



Submission on Reforming the Aboriginal Culture and Heritage System in NSW

prepared by

EDO NSW
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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

EDO NSW's **Indigenous Engagement Program** provides for the employment of an Aboriginal solicitor to work on legal issues and matters that affect the heritage of Indigenous communities. This includes litigation, providing legal advice, working on law reform projects and providing community legal education.

Submitted to:

ach.reform@environment.nsw.gov.au

For further information on this submission, please contact:

Mark Holden, Aboriginal Solicitor
Rachel Walmsley, Policy & Law Reform Director

EDO NSW

T: 02 9262 6989

E: mark.holden@edonsw.org.au; rachel.walmsley@edonsw.org.au.

EDO NSW

ABN 72 002 880 864

Level 5, 263 Clarence Street

Sydney NSW 2000 AUSTRALIA

E: edonsw@edonsw.org.au

W: www.edonsw.org.au

T: + 61 2 9262 6989

F: + 61 2 9264 2414

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1. Executive Summary

As a community legal centre specialising in public interest environmental law, EDO NSW has extensive experience working with Aboriginal people in NSW on legal issues relating to the conservation and protection of Aboriginal culture and heritage. We therefore welcome the opportunity to provide comment on the *Reforming the Aboriginal Cultural Heritage System in NSW (Discussion Paper)*. On behalf of our clients we have consistently advocated for stand-alone culture and heritage laws.

It has been our clear position and the position of our Aboriginal clients that Aboriginal people must have a greater role and power in the determination of their own culture and heritage. Feedback from our clients clearly indicates that Aboriginal people feel disempowered when impacts on their culture and heritage are decided by a third party, and when legal assessment processes in practice result in their knowledge being considered secondary to the non-Aboriginal survey and analysis of their heritage.

Since 2009, we have engaged with a number of Aboriginal stakeholders who have experienced the NSW culture and heritage laws in action. We have convened roundtable discussions on culture and heritage law reform, and conducted a number of workshops in different regions with Aboriginal clients and other traditional owners and custodians. We have also provided extensive advice over the phone and when visiting communities, to concerned clients on culture and heritage issues.

In 2011, we lodged a submission to the state working party on culture and heritage that consolidated consultation feedback into a number of recommendations.¹ These recommendations remain relevant, and this submission examines the extent to which these concerns have been addressed in the Discussion Paper.

Led by our Aboriginal solicitor, employed under our Indigenous Engagement Program, EDO NSW has consulted with 121 Aboriginal clients and stakeholders at local community workshops and meetings, and over the phone where a face to face meeting was not possible, over recent weeks. We discussed reform issues with Aboriginal people from the following areas:

- Moree;
- Walgett;
- Inverell;
- Northern beaches;
- Lismore;
- Byron Bay;
- Grafton.

¹ 'Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform', EDONSW 19 December 2011: http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/267/attachments/original/1380615822/111219culture_heritage_reform.pdf?1380615822.

We have also drawn on feedback from previous roundtables convened for Aboriginal clients of EDO NSW to discuss culture and heritage law reform, our *Caring for Country* booklet, our previous law reform submissions, and on cases we have conducted on behalf of Aboriginal clients in NSW.

This submission details the range of concerns raised during our consultations. Key concerns focussed on the lack of specific detail regarding how some of the options set out in the Discussion Paper would work in practice, and the related concern that the proposed processes would make unreasonable demands for traditional owners and custodians to comply with, whilst not fully resolving existing challenges and inequities.

We are also concerned as to how the concepts outlined in the Discussion Paper will interact with the proposed reforms to the *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)*. The broader planning reforms propose to streamline the development assessment process in NSW which may impact on how culture and heritage is assessed.

The lack of detail in the Discussion Paper on how various reform options would work in practical terms make it difficult for our clients and stakeholders to support the proposed concepts. As currently proposed, there is no evidence to suggest that the new legislation will achieve the necessary balance between economic and cultural prosperity.

In summary, while the overall proposal to enact stand-alone legislation to protect Aboriginal culture and heritage is a positive and long-overdue reform, we are concerned that some key elements of the Discussion Paper are inconsistent with the cultural values of Aboriginal communities, traditional owners and traditional custodians. Some of the proposed measures are unrealistic for Aboriginal communities to accomplish in the short-term and possibly long-term, due to the lack of resources and history of dispossession.

This submission makes 25 recommendations.

Summary of recommendations

Recommendation 1: The new culture and heritage legislation should not be introduced to the NSW parliament until there has been extensive consultation with Aboriginal people on the proposed wording and the practical implications of the new laws.

Recommendation 2: Legislative amendments must be made to relevant planning laws in NSW to ensure the new culture and heritage laws apply to all projects that impact upon Aboriginal culture and heritage.

Recommendation 3: The new legislation must provide for the establishment of an overarching independent Aboriginal culture and heritage body to support the local ACH Committees.

Recommendation 4: The new legislation should provide the right for traditional owners to bring legal action to enforce a breach of the new Act.

Recommendation 5: Revise current sentencing principles under the proposed stand-alone legislation.

Recommendation 6: Ensure the new legislation provides for a range of remedies and enforcement orders to be available for offences involving harm to Aboriginal culture and heritage.

Recommendation 7: The objectives of the proposed legislation should refer to the principles of ESD, for example, the principle of intergenerational equity.

Recommendation 8: The new legislation must include provisions that operationalise the objects by requiring all decision and plan making to be done in accordance with the objectives.

Recommendation 9: The definition of culture and heritage must ensure that broader natural resources in the surrounding landscape are included where relevant.

Recommendation 10: Definitions in the new legislation must not preclude the appropriate recognition, consideration and protection of contemporary culture and heritage.

Recommendation 11: The new legislation must include clear specific provisions on the ownership and rights to intellectual property with regard to registered Aboriginal culture and heritage.

Recommendation 12: To address the range of concerns raised, it may be necessary to expand the definition of Aboriginal culture and heritage into a non-exhaustive, but comprehensive set of terms to more effectively cover the field.

Recommendation 13: The new Act must clarify the custodianship and ownership structure of Aboriginal culture and heritage by appropriate Aboriginal people.

Recommendation 14: The new legislation must stipulate clear and transparent committee processes, for example, in relation to potential conflicts of interest, for example, where a committee member or an influential relation of this member has a commercial enterprise that would benefit from a development going ahead.

Recommendation 15: The new legislation should only allow an Independent Commission (as recommended) to approve the appointment or removal of committee members.

Recommendation 16: The new legislation must set out clear and transparent rules for dispute resolution, including a code of conduct for each committee.

Recommendation 17: The new legislation must set out clear requirements for government departments, non-government organisations and industries to demonstrate a level of cultural competency when engaging with Aboriginal communities on Aboriginal culture and heritage.

Recommendation 18: Further consultation is required on appropriate local boundaries to ensure they are culturally appropriate.

Recommendation 19: The new legislation must set out appropriate limitations on access to culturally sensitive information. Local committees should determine what can be made public.

Recommendation 20: The new legislation must not prejudice any committee or community for not being able to finalise their management plan. Should any plan of management remain incomplete, there must remain a presumption of Aboriginal culture and heritage within the subject area.

Recommendation 21: The NSW Government must be responsible for providing the start-up funding to each committee, as well as any funding as required to adequately implement their management plans.

Recommendation 22: The high/low significance differentiation is eliminated and instead replaced with a description of the areas 'cultural significance'.

Recommendation 23: The new legislation must include provisions for an Aboriginal culture and heritage committee to have their plan of management reviewed through independent mechanisms, including an independent commission or by merits appeal to the NSW Land and Environment Court.

Recommendation 24: The new legislation explicitly provide for the following:

- Free prior and informed consent of the committee to veto the development if it unacceptably impacts an area of cultural significance;
- The timeframe to negotiate with the developer be extended to include time to adequately consult with the community;
- The OEHL provide further information, in consultation with the DPI as to how this model would work with State Significant Development under the new planning legislation.

Recommendation 25: The new legislation must provide a right for a local committee or a traditional owner/custodian to bring an action to enforce a breach of the Act.

2. Introduction

As one Elder puts it: *'our culture is our identity'*.

