invited to participate in discussions about who speaks for Country in an area.

## b. Accreditation and standards

The Federal Government is proposing to introduce a new system of accreditation for state and territory legislation. Under the proposals, if the Federal Minister accepts that a state has 'effective' legislation, such as the *National Parks and Wildlife Act 1974* in NSW, the state could receive accreditation.

If a state becomes accredited, any application for protection at a Federal level will be referred back to the state. The state or territory government would then only be required to "consider" any information or advice provided by the Federal Minister. This change would remove the ability of the Federal Minister to step in and take action in 'accredited' States, even if that State has failed to protect a particular site.<sup>41</sup>

It would limit the current powers of the Federal Minister so that he or she could *not* override the decisions made by a state or territory whose laws had been accredited.

The processes for applying to the Federal Minister must be retained and strengthened to allow Aboriginal people to have an alternative option for protecting cultural heritage.



## *Assessment of cultural heritage when an activity is proposed*

The discussion paper outlines a ‘preferred process’ which state and territory laws would need to adopt in order to become accredited. This process outlines the way that cultural heritage would need to be ‘assessed’ and ‘considered’ by governments and proponents.<sup>42</sup>

NSWALC has a number of concerns about the proposed new process. For example, in a situation where agreement between the Aboriginal community and the developer is not reached, it is unclear how traditional custodians will be involved in the assessment process, and how this information will be recorded and assessed.

The discussion paper outlines a *list of matters* that a state or territory government, as the decision maker, would need to consider before they made a decision about whether to approve a proposed activity.

The proposals do not specify what weight would be given to the views of Aboriginal people and the need to protect the areas, compared to ‘*the interests of the proponent*’. It is unclear what will be considered ‘*practical options to avoid or minimise the likely impact*’, and whether economic considerations will outweigh the need to protect cultural heritage.

In NSW there have been a number of examples of destruction relating to Aboriginal Heritage Impact Permits (AHIPs) that are issued by the NSW Government. There have also been concerns raised regarding the conditions of permits being varied once they have been issued without consulting with the Aboriginal community.

In NSW the assessment of Aboriginal cultural heritage is generally undertaken based on the ‘*Aboriginal Cultural Heritage Standards and Guidelines Kit*’.<sup>43</sup> Such heritage studies have raised issues regarding local councils, developers and other agencies referring to published heritage studies, instead of consulting with the Aboriginal community.

Similar concerns have been raised regarding the database for recording information about Aboriginal cultural heritage. Although the Aboriginal Heritage Information Management System (AHIMS), which is managed by the NSW Department of Environment, Climate Change and Water (DECCW), is reported to contain inaccurate and incomplete information, developers and local councils are often directed to this source for information without talking to the Aboriginal community.

These examples are listed to demonstrate that any proposed minimum standards must be comprehensive to ensure that they work in practice and provide incentives for developers to follow the right procedures.

The current laws in NSW should not meet the proposed minimum standards, and should not be accredited.

The proposed standards should reflect international best practice and be consistent with Australia’s international obligations such as the United Nations *Declaration on the Rights of Indigenous People*.

## c. Protecting cultural heritage

### *Purposes of the legislation*

Currently the purposes of the ATSIHP Act are “*the preservation and protection from injury or desecration of areas and objects in Australia and Australian waters, being areas that are of particular significance to Aboriginals in accordance with Aboriginal tradition*”.<sup>44</sup>

The discussion paper proposes to change the purposes of the Act to “support” state and territory heritage laws and development approval processes. The discussion paper outlines a list of new purposes that are intended to “*consider the impacts on Indigenous traditional areas and objects in full in decisions about land use and development*”.<sup>45</sup>

Clarifying the purposes of the legislation is a positive step if it recognises, values and actively supports the relationship Aboriginal and Torres Strait Islander people have to their culture and heritage.

NSWALC is concerned about the emphasis placed on the needs of proponents, rather than the needs of the Aboriginal community, in the proposed purposes of the ATSIHP Act.

