



Australian Government

Department of the Environment, Water, Heritage and the Arts

Submission form

**Possible reforms to the legislative arrangements
for protecting traditional areas and objects**

The Australian Government is seeking feedback on proposals for more effective laws to protect Indigenous traditional areas and objects across Australia. The government has published a discussion paper that describes 15 proposals to achieve this aim by developing new legislation to replace the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The discussion paper is available at:

www.heritage.gov.au/indigenous/lawreform

The government is interested in hearing your views about the best way to reform the legislation. To encourage people to make submissions we're holding information sessions based on the government's network of Indigenous Coordination Centres across Australia. We will also meet with key representative groups such as native title representative bodies and land councils, state and territory governments, organisations involved in protecting Indigenous heritage and peak industry bodies.

How can I have my say?

This form is designed to make it easy to respond to the proposals and questions in the discussion paper. There is additional space for comments on the back page.

To make a submission please complete this form and email it to atsihpa@environment.gov.au, or post it to:

**Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601**

Alternatively you may wish to make your submission in a different format and send it to one of the addresses listed above.

The deadline for submissions is Friday, 6 November 2009.

What should I put in my submission?

It is up to you what you put in your submission.

Your submission is more likely to have influence if you include brief recommendations about whether and how to improve the legislation, such as whether to use the proposals in the discussion paper. To assist you we have included questions with each proposal. However we encourage you to raise any issues that are important to you to ensure the information provided to government is as robust as possible.

You are welcome to add your own proposals for reforming the legislation if you wish.

Who will be able to read my submission?

We will not regard your submission as confidential. In general we intend to publish all the submissions we receive on our website. That way everyone who has an interest in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will be able to see what other people think about reforming this legislation. However we reserve the right not to publish a submission or any part of a submission, at our discretion. For example we will not to publish any part of a submission that:

- promotes a product or a service
- contains defamatory or offensive language
- expresses sentiments that are likely to vilify sections of the community
- contains personal information that could be used to identify third parties.

Anyone who visits our website will be able to view your submission. This means that other people will be able to view your personal information, such as your name and address or any other information that could be used to identify you, if you include it in your submission. *If you prefer we can conceal your address when we post your submission on our website. Please let us know if you want us to do this by ticking the box on page 4 or by including a similar statement if you make your submission in a different format.*

We will use your submission to prepare advice for the Australian Government about options for reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. As is normally the case with this type of advice, we will advise the government about the views of individuals or groups who have an interest in the legislation. This could mean that we provide some of your personal information, such as your name, to government ministers and other departments, for example the Minister for the Environment, Heritage and the Arts.

What if I need help?

If you need more information about making a submission please contact: **1800 003 1644**

Your details

Name: Aileen Blackburn,
Nindi Ngujarn Ngarigo Monero Aboriginal Corporation.

Postal address:

Other contact details (optional):

Tick if applicable:

Please tick this box if you do not want your address and other contact details included when your submission is posted on the department's website.

Web site (if applicable):

Are you making this submission on behalf of other people or an organisation?

yes - please specify no

What is your interest in making a submission about this legislation? (optional)

Our group are actively involved in cultural heritage and natural resource management in the East Gippsland region of Victoria. Indigenous cultural heritage protection and caring for our country, especially our ancestral trails, our camping and gathering areas, our food and fishing spots, the wildlife and plants, the areas where our family and Elders have always lived, are important to us from social, economic, educational, health and wellbeing point of view.

We are familiar with the State and Commonwealth Legislation, with an in-depth knowledge and experience of the 'pitfalls and historically known short-comings of replying on toothless Aboriginal heritage protection legislation'.

Much of this knowledge and experience comes from first-hand, on the ground, grass-roots involvement with a whole range of activities undertaken throughout our area, indeed over generations and generations. Many of these cultural heritage activities have interacted with all government, non-government and industry stakeholders. For example, Department of Sustainability Victoria, Parks and Wildlife Victoria, East Gippsland Management Board, East Gippsland Shire Council and VicRoads.

Our people have also had a long established involvement with Aboriginal Affairs Victoria. This involvement has been one of necessity and due to the obvious fact that Aboriginal Affairs Victoria administers Victorian Aboriginal Cultural Heritage Act 1996.

Your overall comments

The Australian Government is proposing to reform the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to improve Indigenous heritage protection laws nationally. The Act could be substantially amended or replaced. Details are in the discussion paper.

- ★ **Question 1: Overall, what do you think are the main problems with the current situation, and what improvements are needed?**

There is no doubt that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* fails in its efforts to provide the protection Indigenous cultural heritage.