Aboriginal culture, and the heritage that manifests from it, cements the connections between individuals and their communities. Culture and heritage is an essential element of cultural identity for Aboriginal communities affected by past generations of dispossession, displacement and assimilation into other cultures. Cultural connection to family and land empowers the individual and the community, and this is important in addressing intergenerational trauma.²

A right to culture is enshrined in international law under Article 27 of the UN Convention of Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The right to culture has been recognised by the international community as a particular right for indigenous peoples that is in danger. Indigenous peoples globally endure the common problem of being dispossessed of their lands and culture. Consequently, the *UN Declaration on the Rights of Indigenous Peoples* was drafted and accepted as a means of interpreting the right to culture under the *International Convention on Civil and Political Rights* specifically for indigenous peoples. Specifically, Article 11(2) of the Declaration provides:

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their culture, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

The Declaration was eventually accepted by the Australian Government in April 2008. In May 2013, the Gillard government delivered a commitment to the UN Permanent Forum of Indigenous Issues (UNPFII) to:

*"to increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done"*³

It is unknown as to whether this commitment will continue under the current Australian Government.

² 'Social Justice Report 2011', Australian Human Rights Commission 2012

<http://www.humanrights.gov.au/publications/social-justice-report-2011> (date accessed 25 March 2014).

³ Joint Statement by the Australian Government and the Australian Human Rights Commission on Agenda Item 7 (Delivered at the 12th Session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

The rights of indigenous peoples - including their right to culture - have become increasingly recognised throughout Australia in the laws of some individual states and territories. This is evidenced for example, by the repeal of laws that only considered the 'relics' of Aboriginal occupation and the making of new laws that reflect the need to protect both the culture and heritage of Aboriginal peoples in Queensland⁴ and Victoria⁵.

Unfortunately, current NSW legislation remains focussed on protecting Aboriginal objects under the *National Parks and Wildlife Act 1974 (NSW) (NPW Act)*. From the increasing amount of development in NSW, including its mining boom, many Aboriginal communities, both traditional owners and custodians, have lost their confidence in existing laws and the capacity of the NSW Government to protect their culture and heritage.

It has been our clear position and the position of our Aboriginal clients that Aboriginal people need to have a greater role and power in the determination of their own culture and heritage. Feedback clearly indicates that Aboriginal people feel disempowered when impacts on their culture and heritage are decided by a third party, and when legal assessment processes in practice result in their knowledge being considered secondary to the non-Aboriginal survey and analysis of their heritage.

Since 2009, we have engaged with a number of Aboriginal stakeholders who have experienced the NSW culture and heritage in action. We have convened two roundtable discussions on culture and heritage law reform, and conducted a number of workshops in different regions with Aboriginal clients and other traditional owners and custodians. We have also provided extensive advice over the phone and when visiting communities, to concerned clients on culture and heritage issues.

On 19 December 2011, we lodged a submission to the state working party on culture and heritage that consolidated consultation feedback into a number of recommendations.⁶ The following table compares our recommendations with what is proposed by the Discussion Paper.

10 key recommendations	Do the proposed reforms reflect this?
1. <i>Independent legislation be enacted for the protection of Aboriginal culture and heritage in NSW.</i>	The Discussion Paper addresses this, but does not show how proposed concepts will interact with the proposed planning laws.
2. <i>This legislation be administered by an independent commission, governed by representatives of NSW Aboriginal communities</i>	The Discussion Paper does not include this. The Discussion Paper indicates that the Minister for Environment still retains ultimate discretion for the appointment of committee members and consent to plans of management.
3. <i>Appropriate resourcing be provided for the prosecution of offences relating to Aboriginal culture and heritage.</i>	The Discussion Paper does not include this and the recent changes to the Office of Environment and Heritage are of concern.

⁴ See section 8 of the *Aboriginal Cultural Heritage Act 2003 (Qld)*.

⁵ See section 4 of the *Aboriginal Heritage Act 2006 (Vic)*.

⁶ 'Submission to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform', EDONSW 19 December 2011: http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/267/attachments/original/1380615822/111219culture_heritage_reform.pdf?1380615822.

<p>4. <i>The goal of protecting Aboriginal culture and heritage be made a consistent theme of all relevant legislation, especially in NSW.</i></p>	<p>The Discussion Paper does include this objective, but it is too vague in effect. The Discussion Paper also does not indicate how the new legislation will interact with other legislation, including the <i>Planning Bill 2013</i>. The Discussion Paper does not include a reference to Ecologically Sustainable Development.</p>
<p>5. <i>Definitions of the kind of culture and heritage that are protected be based on the significance of that culture and heritage for present and future Aboriginal people and communities.</i></p>	<p>The Discussion Paper addresses this, but the proposed definition needs to be expanded in scope to recognise contemporary forms of culture and heritage. The Discussion Paper refers to the need to protect cultural 'landscapes' but does not specifically include reference to potentially relevant natural resources in the surrounding area.</p>
<p>6. <i>Ownership of Aboriginal objects be vested in appropriate Aboriginal people, not the NSW Government.</i></p>	<p>The Discussion Paper does not specifically propose objects be vested in local committees, even though it is acknowledged that the Committees have authority to make decisions. The proposed ACH register also does not allow for ownership of culture and heritage, including ownership of intellectual property.</p>
<p>7. <i>Determination of processes for identifying persons culturally authorised to speak on culture and heritage issues be undertaken through broad consultation with Aboriginal people.</i></p>	<p>The Discussion Paper attempts to address this through the proposed local committees, but assumes the committee will not need to consult with specific or wider communities.</p>
<p>8. <i>Aboriginal people be given control over the use of their knowledge of culture and heritage issues and sites of significance, including where such information is listed in publicly-accessible databases.</i></p>	<p>The Discussion Paper includes a public register of culture and heritage information, with some exceptions for sensitive information. It would be preferable to describe the general area as significant only and allow further private discussions with the consent of the traditional owners to discuss the significance of the area.</p>
<p>9. <i>Appropriate Aboriginal people be given the right to determine what use is made of their culture and heritage. Accordingly, their free, prior informed consent must be sought in granting any application for an Aboriginal Heritage Impact Permit, with compensation payable where appropriate.</i></p>	<p>The consultation process outlined in the Discussion Paper does not satisfy this recommendation. The Discussion Paper does not propose a clear right to give/refuse consent and does not allow third party appeal rights.</p>
<p>10. <i>Aboriginal people be given appropriate enforcement rights in relation to the law for protection of their culture and heritage.</i></p>	<p>The Discussion Paper does not address this.</p>

These recommendations remain relevant to the key issues raised in the Discussion Paper and by our clients and stakeholders. Accordingly, this submission addresses these issues in turn.

3. Independent legislation be enacted for the protection of Aboriginal culture and heritage in NSW.

Under the current NSW system, Aboriginal heritage is regulated under the *National Parks and Wildlife Act 1974 (NSW)* (**NPW Act**) and the *National Parks and Wildlife Regulations 2009 (NSW)* (**NPW Regulations**). Both laws were enacted to protect the natural landscape of NSW, as well as any Aboriginal objects. The *Heritage Act 2006 (NSW)* does have powers to protect Aboriginal culture and heritage, but only to declare places of state or local significance. The Discussion Paper seeks to repeal parts of the NPW Act and enact stand-alone legislation for the protection of Aboriginal culture and heritage.

Clear and consistent feedback was that it is offensive for Aboriginal culture and heritage to be dealt with under laws for flora and fauna. EDONSW strongly supports stand-alone legislation.

A new stand-alone Act must still operate in the context of other related NSW legislation. We remain concerned as to how the new legislation will effectively protect Aboriginal heritage, particularly in light of the proposed planning reforms. The current planning laws allow requirements for procuring consent to harm Aboriginal objects to be circumvented for certain projects. The NPW Act gives the Director-General of the OEH authority to issue a permit to harm Aboriginal objects⁷, however if the development is State-Significant Development (**SSD**) under the EP&A Act, the proponent is not required to apply for this permit and need only seek approval either from the Minister for Planning or the NSW Planning and Assessment Commission under the EPA Act.⁸

EDO NSW is concerned that the proposed culture and heritage legislation could be circumvented by particular provisions of the planning laws for particular developments. Positive and empowering provisions of a new Act could potentially be undermined by planning legislation. EDO NSW therefore cannot support the proposed reform to implement stand-alone legislation, unless there are necessary legislative amendments made to relevant planning laws to ensure the new culture and heritage laws apply to all projects that impact upon Aboriginal culture and heritage.

Recommendation 1: The new culture and heritage legislation should not be introduced to the NSW parliament until there has been extensive consultation with Aboriginal people on the proposed wording and the practical implications of the new laws.

Recommendation 2: Legislative amendments must be made to relevant planning laws in NSW to ensure the new culture and heritage laws apply to all projects that impact upon Aboriginal culture and heritage.

⁷ Section 90C(1) of the *National Parks and Wildlife Act 1974 (NSW)*.

⁸ Section 89J(1)(d) of the *Environmental Planning and Assessment Act 1979 (NSW)*.