There is also concern that limited decision making capacity is given to the Aboriginal community and that Aboriginal people are not recognised as owners of their heritage in the purposes of the Act. The proposals outlined in the discussion paper also appear to fail to allow Indigenous people to make key decisions about their cultural heritage.

The primary purpose of the ATSIHP Act should be to protect Aboriginal and Torres Strait Islander cultural heritage, reflecting that Aboriginal culture is recognised and respected and that Aboriginal communities have a right to be the key decision makers in relation to the protection and management of culture and heritage. The purposes of the Act must be supported by practical measures.

### *Terminology – new definitions*

Currently the ATSIHP Act can protect “*areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition*”.<sup>46</sup>

The Federal Government proposes to introduce a new definition for ‘objects’ and ‘areas’ that may be protected under the ATSIHP Act.<sup>47</sup> The new definition will require that:

- the object or area “*has a use or function*” or “*is the subject of a narrative*” under traditional laws and customs, AND
- “*is protected or regulated under traditional laws and customs*”.<sup>48</sup>

NSWALC is concerned that these definitions may not adequately protect all Aboriginal culture and heritage. The proposed new definition focuses on ‘*traditional areas and objects*’ which may exclude more contemporary Aboriginal cultural heritage from being protected.

The proposed new definitions outlining what can be protected should not limit the ability of Aboriginal people to protect places because there is a lack of physical evidence or because the area is of more contemporary significance.

## *Secret sacred objects and remains*

Currently under the ATSIHP Act, secret sacred objects may only be protected in some circumstances, such as when an Aboriginal and/or Torres Strait Islander person makes a specific application to the Federal Minister and a declaration has been made.

The new proposals would create a new offence of “secret sacred objects” or “personal remains” being displayed in a public place.<sup>49</sup> However, it is proposed that there would be circumstances where displaying this material would be allowed, such as if the display was made by Aboriginal and/or Torres Strait Islander people in accordance with traditional laws and customs, if the remains were voluntarily donated under Commonwealth, state or territory laws or possibly if the object was imported into Australia for exhibition by a public museum or gallery.

NSWALC supports stronger penalties and the introduction of new offences relating to the display of “sacred objects” and “personal remains”. However, it must be ensured that sufficient resources are allocated to the implementation and monitoring aspects of these offences. Local Aboriginal communities must be consulted and consent to the terms of the display of cultural material.

## *Sensitive information*

It is proposed that, in applications made to the Federal Government, the Federal Minister could decide to protect both culturally and commercially sensitive information.

However, this proposal also states that sensitive information could still be disclosed if protecting this information was not “balanced” by the need for transparency and procedural fairness in the view of the Government. Also, this sensitive information could be exposed if the matter was disputed in the courts.<sup>50</sup>

It is positive that the proposal recognises the need to protect sensitive knowledge. However it is problematic that protection may only be granted in some circumstances, at the discretion of the Federal Minister, and that it is not guaranteed.

The proposal to protect sensitive information in circumstances where the Minister agrees should be strengthened to fully recognise and protect culturally sensitive information. NSWALC supports the proposal for strong penalties for breaches of confidentiality.

The proposal fails to recognise that other kinds of cultural knowledge may also need to be protected by taking intellectual property into consideration. NSWALC is aware of concerns raised by members of the Aboriginal community that there have been occasions where traditional ecological knowledge has been inappropriately utilised and then published by heritage consultants or researchers. Traditional ecological knowledge should also be protected, and there should be mechanisms in place to allow for this.

NSWALC supports the proposal that any databases or registers should have rigorous access restrictions due to the need to protect cultural knowledge and respect the wishes of the Aboriginal community. The requirement for proponents to access databases should not replace consultation with the Aboriginal community. Members of the Aboriginal community should also be able to access their cultural information on government registers free of charge.

## d. Applying to the Federal Minister for protection

The discussion paper proposes that if the laws in NSW were *not* accredited, legally recognised traditional custodians or their representative bodies, would be eligible to apply to the Federal Minister to protect an area or object. If these do not exist then any Aboriginal and/or Torres Strait Islander would be eligible to apply to the Federal Minister for protection.

Under these proposals the Federal Minister would *not* accept applications to protect cultural heritage if:

- A state or territory law is accredited;
- A traditional custodian of the area has been recognised under native title or land rights laws but the applicant is not applying on their behalf; or
- The activity is permitted under a registered Indigenous Land Use Agreement (ILUA).<sup>51</sup>

The Federal Government is proposing that applications for protection would need to be detailed and meet certain criteria before being accepted by the Federal Minister.

However, as recommended by the Evatt Review, the process of making applications to the Minister should be easy and straight forward.<sup>52</sup> The level of detail to be provided in any application should only be general in nature to protect the knowledge of the local community. Descriptions of the significance of the area or object should be given based on the wishes of the Aboriginal community.

The process of making applications to the Federal Minister to protect cultural heritage should be easy and straight forward. The onus of the application process should not be on Aboriginal people to reveal sensitive information.

The application process should recognise that there are circumstances where documentation may not be readily available, and that there are instances where it may take time to contact the relevant people in the community about the threats to cultural heritage.

### *Interim protection*

Under the current system, where the Federal Minister is satisfied that an object or area is under threat of injury or desecration he or she *may* make a declaration for its protection.<sup>53</sup> There is also a power for emergency declarations to be made where there is a serious and immediate threat of injury or desecration to an object or area.<sup>54</sup>

The Federal Minister must remove a declaration where he or she is satisfied that a state law, such as the main law in NSW relating to culture and heritage the *National Parks and Wildlife Act 1974*, makes 'effective provision' for the protection of the Aboriginal area or object.<sup>55</sup>

The proposal to clarify the reasons for providing and revoking interim protection would no longer allow emergency declarations to be made.<sup>56</sup> Instead an *interim protection order* could be made while an application for longer term protection was being lodged.

This proposal would also introduce new timeframes and new criteria for the making of interim declarations. The discussion paper states that applications to make emergency declarations would need to be more detailed than they are currently. The discussion paper also states that emergency protection would only be provided if there was no other way to protect the heritage while a decision was being made. NSWALC is concerned that this additional requirement may not help to protect cultural heritage, but instead create more barriers.

NSWALC supports the establishment of quicker and more effective processes to protect cultural heritage. Any new criteria for applying to the Federal Minister should not place further burdens on the Aboriginal community in order to have cultural heritage protected. This includes allowing for the provision of oral evidence in some cases. NSWALC supports the delegation of powers by the Federal Minister so that matters can be dealt with more quickly.

### *Longer-term protection*

Under the proposed changes the Minister will only be able to make longer term declarations where an activity would impact on a traditional area or object, *and* would reduce or impede the ability of Aboriginal people to:

- use or enjoy of the area or object under traditional laws and customs, *or*
- maintain their traditional laws and customs about the area or object.

NSWALC does not support the proposed criteria which pose further threats to Aboriginal cultural heritage.

The proposal to clarify the reasons for providing and revoking longer-term protection would also introduce new criteria for when a declaration will be made including a list of things that the Minister would need to consider before making a longer-term protection order.<sup>57</sup> This list is similar to the list proposed for what accredited states or territories would need to consider under proposal 4 in the discussion paper.

As noted above, NSWALC is concerned about the transparency of the decision making process in relation to the “statement of facts” to be considered.

It is also a concern that culturally sensitive information would have to be disclosed in preparation of a “statement of facts”.

The list of proposed factors to be considered by the Federal Minister when making decisions must prioritise the protection of Aboriginal cultural heritage.



## e. Negotiation between developers and Aboriginal people

NSWALC welcomes recognition that effective consultation and negotiation processes for reaching agreement are important. However, the discussion paper does not outline a clear role for what would be expected of members of the Aboriginal community.