4. Legislation be administered by an independent commission, governed by representatives of NSW Aboriginal communities

Currently, the Director-General of the OEH has the discretion under Section 90 of the NPW Act to approve any harm to “a specified Aboriginal object, Aboriginal place, land, activity or person or specified types or classes of Aboriginal objects, Aboriginal places, land, activities or persons”⁹. For State Significant Development, this role lies with either the Minister for Planning or the NSW Planning and Assessment Commission.

In our previous 2011 submission, we recommended the establishment of an independent body to manage and protect culture and heritage. This body should be able to support and delegate authority to each local committee to ensure they operate adequately. This has been a recommendation since the Keane Committee released its report in 1980¹⁰. We note that presently the OEH is advised by the Aboriginal Cultural Heritage Advisory Committee (ACHAC), but this committee has no specific enforcement or support functions.

The Discussion Paper aims to establish local ‘Aboriginal Cultural Heritage Committees’. These local Committees represent an attempt to create independent bodies, but the committees are still subject to the discretion of the Minister. Furthermore, while the Discussion Paper does suggest an expanded strategic advisory role for ACHAC¹¹, there are no plans to implement an overarching independent body such as the independent commission recommended by EDO NSW and others. ACHAC has no clear support or administrative role for the local ACH Committees, either through complaint handling, providing expert assistance or independent management of funding.

Recommendation 3: The new legislation must provide for the establishment of an overarching independent Aboriginal culture and heritage body to support the local ACH Committees.

5. Appropriate resourcing be provided for the prosecution of offences relating to Aboriginal culture and heritage.

The NSW OEH is currently responsible for the prosecution of offences under the NPW Act. The NPW Act has provisions that make it an offence to harm or desecrate either Aboriginal objects or places. Section 86 (1)–(5) provides:

86 Harming or desecrating Aboriginal objects and Aboriginal places

(1) A person must not harm or desecrate an object that the person knows is an Aboriginal object.

Maximum penalty:

⁹ Section 90(3) of the *National Parks and Wildlife Act 1974 (NSW)*.

¹⁰ NSW Select Committee of the Legislative Assembly upon Aborigines, First Report, *Aboriginal Land Rights and Sacred and Significant Sites* (Chairman: MF Keane MP) Sydney, 1980.

¹¹ Page 12 of the Discussion Paper.

- (a) *in the case of an individual—2,500 penalty units or imprisonment for 1 year, or both, or (in circumstances of aggravation) 5,000 penalty units or imprisonment for 2 years, or both, or*
- (b) *in the case of a corporation—10,000 penalty units.*

(2) *A person must not harm an Aboriginal object.*

Maximum penalty:

- (a) *in the case of an individual—500 penalty units or (in circumstances of aggravation) 1,000 penalty units, or*
- (b) *in the case of a corporation—2,000 penalty units.*

(3) *For the purposes of this section, **circumstances of aggravation** are:*

- (a) *that the offence was committed in the course of carrying out a commercial activity, or*
- (b) *that the offence was the second or subsequent occasion on which the offender was convicted of an offence under this section.*

This subsection does not apply unless the circumstances of aggravation were identified in the court attendance notice or summons for the offence.

(4) *A person must not harm or desecrate an Aboriginal place.*

Maximum penalty:

- (a) *in the case of an individual—5,000 penalty units or imprisonment for 2 years, or both, or*
- (b) *in the case of a corporation—10,000 penalty units.*

(5) *The offences under subsections (2) and (4) are offences of strict liability and the defence of honest and reasonable mistake of fact applies.*

The NPW Act was amended in October 2010 to include strict liability offences (section 86(5)). In our 2011 submission, we noted that from the period from 2005 to 2011, there were only four distinct prosecutions, with fines totalling \$6,150.

Since 2011, the only prosecution against a developer for harming Aboriginal objects was *Chief Executive, Office of Environment and Heritage v Ausgrid*¹². This was a prosecution under Section 86(2) of the NPW Act, which provides for a maximum penalty of \$220,000 for corporations. Instead, the penalty handed down by the Court in this case was \$4,690.

In the same time period, 273 applications for Aboriginal Heritage Impact Permits (**AHIP**) were lodged with the OEH. Of the 251 that were determined by the OEH, only two were refused¹³.

¹² [2013] NSWLEC 51.

¹³ *NSW Budget Estimates 2013-2014 – Environment – answers to supplementary questions*, page 17 ([http://www.parliament.nsw.gov.au/prod/parlament/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/parlament/committee.nsf/0/cc7a2af1c2769eb4ca257be3002d3a3e/$FILE/83118337.pdf/Answers%20to%20supplementary%20questions%20-%20Minister%20Parker%20-%20The%20Environment%20-%20Heritage.pdf)) date accessed 28 March 2014.

Since 2013, the OEH has only 21 compliance officers to handle complaints across a wide range of projects and programs, including Aboriginal culture and heritage matters. Consequently, only 25 of the 41 (61%) of complaints registered for the period between 1 July 2012 and 30 June 2013 were investigated¹⁴.

Many stakeholders have expressed their disappointment with the number of prosecutions in comparison to the number of AHIPS issued. They are even more disappointed with the extremely low penalties issued to the offenders. Such low penalties have no deterrence value and send a message to developers that any fines will be minimal.

The Discussion Paper indicates the new legislation will retain the existing offences, defences and penalty provisions in place (p37). This is not sufficient to address the problems of the current system. The general consensus in our stakeholder consultations was that traditional owners should have the right to pursue legal action against developers for harming their heritage, rather than waiting for the OEH to take action. This is discussed further below.

Recommendation 4: The new legislation should provide the right for traditional owners to bring legal action to enforce a breach of the new Act.

Recommendation 5: Revise current sentencing principles under the proposed stand-alone legislation.

Recommendation 6: Ensure the new legislation provides for a range of remedies and enforcement orders be available for offences involving the harm to Aboriginal culture and heritage.

6. The goal of protecting Aboriginal culture and heritage be made a consistent theme of all relevant NSW legislation

Currently, the legislative objectives for culture and heritage are:¹⁵

2A Objects of Act

(1) *The objects of this Act are as follows:*

...

(b) *the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:*

(i) *places, objects and features of significance to Aboriginal people, and*

(ii) *places of social value to the people of New South Wales, and*

(iii) *places of historic, architectural or scientific significance,*

¹⁴ NSW Budget Estimates 2013-2014 – Environment – answers to supplementary questions, page 18 ([http://www.parliament.nsw.gov.au/prod/parlment/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/parlment/committee.nsf/0/cc7a2af1c2769eb4ca257be3002d3a3e/$FILE/83118337.pdf/Answers%20to%20supplementary%20questions%20-%20Minister%20Parker%20-%20The%20Environment%20-%20Heritage.pdf)) date accessed 28 March 2014.

¹⁵ Section 2A(1)(b) and (c) and subsection (2) of the NPW Act.

(c) fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation,

(2) The objects of this Act are to be achieved by applying the principles of ecologically sustainable development.

The objectives under the NPW Act are also a factor to be considered when the Director-General considers granting an AHIP¹⁶. However, these objectives do not give the Director-General any obligation to consult with the traditional owners or custodians.

The Discussion Paper's objectives of the new Act are:

The Legislation seeks to protect the ACH values identified as important to Aboriginal people of 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.¹⁷*

The main difference between these objectives and the current objectives under the NPW Act is the recognition of the spiritual and symbiotic relationship of traditional owners with their land.

However, much like the previous iterations, it is unclear whether these objectives will have any practical effect, and how these objectives will interact with the competing objectives of proposed planning legislation.

The objectives also make no reference to other principles of conservation, including the principle of Ecologically Sustainable Development (**ESD**).¹⁸ ESD is relevant to the protection of Aboriginal culture and heritage, for example as it includes the principle of intergenerational 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”¹⁹

This is a very relevant principle to consider towards the protection of Aboriginal culture and heritage and has been considered by the NSW Land and Environment Court when considering AHIPs under the NPW Act. Her Honour Justice Pain made some useful

¹⁶ Section 90K(1)(a) of the *National Parks and Wildlife Act 1974 (NSW)*.

¹⁷ Page 13 of the Discussion Paper.

¹⁸ ESD is defined under section 6(2) of the *Protection of Environment Administration Act 1991 (NSW)*. ESD is also currently an object under the EP&A Act¹⁸, and must be considered by every consent authority under the EP&A Act: *BGP Properties v Lake Macquarie City Council* [2004] NSWLEC 399 at [133].