‘Consultation’ includes the expectation that the contribution of the Aboriginal community will influence the decision. This means that consultation mechanisms must facilitate the involvement of Aboriginal people in the decision making process.

Consultation processes should also seek input from the community in designing how participation methods and provide participants with the information needed to engage in a meaningful way.

NSWALC supports the recognition that Aboriginal cultural heritage be considered at the earliest stages of planning and development processes. Early ‘consideration’ requirements should be strengthened to ensure that heritage issues are actively addressed and incorporated into future planning proposals. Resources must be allocated to ensure consultation is supported.

There are concerns that developers may not always be able to fulfil these requirements which may lead to further distrust and unacceptable outcomes for Aboriginal people

These concerns are raised because currently in NSW, members of the Aboriginal community have reported that they are aware that:

- sites are being destroyed at alarming rates, and
- it is difficult to protect sites in some circumstance because it is hard to access important areas.

It is unclear how will these kinds of situations be dealt with in a revised ATSIHP Act. NSWALC is concerned that in some circumstances there may be tensions that may make it difficult for a negotiation process to proceed effectively.

It must be ensured that these processes are effective at protecting cultural heritage, rather than becoming ‘tick the box’ exercises for proponents to receive approvals to damage or destroy cultural heritage. Additionally, it must be ensured that these processes are not development driven and that developers do not set the standards for consultation.

There are concerns about how the scale and impacts of proposals would be determined and what guidelines or policies would be followed to make these decisions.<sup>58</sup>

This means that accredited State and Territory laws would need to establish proper and effective requirements for consultation for proponents.

The Federal Government should establish processes to ensure that if developers fail to meet their responsibilities in relation to consultation the Aboriginal community will not be disadvantaged, or limited from protecting cultural heritage.

## Conferences

The Federal Government have outlined proposals to encourage meetings and negotiations before decisions are made about whether to protect “*traditional areas and objects*”. For applications made to the Federal Government, it is proposed that DEWHA could hold conferences between the relevant parties to help the Government decide whether or not to protect cultural heritage.<sup>59</sup>

If a conference were to take place, the discussion paper states that the relevant parties would be defined by the Government, and would set out who would be consulted by DEWHA before they make a decision about an application.

Methods of consultation with Aboriginal people, such as meetings and conferences, must be accessible and appropriate to the needs of the Aboriginal community.

## f. Penalties and enforcement

Currently under the ATSIHP Act, declarations made by the Federal Minister are legally enforceable.

<b>CURRENT maximum penalty for ‘knowingly’ engaging in conduct that contravenes a provision of a declaration made in relation to a significant Aboriginal AREA<sup>60</sup></b>	<b>CURRENT maximum penalty for ‘knowingly’ engaging in conduct that contravenes a provision of a declaration made in relation to a significant Aboriginal OBJECT or OBJECTS<sup>61</sup></b>
\$10,000 or imprisonment for 5 years, or both for a person	\$5,000 or imprisonment for 2 years, or both for a person
\$50,000 for a body corporate	\$25,000 for a body corporate

However, no person or corporation has ever been prosecuted under the ATSIHP Act.<sup>62</sup>

The Federal Government proposes to introduce higher penalties for breaching a protection order as well as remediation or compensation orders to people or companies who have damaged or destroyed areas or objects protected under the ATSIHP Act.<sup>63</sup>

This proposal also suggests that investigators could be given additional powers, such as searching persons or premises for evidence, to monitor compliance with the laws.

NSWALC supports the proposed higher civil and criminal penalties for disobeying a protection order and the introduction of new powers to issue remediation orders, in consultation with the Aboriginal community.

NSWALC supports the introduction of criminal and civil penalties regarding the display of “secret sacred objects” and Indigenous “personal remains”, and for contravening the Minister’s directions about maintaining confidentiality.

NSWALC supports the proposed removal of the defence that a person or body corporate cannot be prosecuted if they breach a declaration of which they were not aware.