¹⁹ Section 6(2)(b) of the *Protection of Environment Administration Act 1991 (NSW)*.

comments about culture and heritage in *Anderson v Director-General Department of Environment and Conservation*²⁰. She stated:

*I agree with the applicants' submission that the right for Aboriginal people to enjoy objects of Aboriginal heritage is a right recognized by Article 5 of CERDS and consequently s10(1) and (2) of the Racial Discrimination Act. For Aboriginal people, participation in cultural activities is associated with those places and objects that are of cultural value or significance. If Aboriginal heritage is destroyed, their ability to participate and enjoy participation in associated cultural activities is diminished.*²¹

Her Honour found that cultural significance is a relevant consideration for the Director-General in determining consents to destroy issued under section 90 of the NPW Act and that it was important the decision maker has on hand the most recent and accurate information in determining cultural significance.²² In this case, Her Honour found that the Director-General had erred by not having in front of him the most recent reports on culture and heritage. Her Honour went onto consider the principles of ESD:

*One of the principles of ESD is that of inter-generational equity. He is not literally required by the NPW Act to refer to these but in the circumstances of the case it is striking that he has not referred to issues relevant to an assessment of significance from an inter-generational perspective. This is particularly so in light of the applicants' claim that the reason this site was so important to them was because of the destruction on the other half of Angels beach of Aboriginal objects significant to the Bandjalung people. A subdivision that was built on the site in the early 1990s at the time a consent to destroy under s.90 was also issued. Inter-generational equity is the principle whereby the present generation should ensure that the health, diversity and productivity of the environment be maintained or enhanced for the benefit of future generations (Protection of the Environment Administration Act 1991 (NSW) 6(2)). A key matter attested to in the applicant's affidavits and evidence in the case is the importance to Aboriginal people of sites where their ancestors have been present demonstrated by, inter alia, the presence of objects which they consider significant by virtue of that association. Obviously the fewer of these sites that remain the less opportunity there will be for future generations of Aboriginal people to enjoy the cultural benefits of those sites.*²³

...

In order for an essential analysis of significance to be undertaken as required by the ESD principles, Mr Naden should have undertaken or ensured was undertaken an analysis of how many intact middens relevant to the Bandjalung people remained in the immediate area. It would appear that consideration of the cumulative impacts of destruction of Aboriginal objects of significance to Aboriginal traditional owners is

²⁰ (2006) 144 LGERA 43.

²¹ Ibid at 64.

²² At 189 and 193.

²³ Ibid at 199.

*relevant to the assessment of significance of particular objects in any s.90 consent application*²⁴.

The planning reforms seek to remove reference to the principles of ESD. Therefore, if it is not referred to in the new culture and heritage Act there would be no legislative requirement to consider specific principles such as intergenerational equity.

We do agree that the proposed objectives are a step in the right direction, but can only regard them as concepts with no practical value yet given the uncertainties of how they would be applied.

Recommendation 7: The objectives of the proposed legislation should refer to the principles of ESD, for example, the principle of intergenerational equity.

Recommendation 8: The new legislation must include provisions that operationalise the objects by requiring all decision and plan making to be done in accordance with the objectives.

7. Definitions of the kind of culture and heritage that are protected be based on the significance of that culture and heritage for present and future Aboriginal people and communities.

The current legislative definition of culture and heritage under Section 5 of the NPW Act is limited to 'Aboriginal objects':

***Aboriginal object** means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.*

The current definition of Aboriginal heritage under the NPW Act is dependent upon the physical existence of individual objects that indicate Aboriginal *occupation* before and after colonisation. Therefore, the developer need only look for objects that are of archaeological significance and not of cultural significance.

The only exception to this relates to Aboriginal Places that are registered under Section 84 of the NPW Act. However, there are only 96 Aboriginal Places registered to date²⁵.

It was the general feeling of the consulted stakeholders that this definition has lead to their knowledge of the cultural significance being considered secondary to the non-Aboriginal

²⁴ Ibid at 200.

²⁵ NSW Atlas of Aboriginal Places (<http://www.environment.nsw.gov.au/aboriginalplaces/>) date accessed: 28 March 2014.

expertise of archaeologists. Some stakeholders also recounted events where only their attendance and consultation was required and their input was ignored.

In one case study, a statutory body engaged an archaeologist to conduct a cultural assessment over a state forest compartment for harvesting. The archaeologist consulted the AHIMS and existing non-Aboriginal literature over the site area. The Archaeologist conducted a preliminary assessment on site as to the likelihood of Aboriginal objects and presented a methodology report to the local Aboriginal community for consultation. Members of the Aboriginal community made a number of objections to this, but they were not acted upon. The archaeologist invited a select few members of the Aboriginal community to conduct test excavations in the compartment. During the inspection, some of the traditional owners requested to physically inspect a number of sites used for men's business. However, this request is denied by the archaeologist and the forest manager as it was not part of their inspection schedule. The archaeologist report was prepared and reflected only her findings and research, with the traditional owners and custodians unable to have a say as to their culture within the area.

This is not to say that all archaeologists act in this way. Some of the stakeholders reported that non-Aboriginal archaeologists were able to work well with traditional owners and custodians in partnership and in recognition of the traditional owners and custodians as the primary knowledge holders of culture and heritage within the area to be impacted. By having a broader definition that includes cultural landscapes, the likelihood of accurately and more comprehensively discovering Aboriginal heritage is increased.

We note the OEH guidelines on culture and heritage assessment '*Operational Policy: Protecting Aboriginal Cultural Heritage*'²⁶ does expand on the definition of Aboriginal culture and heritage:

Aboriginal cultural heritage consists of places and objects that are of significance to Aboriginal people because of their traditions, observances, lore, customs, beliefs and history. It provides evidence of the lives and existence of Aboriginal people before European settlement through to the present.

Aboriginal cultural heritage is dynamic and may comprise physical (tangible) or non-physical (intangible) elements. It includes things made and used in traditional societies, such as stone tools, art sites and ceremonial or burial grounds. It also includes more contemporary and/or historical elements, such as old mission buildings, massacre sites and cemeteries. Tangible heritage is situated in a broader cultural landscape and needs to be considered in that context and in a holistic manner.

Aboriginal cultural heritage also relates to the connection and sense of belonging that people have with the landscape and with each other. For Aboriginal people, cultural heritage and cultural practices are part of both the past and the present and cultural heritage is kept alive and strong by being part of everyday life.

²⁶ NSW OEH 2009 - <http://www.environment.nsw.gov.au/resources/cultureheritage/09122ACHOpPolicy.pdf> (date accessed 28 March 2014).

Aboriginal cultural heritage is not confined to sites. It also includes people's memories, storylines, ceremonies, language and 'ways of doing things' that continue to enrich local knowledge about the cultural landscape. It involves teaching and educating younger generations. It is also about learning and looking after cultural traditions and places, and passing on knowledge. It is enduring but also changing. It is ancient but also new.

Aboriginal cultural heritage provides essential links between the past and present: it is an intrinsic part of Aboriginal people's cultural identity, connection and sense of belonging to Country. The effective protection and conservation of this heritage is important in maintaining the identity, health and wellbeing of Aboriginal people.

This definition recognises the broader cultural significance of Aboriginal heritage. However, the legislative definition of 'Aboriginal objects' has legal force under the NPW Act. Consequently, developers rely primarily on the research and findings of archaeologists, desktop research and the findings made by other archaeologists under the Aboriginal Heritage Information Management System (**AHIMS**) in relation to objects, rather than broader culture and heritage values.

The new definition as proposed is broader. The Discussion Paper removes the reference to 'Aboriginal objects' and replaces it with 'Aboriginal cultural heritage'. The proposed definition of 'Aboriginal cultural heritage' is (p 13):

Aboriginal cultural heritage means the practice, representations, expressions, knowledge and skills – as well as associated objects and artefacts – that Aboriginal people recognised as part of their cultural heritage, insofar as these values are reflected in the landscape.

Some of the stakeholders disapproved of the term 'cultural heritage' as each of the terms are separable. Therefore, it was suggested that the new legislation refer to 'Aboriginal culture and heritage'.

We join our clients in supporting the principle that traditional owners have the right to define their own heritage, based on their culture, and this should be set out clearly in the new legislation.

The proposed definition does include the reference to values reflected in the landscape, but does not explicitly include the protection of the natural resources within the area. The proposed definition also does not explicitly extend the modern manifestations of Aboriginal culture and heritage, such as books and tapes, nor the intellectual property surrounding this (this is discussed further below).

Many of the consulted stakeholders have recommended that the proposed definition of Aboriginal culture and heritage be expanded to consider the whole environment and landscape as culturally significant. This extends to the natural resources in the area, such as water, flora and fauna which can indicate a higher potential for culturally significant landscapes.

The current system arguably implies a need to consider the natural resources within the area to determine the likelihood of Aboriginal objects, under OEH's '*Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*' (13 September 2010). Archaeologists that assess an area for Aboriginal objects also usually consider the natural resources within the area, including water resources and vegetation. However, the current definition of Aboriginal objects does not extend to the protection of these resources, unless the area is a registered Aboriginal place under the NPW Act.

Natural resources in the surrounding landscape, such as rivers, native vegetation, birds, and local biodiversity are of cultural significance to the traditional owners. Examples from clients included descriptions of the Namoi River as a sacred source for cultural activities and the kangaroo as a totemic animal. The destruction of these natural resources impacts the cultural landscape and the potential to continue cultural practices.

As explained in our 2011 submission, the protection of cultural landscapes should also extend to the means of protecting and accessing these cultural sites. For example, a bora ring for initiation ceremonies would be rendered useless and desecrated if the surrounding vegetation is removed or no access is allowed to the site.

Recommendation 9: The definition of culture and heritage must ensure that broader natural resources in the surrounding landscape are included where relevant.

Some of our clients and stakeholders have also argued that the protection of culture and heritage should also extend to all manifestations of their culture and heritage. There is the need to better consider how the new Act will recognise the value of contemporary culture and heritage.

This issue has been explored within the Expert Mechanism on the Rights of Indigenous Peoples where cultures change when they interact with other cultures:

Cultural identity cannot exist without people practising their culture and traditions. New expressions of traditional values may be necessary to revitalize cultural practices in the modern context but should not alter the essence of the indigenous culture. Adaptation of cultures is an indicator of their strength and is necessary to attract the young. Indigenous cultures should not be viewed as relics of the past belonging to museums but, instead, be understood and protected as alive and dynamic, in need of enrichment, to enable them to strengthen despite external influences.²⁷

For example, the Dhiyaan Indigenous Centre in Moree is a keeping place that was formerly managed by Aunty Noelie Briggs-Smith. Aunty Noelie collected material from the local Aboriginal community in and surrounding the town of Moree that was of cultural significance to the community. The material included books, newspaper clippings and photos, which would not be considered as 'Aboriginal objects' under the NPW Act. However, they were

²⁷ '*Role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*' – study of the Expert Mechanism on the Rights of Indigenous Peoples (21st session of the Human Rights Council 16 August 2012).

objects that were of cultural significance to the Aboriginal community as they document the family ties to their ancestral lands, their traditional languages, laws, customs and cultural practices. Without this material, it would prove more difficult for the Aboriginal community to provide proof of their cultural links to their land for protection. However, because this was not recognised as Aboriginal heritage, it was procured by the Moree Plains Library for their custodianship without the consent of the Aboriginal community. Consequently, the integrity of this material is jeopardised as it is easily accessible to the public.

Another example of contemporary Aboriginal culture and heritage is the Taylor Oval in Moree. The oval is significant to the Aboriginal community in Moree, not just for the burials that were located within the area of land. The oval was significant to the Aboriginal community as a place to socially convene and to play sports. It was particularly significant to the Aboriginal community as it was one of the first places where Aboriginal people played sports with non-Aboriginal people. During a period of segregation and heated racial tensions, Taylor Oval was a place that was significant in helping find some reconciliation through sports. However, this area would not be considered to be an Aboriginal object under current legislation.

Other sites that would have contemporary cultural significance include:

- Missions;
- Reserves;
- Schools; and
- Community centres.

Recommendation 10: Definitions in the new legislation must not preclude the appropriate recognition, consideration and protection of contemporary culture and heritage.

Some of the consulted stakeholders have also noted the need to extend the definition of Aboriginal culture and heritage to include the intellectual property associated with Aboriginal culture and heritage. Indigenous peoples have been often exploited for their cultural knowledge by outside parties. In this case, there is the need to protect the cultural knowledge and its manifestations associated with Aboriginal heritage. We remain concerned that current copyright laws are not adequate to address culture and heritage issues, and these should be further considered as part of the reform process. EDO NSW has previously commented on access and benefit sharing issues.²⁸ We also note that the Arts Law Centre of Australia has addressed this same issue in their submission and support their recommendations.

Recommendation 11: The new legislation must include clear specific provisions on the ownership and rights to intellectual property with regard to registered Aboriginal culture and heritage.

²⁸ 'Ratifying the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits', EDO NSW 20 April 2011. (<http://d3n8a8pro7vnmx.cloudfront.net/edonsw/pages/269/attachments/original/1380615860/110420nagoya.pdf?1380615860>) (Date accessed 28 March 2014).

While the proposed definition does recognise the cultural landscapes of Aboriginal heritage, EDO NSW and our clients remain concerned that the definition may preclude other cultural aspects of Aboriginal heritage.

Recommendation 12: To address the range of concerns raised, it may be necessary to expand the definition of Aboriginal culture and heritage into a non-exhaustive, but comprehensive set of terms to more effectively cover the field.

Examples of such lists may be found in other jurisdictions. For example, Section 2 of the *Cultural Heritage Act (2012)* of Quebec, Canada provides such a comprehensive list of definitions:

- *“heritage cultural landscape”*: a land area recognized by a community for its remarkable landscape features, which are the result of the interaction of natural and human factors and are worth conserving and, if applicable, enhancing because of their historical or emblematic interest, or their value as a source of identity;
- *“heritage document”*: a medium on which intelligible information is inscribed in the form of words, sounds or images structured and delimited in a tangible or logical manner, or the information itself, including archives, which has artistic, emblematic, ethnological, historical, scientific or technological value;
- *“heritage immovable”*: an immovable property that has archaeological, architectural, artistic, emblematic, ethnological, historical, landscape, scientific or technological value, in particular a building, a structure, vestiges or land;
- *“heritage object”*: a movable property, other than a heritage document, that has archaeological, artistic, emblematic, ethnological, historical, scientific or technological value, in particular a work of art, an instrument, furniture or an artefact;
- *“heritage property”*: a heritage document, immovable, object or site;
- *“heritage site”*: a place, a group of immovables or, in the case of a heritage site referred to in section 58, a land area that is of interest for its archaeological, architectural, artistic, emblematic, ethnological, historical, identity, landscape, scientific, urbanistic or technological value;
- *“intangible heritage”*: the skills, knowledge, expressions, practices and representations handed down from generation to generation and constantly recreated, in conjunction with any cultural objects or spaces associated with them, that a community or group recognizes as part of its cultural heritage, the knowledge, protection, transmission or enhancement of which is in the public interest.

8. Ownership of Aboriginal objects be vested in appropriate Aboriginal people, not the NSW Government.

Under the current system, Aboriginal objects remain under the custodianship of the Crown. Section 85 of the NPW Act provides:

85 Director-General's responsibilities as to Aboriginal objects and Aboriginal places

(1) The Director-General shall be the authority for the protection of Aboriginal objects and Aboriginal places in New South Wales.

(2) In particular, the Director-General shall be responsible:

- (a) for the proper care, preservation and protection of any Aboriginal object or Aboriginal place on any land reserved under this Act, and*
- (b) subject to Division 2, for the proper restoration of any such land that has been disturbed or excavated in accordance with an Aboriginal heritage impact permit.*

The only exception to this is if the traditional owners or custodians make an application under Section 85A of the NPW to transfer the Aboriginal objects into their care. They need to specify which objects belong to their group and how they will take care of them. The Director-General of the OEH then decides whether to approve this.

One of the stakeholders did give a good account of the transfer process, having completed it within three months. However, the majority of the stakeholders did not agree with the Crown having property rights to their heritage. This has proven difficult when traditional owners have sought legal action to protect their heritage without a transfer permit (as discussed below).

The Discussion Paper does not specifically address ownership rights. The Discussion Paper proposes that the local committees will be responsible for recording and managing their culture and heritage within their boundaries. It is not clear whether this could create a situation whereby the local committee with a custodianship role over the culture and heritage might be the only body allowed to take legal action. This was not supported by the stakeholders as it poses a potential difficulty with the traditional owners that are not members of the committee but are concerned for the wellbeing of their heritage. This could result in a scenario where a traditional owner or group of traditional owners want to take legal action against a developer for harming culture and heritage, but the committee would not commence any proceedings.

Recommendation 13: The new Act must clarify the custodianship and ownership structure of Aboriginal culture and heritage by appropriate Aboriginal people.

9. Determination of processes for identifying persons culturally authorised to speak on culture and heritage issues be undertaken through broad consultation with Aboriginal people.

A fundamental issue of concern raised by EDO clients and workshop participants was '*who speaks for country?*' This question is crucial in order to determine the cultural significance of an impacted area. We acknowledge that this is one of the most important and contentious issues – it is essential to get this right or the new Act will fail to protect Aboriginal culture and heritage.