The experience too often in NSW has been that there have been few prosecutions under the *National Parks and Wildlife Act* for destroying cultural heritage. This situation has shown that developers or proponents may be willing to pay a fine for destroying cultural heritage.

There have also been concerns raised that the NSW Government has not been willing to take action against people who have illegally damaged Aboriginal cultural heritage, and has not provided adequate resources to support prosecutions.<sup>64</sup>

Stronger incentives for developers should be introduced to protect cultural heritage, and to work with Aboriginal communities. Increased resources also need to be allocated to create awareness in the community about cultural heritage laws to ensure that illegal destruction is more effectively investigated and prosecuted.

## g. Reviews

The discussion paper outlines proposals for timelines and processes for reviewing the ATSIHP Act as well as reviewing the accreditation of states and territories.<sup>65</sup>

NSWALC has concerns that a state or territory that has become accredited could later change its laws or fail to properly administer its laws.

Processes must be established to ensure that state and territory laws are constantly monitored and regularly reviewed in relation to the level of protection they are offering Aboriginal cultural heritage.

For more information about this submission contact the Land, Policy and Research Unit of the NSW Aboriginal Land Council by phone on 02 9689 4444. Copies of NSWALC submissions can be downloaded from [www.alc.org.au](http://www.alc.org.au).

## Footnotes

- 1 A current version of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* can be accessed at [www.comlaw.gov.au](http://www.comlaw.gov.au) Click on 'Browse'. Under 'Acts', click on 'Compilations - Current'. Click on 'Ab'. Click on Aboriginal and Torres Strait Islander Heritage Protection Act 1984.
- 2 See page 4 of the Discussion Paper: '*Indigenous heritage law reform*' available at <http://www.heritage.gov.au/indigenous/lawreform>.
- 3 See page 4 in the Discussion Paper: '*Indigenous heritage law reform*'
- 4 See 'Boobera Lagoon' by Robynne Quiggin, in *Indigenous Law bulletin*, Vol. 5, No. 6, February 2001, accessed <http://www.austlii.edu.au/au/journals/ILB/2001/9.html>
- 5 See proposal 3 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 6 See Answers by the relevant Ministers representing the Minister for the Environment and Climate Change, to *Question on Notice Number 0127* (31 July 2007), *Number 2091* (28 October 2008), *Number 3009* (7 May 2009) and *Number 3120* (17 June 2009), Legislative Council, asked by Ian Cohen MLC, as available to download from the NSW Parliament website at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).
- 7 The proposed standards are outlined in proposal 4 of the discussion paper: '*Indigenous heritage law reform*'
- 8 Department of Environment and Conservation, *National Parks and Wildlife Act 1974: Part 6 Approvals Interim Community Consultation Requirements for Applicants*, available at <http://www.environment.nsw.gov.au/resources/parks/interimConsultationGuidelines.pdf>
- 9 See Section 2A, (1)(b)(i) of the *National Parks and Wildlife Act 1974*
- 10 See Environment Protection and Regulation Group's '*Guide to Determining and Issuing Aboriginal Heritage Impact Permits*', February 2009.
- 11 See, for example, public statements made by the Minister for the Environment in relation to the proposed reforms to the *National Parks and Wildlife Act* in May 2009, through the proposed Omnibus Bill. See also earlier statements made in Hansard in relation to reforms to the National Parks and Wildlife Act 1974 proposed in 2001, as available from the NSW Parliament website at <http://www.parliament.nsw.gov.au>.
- 12 See *Discussion Paper: Reforming New South Wales' Laws for Protection of Aboriginal Cultural Heritage*, prepared by Neva Collings of the Environmental Defender's Office for the 28 May 2009 Culture and Heritage Roundtable.
- 13 For more information on the current laws in NSW see NSWALC's submission on the National Parks and Wildlife Amendment Bill 2009 '*More than Flora and Fauna*' July 2009, accessible [www.alc.org.au](http://www.alc.org.au)
- 14 See section 4, ATSIHP Act
- 15 See Department of the Environment, Water, Heritage and the Arts, 2009, '*Frequently Asked Questions - Improving protection for Indigenous traditional areas and objects*' accessed <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/frequently-asked-questions.pdf>
- 16 See page 4 of the Discussion Paper: '*Indigenous heritage law reform*'
- 17 See 'Boobera Lagoon' by Robynne Quiggin, in *Indigenous Law bulletin*, Vol. 5, No. 6, February 2001, accessed <http://www.austlii.edu.au/au/journals/ILB/2001/9.html>. See also page 78 of the Department of Environment and Heritage Annual Report 2003-04, available at <http://www.environment.gov.au/about/publications/annual-report/03-04/index.html>
- 18 Department of Environment, Water, Heritage and the Arts (2006) '*Annual Report 2005 – 2006*', see page 119, accessed <http://www.environment.gov.au/about/publications/annual-report/05-06/pubs/deh-annualreport05-06-vol1.pdf>
- 19 A summary of the Evatt Review can be accessed in 'Australian Indigenous Law Reporter' Volume 2 No. 3, October 1997 can be accessed at: <http://www.austlii.edu.au/au/journals/AiLR/1997/38.html> See also Key Issue 3 '*Valuing Cultures: Recognising Indigenous Cultures as a valued part of Australian heritage*' in The Council for Aboriginal Reconciliation, 1993, '*Addressing The Key Issues For Reconciliation*', accessed <http://www.austlii.edu.au/au/other/IndigLRes/car/1993/9/>; and Aboriginal and Torres Strait Islander Commission '*Recognition Rights and Reform Report*' 1995, sections 6.1 to 6.76, accessed <http://www.austlii.edu.au/au/other/IndigLRes/1995/1/index.html>
- 20 See the Commonwealth Government's Discussion Paper '*Mabo – The High Court Decision on Native Title*, June 1993
- 21 Justice Elizabeth Evatt recognised a number of problems with the Act including, the 'lack of Aboriginal involvement and respect for custom' and 'uncertainty and delays', referenced above.