It would be an insult to traditional owners if someone with no cultural connection to particular land has the power to say '*there is no culture and heritage there*' despite evidence to the contrary (as has happened in some situations under the current system). It is essential that provision be made for both traditional owners and custodians to have a say as to the cultural significance of an area. No one should have the right to deny the culture and heritage of others. A statement as to no or 'low' culture and heritage cannot be definitive if it is made by people who are not the knowledge holders. The fate of Aboriginal culture and heritage should be decided by those who speak *for* country, while those who speak *about* country can only provide the information as its location and significance.

The Director-General of the OEH (or the Minister for Planning in the event of SSD) is the sole decision maker as to whether Aboriginal heritage should be impacted.²⁹ Consequently, there is a very high approval rate for culture and heritage to be destroyed as discussed above.

The Discussion Paper seeks to empower local communities to administer and protect their culture and heritage through local committees, which is a very positive step towards self-determination. However, the Discussion Paper outlines concepts that are heavily flawed as they do not sufficiently explore how the new system would realistically operate in local communities.

Local committee processes

The Discussion Paper seeks to give more power to the traditional owners by giving local committees a custodian role over Aboriginal culture and heritage within their boundaries and have them as the decision makers. While we do agree that such committees could be a path towards traditional owners having the power to determine the fate of their culture and heritage, stakeholders raised a number of concerns about the practical functioning of these committees.

Some of the stakeholders have been a part of models established to fulfil similar functions to determine culture and heritage. However, experience shows that the effectiveness of these groups is often limited by a number of reasons, including:

²⁹ Section 90 of the NPW Act.

- Breach of trust with community
- Lack of resources
- Conflict of interests with different parts of the community
- Conflicts of interest with business enterprises and developers
- Conflict with other Aboriginal organisations as to who speaks for country.

These problems are further exacerbated by different interest groups. We have heard case studies of developers giving more resources or recognition to those members of groups who might be more likely to agree to their development agendas. Consequently, the other stakeholders are not empowered to have a say for their heritage and are often ignored.

Therefore, the independence of the new committees is essential. It would be highly inappropriate for a developer to have any involvement whatsoever in the conception or operation of any culture and heritage committee. Such involvement would jeopardise the integrity and public confidence in the total independence of the committees. Any dealings and consultations with developers should be transparent and therefore avoid any perception of potential inappropriate influence or corruption.

Recommendation 14: The new legislation must stipulate clear and transparent committee processes, for example, in relation to potential conflicts of interest, for example, where a committee member or an influential relation of this member has a commercial enterprise that would benefit from a development going ahead.

Committee membership

The Discussion Paper seeks to appoint the committee members from a range of Aboriginal organisations and groups, including:

- Aboriginal Owners registered under the *Aboriginal Land Rights Act 1982 (NSW)*;
- Representatives of native title claimants;
- Representatives of native title holders;
- Representatives of Indigenous land use agreements; and
- Representatives of Elders and members with cultural association.

Concerns raised by stakeholders included that not all of these groups would be found in one area; and that the appointment of people from different groups may impact on the already sensitive organisations. Some stakeholders requested that these committees be 'custom-fitted' to adequately represent their local community. Other stakeholders have pushed for representatives of different family groups to be appointed to the committees, strongly arguing this would be the most preferable option. Some stakeholders also suggested that these committee members be democratically elected from their community to ensure that they have the trust and confidence of the traditional owners and knowledge holders.

The Discussion Paper states that the Minister would have the final say in the appointment of the members of the committee. The consulted stakeholders were opposed to this. Some stakeholders predicted that if a committee does not allow enough development, then the

Minister would replace the committee with another that is more agreeable towards increased development. It would be more appropriate to ensure external review mechanisms operate to independently review and appoint committee members.

Recommendation 15: The new legislation should only allow an Independent Commission (as recommended) to approve the appointment or removal of committee members.

Community conflicts, lateral violence and healing

It is undisputed that the current system for managing Aboriginal heritage has resulted in increased conflicts between traditional owners and groups. In some circumstances, where one traditional owner group seeks to protect their heritage, another other group or individual may criticise them if they disagree. Developers may stand to benefit from such disagreement where they may discredit or undermine the complainant group.

One stakeholder from our consultations pointed out that these conflicted communities are in need of 'healing'. The Australian Human Rights Commission has described these types of conflicts as 'lateral violence'. This was explored in their 2011 social justice report³⁰. Lateral violence is described as an internalised colonialism:

*[T]he organised, harmful behaviours that we do to each other collectively as part of an oppressed group: within our families; within our organisations and; within our communities. When we are consistently oppressed we live with great fear and great anger and we often turn on those who are closest to us.*³¹

Some examples of lateral violence include constant and /or public putdowns, denial of cultural identities and poisoned family relationships. It has been recognised that lateral violence affects the right to culture³² and the right to participate in decision making processes³³ for Aboriginal people. This affects their ability to participate not just through the current means of consultation with traditional owners and custodians, but also through the measures within the Discussion Paper.

The 2011 report emphasises that:

³⁰ 'Social Justice Report 2011', Australian Human Rights Commission 2012

<http://www.humanrights.gov.au/publications/social-justice-report-2011> (date accessed 25 March 2014)

³¹ Ibid at page 52; extracted from R Frankland and P Lewis, *Presentation to Social Justice Unit staff*, Australian Human Rights Commission, 14 March 2011.

³² United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 11–13. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 23 September 2011); International Covenant on Civil and Political Rights, 1966, article 27. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); International Covenant on Economic, Social and Cultural Rights, 1966, article 15. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 23 September 2011). Extracted from the 2011 Social justice report at page 104.

³³ United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 5, 13(2), 18, 19, 20(1), 23, 27, 30(2), 32, 36, 38. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 20 September 2011); International Covenant on Civil and Political Rights, 1966, article 25. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); Human Rights Committee, General Comment 25: The Right to Participate in Public Affairs, Voting and the Right of Equal Access to Public Service (art 25), UN Doc CCPR/C/21/Rev.1/Add.7 (1996), para 5. At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) (viewed 23 September 2011) Extracted from the 2011 Social justice report at page 104

*'If governments continue to leave groups out of the engagement process or consult with the wrong people, not only do they miss out on the depth and diversity of views necessary to form good policy, but they also alienate groups from the process, possibly limiting the success of the project. Alienation breeds powerlessness and can manifest in lateral violence.'*³⁴

The Report recommended a number of actions that could be taken to help address lateral violence and promote cultural safety and security including:

- Raising awareness of lateral violence and its effects within the community³⁵;
- Develop appropriate bodies with the cooperation of the community to receive reports and complaints about lateral violence³⁶;
- Establishing Alternative Dispute Resolution policies or bodies to help resolve conflicts³⁷; and
- Developing culturally safe healing spaces to build conflict resolution skills, deal with grief and trauma and promote strong culture³⁸.

The Report also recommended for governments, NGOs and industries to be culturally competent, and not just intervene directly. Cultural competency is defined by the National Health and Medical Research Council as:

"a set of congruent behaviours, attitudes, and policies that come together in a system, agency or among professionals and enable that system, agency or those professions to work effectively in cross-cultural situations. Cultural competence is much more than awareness of cultural differences, as it focuses on the capacity of the health system to improve health and wellbeing by integrating culture into the delivery of health services.

To become more culturally competent, a system needs to:

- *value diversity*
- *have the capacity for cultural self-assessment;*
- *be conscious of the dynamics that occur when cultures interact;*
- *institutionalise cultural knowledge; and*
- *adapt service delivery so that it reflects an understanding of the diversity between and within cultures*³⁹

Some measures that can be utilised to achieve this, as identified by stakeholders, include:

- establishing mutually agreed cultural 'brokers' to encourage two-way communication;
- effective engagement protocols and systems with Aboriginal communities;

³⁴ 2011 Social Justice Report, Australian Human Rights Commission at page 78.

³⁵ Ibid at page 128.

³⁶ Ibid at page 132.

³⁷ Ibid at page 138.

³⁸ Ibid at page 145.

³⁹ National Health and Medical Research Council, Cultural Competency in Health: A guide for policy, partnerships and participation (2006), p 7. At <http://www.nhmrc.gov.au/guidelines/publications/hp19-hp26>. Extracted from 2011 social justice report at page 150.

- increasing the presence and involvement of Aboriginal people within government, NGOs and Industries; and
- building capacity through partnerships.

The Discussion Paper does acknowledge the potential difficulties that these committees could pose to the existing traditional owners and custodians within the boundaries. It is anticipated that these committees will generate further community tensions and there are no measures proposed to resolve this.