# RESPECT AND PROTECT

- 22 See page 4 of the Discussion Paper: '*Indigenous heritage law reform*' available at <http://www.heritage.gov.au/indigenous/lawreform>.
- 23 See page 3 of the Discussion Paper: '*Indigenous heritage law reform*'
- 24 For details on the information sessions see the Department of Environment, Water, Heritage, and the Arts website on 'Reform of Indigenous heritage protection laws', last accessed 27/10/2009 <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html>
- 25 See for example NSWALCs submission 'More than Flora and Fauna' available at [http://www.alc.org.au/resources/c+h/More\\_Than\\_Flora\\_and\\_Fauna.pdf](http://www.alc.org.au/resources/c+h/More_Than_Flora_and_Fauna.pdf)
- 26 United Nations *Declaration on the Rights of Indigenous People*, adopted on 13 September 2007 available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>
- 27 The Federal Government supported the UN Declaration on the Rights of Indigenous People in a speech made by the Hon. Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' at Parliament House, Canberra, **3 April 2009, available at:** [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm)
- 28 See page 18, Discussion Paper: *Indigenous Heritage Law Reform*
- 29 'Closing the gap on Indigenous disadvantage: the challenge For Australia', available at [Http://Www.Fahcsia.Gov.Au/Sa/Indigenous/Pubs/General/Documents/Closing\\_The\\_Gap/Closing\\_The\\_Gap.Pdf](Http://Www.Fahcsia.Gov.Au/Sa/Indigenous/Pubs/General/Documents/Closing_The_Gap/Closing_The_Gap.Pdf)
- 30 Steering Committee for the review of government service provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2007: Overview', Commonwealth of Australia, [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0005/85046/keyindicators2007overview.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0005/85046/keyindicators2007overview.pdf)
- 31 Distress at the current process for the issuing of AHIPs was raised repeatedly during recent consultations held by DECC in 2009 in relation to the Aboriginal Land Management Framework and later the Draft Community Consultation Requirements. See also articles by, Ridge and Seiver 'Carriage – An Elder's Journey through the Courts' [2005] ILB 10; Kennedy 'Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural Heritage Sites' [2005] ILB 57, as available to download from [www.austlii.edu.au](http://www.austlii.edu.au); O'Dwyer 'Aboriginal Heritage Under Threat in NSW' (March 2007) *Chain Reaction Magazine* #99, as available to download from [www.foe.org.au](http://www.foe.org.au) and the EDO *Discussion Paper* (2009) referenced above.
- 32 See Answers by the relevant Ministers representing the Minister for the Environment and Climate Change, to *Question on Notice Number 0127* (31 July 2007), *Number 2091* (28 October 2008), *Number 3009* (7 May 2009) and *Number 3120* (17 June 2009), Legislative Council, asked by Ian Cohen MLC, as available to download from the NSW Parliament website at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au).
- 33 See Environmental Planning and Assessment Act, section 75U
- 34 See Environmental Planning and Assessment Act, section 75V(1)
- 35 See NSW Department of Planning, *NSW Major Development Monitor 2007-08*, NSW Government 2008 page 7, accessed 18/6/2009 [http://www.planning.nsw.gov.au/corporate\\_publications/pdf/major\\_development\\_monitor\\_301008.pdf](http://www.planning.nsw.gov.au/corporate_publications/pdf/major_development_monitor_301008.pdf).
- 36 See *Report of the Independent Expert Panel: A Review of the NSW Heritage Act 1977* (2009), available to download from the NSW Heritage Council website at [http://www.heritage.nsw.gov.au/09\\_subnav\\_02.htm](http://www.heritage.nsw.gov.au/09_subnav_02.htm).
- 37 See the Heritage Council website at <http://www.heritage.nsw.gov.au>.
- 38 See sections 9 & 10 of the ATSIHP Act.
- 39 See proposal 5 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 40 See page 10, Discussion Paper: '*Indigenous heritage law reform*'.
- 41 See proposal 3 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 42 See pages 6 and 17 -22 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 43 NSW National Parks and Wildlife Service, 1997, *Aboriginal Cultural Heritage Standards and Guidelines Kit*, available at <http://www.environment.nsw.gov.au/resources/cultureheritage/aboriginalHeritageGuidelinesKit.pdf>
- 44 See section 4, ATSIHP Act
- 45 See Proposal 1 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 46 See section 4, ATSIHP Act
- 47 See proposal 2 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 48 See proposal 2 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 49 See proposals 8 and 14 of the Discussion Paper: '*Indigenous heritage law reform*'.

- 50 See proposal 11 of the Discussion Paper: 'Indigenous heritage law reform'.
- 51 See proposal 9 of the Discussion Paper: 'Indigenous heritage law reform'.
- 52 This was also a recommendation of the Evatt Review, referenced above
- 53 See sections 10 & 12 of the ATSIHP Act.
- 54 See sections 9 & 18 of the ATSIHP Act.
- 55 See section 13(5) of the ATSIHP Act.
- 56 See proposal 12 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 57 See proposal 13 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 58 See page 34 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 59 See proposal 10 of the Discussion Paper: '*Indigenous heritage law reform*'.
- 60 See Section 22(1) of the ATSIHP Act
- 61 See Section 22(2) of the ATSIHP Act
- 62 See page 46 of the Discussion Paper: '*Indigenous heritage law reform*'
- 63 See proposal 14 of the Discussion Paper: '*Indigenous heritage law reform*'
- 64 See for example Ridge and Seiver [2005], 'Carriage – An Elder's Journey through the Courts' Indigenous Law Bulletin, 10, Vol. 6, No. 9, available at <http://www.austlii.edu.au/au/journals/ILB/2005/10.html>
- 65 See Proposal 15 of the Discussion Paper: '*Indigenous heritage law reform*'