Recommendation 16: The new legislation must set out clear and transparent rules for conflicts of interest and dispute resolution, including a code of conduct for each committee.

Recommendation 17: The new legislation must set out clear requirements for government departments, non-government organisations and industries to demonstrate a level of cultural competency when engaging with Aboriginal communities on Aboriginal culture and heritage.

Committee area boundaries

Concerns were raised regarding the boundaries that have been proposed by the Discussion Paper. The boundary options are problematic in that they are not based on cultural boundaries for different Aboriginal peoples, but on existing political boundaries. Many of the boundary options if chosen could result in committees made up of particular traditional owner groups making decisions for other traditional owner groups.

Some of our clients have suggested that these boundaries be based upon language groups to ensure appropriate cultural coverage. There is also the possibility of establishing boundaries based on completed native title claims.

The number of committee members must be proportionate to the size of land and the number of proposed developments taking place. The size of a nominated area may also be difficult to cover by only ten people, and therefore the arbitrary limit of ten people per committee may be inappropriate for large areas. The membership must also be based around different family groups in the area to avoid one family group having more members. These members must also have the necessary connection and trust with their community, including other families within the boundaries. It would be impossible to assume that each committee member would have the entire knowledge of the culture and heritage within their boundary, and therefore they would need to consult with their community, especially the elders. That is why each member must be able to effectively communicate with their community and be entrusted their most important cultural knowledge (as noted above).

Recommendation 18: Further consultation is required on appropriate local boundaries to ensure they are culturally appropriate.

10. Aboriginal people be given control over the use of their knowledge of culture and heritage issues and sites of significance, including where such information is listed in publicly-accessible databases.

We understand that one of the primary roles of the proposed local committees is the development and implementation of plans of management for their culture and heritage. This is outlined under table one of the Discussion Paper. Although stakeholders we have consulted with do generally agree with the concept of traditional owners handling their culture and heritage, there are still a number of concerns.

ACH register

The Discussion Paper details the creation and operation of an Aboriginal Cultural Heritage Register (**ACH Register**), similar to the Aboriginal Heritage Information Management System. The ACH Register would receive and maintain the culture and heritage data for each Local ACH Committee, including cultural maps and plans of management. This material would be made available to the general public to provide information relevant for future development and land use planning decisions (Discussion Paper, p20).

Most of the stakeholders opposed this idea and the balance of stakeholders did not have anything to say in support. Reasons for concern included:

- Unrestricted access to culturally sensitive information would breach cultural protocols such as access to men's' and women's' sites.
- Access to cultural knowledge and intellectual property could be exploited; and
- The fear that once the location of culturally significant sites is divulged, outsiders could deliberately seek to destroy the heritage there, with or without a permit.

The stakeholders preferred that the information be retained within the local ACH committee and not disclosed to the public. It was felt that this was more appropriate as the developer should consult with the local ACH committee first as a matter of due diligence. Some stakeholders also suggested that different layers of cultural maps could be available, with general areas marked as culturally significant. The other map layers could then be explored between a local ACH committee and the developer under a confidentiality agreement. This would help preserve the cultural significance of the site and help promote cooperative management between the developer and the local ACH Committee.

Recommendation 19: The new legislation must set out appropriate limitations on access to culturally sensitive information. Local committees should determine what can be made public.

Plans of management

The Discussion Paper envisages that every local committee will develop a plan of management for the culture and heritage within their boundaries. The process for this is conceptually set out in the Discussion Paper⁴⁰.

The proposed method for developing a plan of management is akin to the process in registering an Aboriginal place under section 84 of the NPW Act. This would involve the collection of both archaeological and cultural information about the area, registering any particularly significant sites and negotiating access and care agreements with both the OEH and any private landholders involved.

Most of the stakeholders who have sought to register an Aboriginal place have experienced significant difficulties and long delays, even for small areas of land. They explained the difficulty in ascertaining the cultural information for their application due to the Aboriginal tradition of storing and passing information orally within a select group of people. A lot of effort is required in finding out the names and locations of those people with cultural information and to then get their trust in passing it onto paper and/or other recordings. Sometimes this evidence is not accepted by the OEH for various reasons and the applicants will need to keep trying. Consequently, the chances of successfully registering an Aboriginal place, let alone one within a year of lodgement is slim and depends on the skills, resources and knowledge of the applicants.

It is likely that the creation and implementation of these plans of management will encounter the same difficulties, and therefore it is unlikely that these plans of management would be finalised within even a year.

Recommendation 20: The new legislation must not prejudice any committee or community for not being able to finalise their management plan. Should any plan of management remain incomplete, there must remain a presumption of Aboriginal culture and heritage within the subject area.

Funding the committee and plans of management

Resourcing of committee members to undertake their planning role (and for committee functions more generally) was identified as another key concern. Some stakeholders identified initial and ongoing resources as including:

- Staff and administration wages and travel expenses;
- Office infrastructure, including furniture;
- Office supplies;
- Transport;
- Expert consultants;
- Information Technology;
- Catering for meetings; and
- Computer software designed for mapping and recording heritage.

⁴⁰ Page 19 of the Discussion Paper.

The Discussion Paper proposes that these committees could be funded through the following measures:

1. Flexible project agreements;
2. Development levies;
3. Offsets; and/or
4. Costs recovery plus conservation.

We note that these funding strategies rely on whether the development proceeds or not. Such options do not give the committee any real power to refuse the developments or agree to suitable terms as the committee would be defunded. After consulting with a number of Aboriginal Parties registered under Victoria's *Aboriginal Heritage Act 2006 (Vic)*, they note that some regions would be over or underfunded, due to the varying levels of development in each region. This prevents a reliable means of funding and many Parties need to find alternative funding arrangements.

There is the additional concern as to the potential lack of transparency and accountability between the proposed committee and the proponent. Some stakeholders have been concerned with not having any say in how the funding would be apportioned, where it may not go towards their community.

The Discussion Paper does not address these issues and is vague on the provision of adequate start-up funding. It is essential that these committees are provided funding for start-up costs, and adequate and reliable ongoing resources.

Another option that should be explored is the availability of impartial funding through a third party. It has been recommended by a number of clients and other stakeholders that a third party trust fund be established to apportion funding to each committee as beneficiaries.

Recommendation 21: The NSW Government must be responsible for providing the start-up funding to each committee, as well as any funding as required to adequately implement their management plans.

High/low significance

The Discussion Paper and the proposed plans of management aim to designate areas of cultural significance into:

- High;
- Low;
- Unknown; or
- None.

Based on feedback received, it is unlikely that any of the committees or traditional owners would set out areas as 'low significance'. This is because none of the stakeholders believed that any part of their cultural lands are of low significance.

Recommendation 22: The high/low significance differentiation is eliminated and replaced with a description of the areas 'cultural significance' instead.

Acceptance of plans of management

We note that step 5 of the plan of management development process gives the Minister for Environment the final say in whether the plan of management will be accepted. There is a lack of criteria for this decision.

However, there was a general disagreement with the Minister making the final decision to approve the management plan. Some stakeholders felt that there is no real independence in deciding for their heritage, especially should they wish to decide that the entirety of their region is significant.

To help promote a more transparent and accountable system, the new legislation should establish independent review mechanisms in the event that the Minister withholds approval of a management plan or has been deemed to have refused the management plan if no decision is to be made. For example, the proposed management plan could be referred to an independent commission (as discussed above) for review to assess the management plan for any errors in assessment, consultation, evidence and/or administration.

Alternatively, the committee could lodge the rejected management plan with the NSW Land and Environment Court for merits review. Such provision currently exists for appealing an AHIP decision under section 90L(1)-(3) of the NPW Act:

90L Appeals

(1) An applicant for, or holder or former holder of, an Aboriginal heritage impact permit may appeal to the Land and Environment Court against any of the following decisions of the Director-General:

- (a) a decision to refuse any application in relation to an Aboriginal heritage impact permit or former permit,*
- (b) a decision in relation to any condition to which a permit or former permit (or a surrender of a permit) is subject,*
- (c) a decision to suspend or revoke a permit.*

(2) The Land and Environment Court:

- (a) may refuse to grant the appeal, or*
- (b) may grant the appeal wholly or in part, and may give such directions in the matter as the Land and Environment Court thinks appropriate.*

(3) The decision of the Land and Environment Court on the appeal is final and is binding on the Director-General and the appellant, and is to be carried into effect accordingly.

These appeals are dealt with by merits appeal in the Class 1 of the Land and Environment Court⁴¹, allowing the decision maker to consider this management plan in the same shoes as

⁴¹ Section 17(k) of the *Land and Environment Court Act 1979 (NSW)*.

the decision maker⁴², allows fresh evidence to be admitted⁴³ and each party would bear their own legal costs⁴⁴.

A proposed management plan would practically work the same as an AHIP. Both would set out where development can proceed, what measures must be taken if new heritage is discovered (p 34) and further consultation with the traditional owners and committee. For the legitimacy of the new legislation and its objectives, it is impossible to not allow merit appeal rights to these committees when a right is already available to developers.

Recommendation 23: The new legislation must include provisions for an Aboriginal culture and heritage committee to have their plan of management reviewed through independent mechanisms, including an independent commission or by merits appeal to the NSW Land and Environment Court.

Lack of further information for 'minimum standards'

The Discussion Paper is lacking in information as to how exactly the plans of management will work. There is no information as to what kind of 'minimum standards' will be set out under proposed regulations, and how the standards will be developed and finalised.

11. Appropriate Aboriginal people be given the right to determine what use is made of their culture and heritage. Accordingly, their free, prior informed consent must be sought in granting any application for an Aboriginal Heritage Impact Permit, with compensation payable where appropriate.

Our consulted stakeholders consistently expressed feelings of disempowerment from being unable to make decisions concerning their culture and heritage. Both of the current methods of deciding culture and heritage, whether as normal development or SSD do not give the traditional owners the right to not consent to destroying their culture and heritage.

The current system of culture and heritage assessment does give the traditional owners the right to consent to activities that will impact their heritage. However, the current consultation system is designed to hear the views of the traditional owners and some traditional custodians as to the cultural significance and what measures could be implemented to avoid unnecessary impact, but these views only serve as advice to the decision maker as to the future of their culture and heritage.

The parties have their say, but despite any objections, culture and heritage management is ultimately decided by the Director-General for OEH or the Minister for Planning if the proposed development is state-significant development under the EP&A Act as noted. There have been many examples where traditional owners feel they are not adequately considered

⁴² Section 39(2) of the *Land and Environment Court Act 1979 (NSW)*.

⁴³ Section 39(3) of the *Land and Environment Court Act 1979 (NSW)*.

⁴⁴ Rule 3.7(2) of the *Land and Environment Court Rules 2007 (NSW)*.

by these decision makers. This can result in a number of actions by the traditional owners or custodians, including extensive litigation, overt and covert disruption operations or even aligning with the views of the developers for better negotiation leverage, to the chagrin of other traditional owners.

The proposed model to allow the local committee to negotiate an agreement with the prospective developer is a step towards empowering traditional owners in deciding the future of their culture and heritage. However, there are some issues with the proposed model that we do not support.

As discussed above, the establishment and representation of the local committee does not guarantee the full representation of views in the community. There will always be the possibility of areas of culture and heritage for some traditional owners that may not be known or ignored by members of the committee. As noted above, depending on how committee membership and boundaries are determined, if knowledge for large areas is not held by one of the ten committee members, there could be a knowledge gap on the committee.

Consequently, it would be prudent of the committees to consult with their information records, *and* with the community as well. This can be a long process, where the committee would need to explain the proposed project to the community. They would need to ascertain any traditional owners for an area (not represented on the committee) and receive any further input regarding culture and heritage, which is sometimes quite difficult as particular traditional owners do not trust either or both the committee or the developers enough to divulge their knowledge. There is also the overriding need to address cultural practices, such as 'sorry business', where members of the community would be unavailable for a number of days. However, this is not reflected in the Discussion Paper.

Therefore, the necessary consultation cannot be completed within the timeframe of 20 days as proposed in the Discussion Paper. We understand from the OEH that this number of days is not definitive, however a key rationale of the broader planning reforms in NSW and federally is to streamline development assessment processes to speed up approval times.⁴⁵

It is not appropriate to streamline any development assessment process without adequately consulting with the rest of the traditional owners.

There is no clarification as to how such consultation would be guaranteed with regard to state-significant development under the proposed planning reforms. Large scale designated development has a wide-scale impact that may impact the culture and heritage of different culture and heritage groups. This would require additional time to discuss with the traditional owners affected, and may involve other culture and heritage committees as well. This is another reason for why there is a need for further information and analysis regarding how the concepts in the Discussion Paper would interact in practice with the new planning laws.

⁴⁵ See: The NSW Department of Planning and Infrastructure 'A New Planning System for NSW: White Paper; Planning Bill 2013 (NSW); and the recent NSW – Commonwealth Bilateral Agreement under the EPBC Act for environmental assessments.

We also note from our observations of developers negotiating with Aboriginal people that there is a strong imbalance of power in these negotiations. This imbalance has been explored extensively in relevant literature, especially around the native title process. Such imbalances revolve around the resources and expertise of each party as well as the need to consult with the community for a response, while the developer is comprised of a small select number of individuals.⁴⁶ Such imbalances have not compelled some developers to negotiate in good faith. It is now a legislated requirement that the parties negotiate an agreement in good faith⁴⁷.

Most disturbing in the Discussion Paper is the proposal that if no consensus is reached either in a negotiation or a third party dispute resolution, the development proceeds 'with caution'. We understand that this caution involves adhering to the plan of management as set out by the local committee, but as noted above, we cannot be assured that the plans of management would be adequate for the all of affected traditional owners.

The proposed committee functions, plans of management and project report processes do not equate to a clear right of consent. The reforms, as currently proposed, do not give Aboriginal communities the unfettered right to give their free, prior and informed consent to these proposed developments.

For these reasons, we do not support the current model of consultation with development proponents.

Recommendation 24: The new legislation must explicitly provide for the following:

- Free prior and informed consent of the committee to veto the development if it unacceptably impacts an area of cultural significance;
- The timeframe to negotiate with the developer be extended to include time to adequately consult with the community;
- The OEHL provide further information, in consultation with the DPI as to how this model would work with State Significant Development under the new planning legislation.

12. Aboriginal people be given appropriate enforcement rights in relation to the law for protection of their culture and heritage.

Appeal rights

The NPW Act contains a number of appeal provisions, but they only give this right of appeal either to the proponent seeking to harm Aboriginal heritage⁴⁸ or a person who has been issued an order under the NPW Act to cease or modify their workings⁴⁹. Any traditional owners or custodians would need to apply to the NSW Land and Environment Court for

⁴⁶ See: *Resolving Indigenous Disputes: Land Conflict and Beyond* by Dr Larissa Behrendt and Dr Loretta Kelly, Published 9 December 2008, Publisher The Federation Press.

⁴⁷ Section 31(1)(b) of the *Native Title Act 1993 (NSW)*.

⁴⁸ Section 90L(1) of the *National Parks and Wildlife Act 1974 (NSW)*.

⁴⁹ Section 91T of the *National Parks and Wildlife Act 1974 (NSW)*.

judicial review under the EP&A Act⁵⁰. However, doing so often attracts the risk of adverse litigation between materially imbalanced parties and the threat of costs orders should the applications fail in their attempt to protect their heritage.

As discussed, the new legislation must provide legal rights to enable local committees and traditional owners to adequately protect their culture and heritage. Such a right is an essential safeguard, for example where: a development commences after failed negotiations; if the committee does not adequately address all of the culture and heritage issues for the development; or if the developer breaches the agreement or plan of management and destroys culture and heritage.

The Discussion Paper does not adequately address the need for the traditional owners to have the right to either appeal the decision made for culture and heritage, nor are there any provisions for how traditional owners can enforce their rights to culture and heritage.

To date, traditional owners only have the right to take action against a development consent through the following means:

- Lodging a merits appeal application against a designated development within the class one Division of the NSW Land and Environment Court if it is not sent to the Planning and Assessment Commission for determination; or
- Commencing judicial review proceedings under Section 123 of the EPA Act under an error of law.

However, traditional owners currently do not have the right to appeal any decision by the Director-General for OEH to grant an AHIP or reject an application for an Aboriginal place.

Currently, Aboriginal people do not have the right to pursue legal action against the developer who harms an Aboriginal object under the NPW Act (section 85) as noted above. Instead, only the Director-General or their delegate has the right to commence an action against a developer for harming Aboriginal objects. The only exception is if you lodge an application to transfer Aboriginal objects in to the care and custodianship of select groups or individuals (section 85A of the NPW Act).

We cannot support the reforms proposed in the Discussion Paper without adequate consideration of appeal rights for traditional owners and custodians.

Recommendation 25: The new legislation must provide a right for a local committee or a traditional owner/custodian to bring an action to enforce a breach of the Act.

⁵⁰ Section 123 of the *Environmental Planning and Assessment Act 1979 (NSW)*.