There are several basic and fundamental reasons that can be argued as the root cause of this failure and these include, but are not exclusive to the following:

- If this legislation is to fully recognise that Australian Indigenous people are the owners of their cultural heritage, then Commonwealth & State/Territory governments need to do more than merely legislate, because legislation without the appropriate Indigenous resourcing and infrastructure will have the consequence of further disempowerment.
- Both Commonwealth and State/Territory Governments should link any future legislative reforms to also include reforms to the various Commonwealth, State/Territory agencies responsible for cultural heritage management and legislative responsibility. From our experience, this is where the control of Indigenous cultural heritage occur, basically with the power of government agencies. It could be argued that in response to this imbalance of power and control, many Indigenous groups are forced to prove their eligibility rights:
- Cultural heritage rights are indeed 'basic human rights' and require 'blanket protection' enforcement, with Indigenous infrastructure.

The points raised could be described as 'motherhood' statements. International human rights standards already recognise these principles, and most of these 'motherhood' statements involve rights and standards which provide a basic starting point, but need to be developed far more in terms of aligning them with true Indigenous ownership, control, resourcing and management. For instance, making statements such quoted in discussion paper, 'encouraging developers and Indigenous Australians to agree at the earliest available opportunity on practical ways to protect traditional areas and objects, and ensuring that government decisions about whether to allow activities to proceed will avoid or minimise the likely adverse impacts on traditional areas and objects, fall short of the type of Indigenous control and decision making required.' It appears that there is already an 'assumption' that if legislation can address this level of concern, that the legislation would improve. It is our view, that the real problems and core to future improved does not lie at this low level of decision and control, it lies at a much higher level, where Indigenous people have management and control prior to such low level consultation occurring. Basically, the points suggested for proposal 1 are inadequate and simplistic because they do not take into the account the changing Indigenous Australian social, cultural and political environment and expectations, which are to take control of our cultural heritage from the top to the bottom. We would want to improve legislation to take away the discretion or power of a Commonwealth Government Minister to make a deciding decision when developers and Indigenous groups are unable to meet agreement, and give credence to the principles intent of the legislation. Ultimate decision making should not lie with non-Indigenous government agencies or stakeholders.

From our experience, State/Territory agencies have more power, resources and control to effect decision making as opposed to under-resourced Indigenous peoples and their community.

Proposal 1: Purposes of the legislation

The new legislation could set out its overall aims. This could be done using the points set out on page 11 of the discussion paper.

- ★ **Question 1.1: Do these points adequately express the purposes of the legislation?**

yes

no - please explain why not

Once again, basically, the points suggested for proposal 1 are inadequate and simplistic because they do not take into the account the changing Indigenous Australian social, cultural and political environment and expectations, which are to take control of our cultural heritage from the top to the bottom. The points raised are predetermined presumptions and do not address the core challenges being faced by Indigenous Australians. The Commonwealth Aboriginal Cultural Heritage Legislation is one of a multitude of Commonwealth legislation that fail to fulfil their obligations to Indigenous Australians. Apart of the problem lies not only within the legislation(s), but within the inability of Commonwealth to give Indigenous Australians true ownership and control of their affairs, 'cultural heritage' included.

Proposal 2: Terminology – new definitions

New definitions could be put in the legislation. The definitions clarify the basis on which areas and objects can be protected under the legislation. The new definitions could use the concept of 'traditional laws and customs'. This would match the *Evidence Act 1995*. The definitions would no longer need to rely on the concept of 'particular significance', which is vague. Possible definitions appear on page 14 of the discussion paper.

- ★ **Question 2.1: Overall, what do you think about this proposal?**

This can be avoided by adopting an understanding and acceptance that the minimum starting point should be: 'that all Indigenous cultural heritage' is covered by a blanket protective legislation and leaving such matters to Indigenous people to undertake. Definitions and terminology can be improved to help the purpose of the legislation. However, once again, it must be asked, who's best being served by the legislation? Surely, it can be understood that Indigenous languages do not necessary 'fit' or 'align' with one single English word, and therefore the hurdle is not to continue trying to massage language and terminology, but to give Indigenous people the control and manage in the first instance.

If indeed, the true purpose of the legislation is to give Indigenous Australians control and management of their cultural heritage, then terminology issues will be the responsibility of the many Indigenous peoples who may adopt their own individual language or terminology that best reflects their cultural practises and heritage. This problem can be overcome by acknowledging that the English language does not have the capacity to accurately translate, interpret or give meaning to Indigenous culture.

- ★ **Question 2.2: Would the proposed definitions leave out any areas and objects that are covered by the current legislation because they are 'of particular significance to Aboriginals in accordance with Aboriginal tradition'?**

yes – please explain why

no

There is no need to become 'obsessed' with definitions. If the legislation is to meet its objectives, then it should have the scope and ability to accept that there are many different and varying Indigenous definitions. In other-words, allow Indigenous Australians to define these matters accordingly to their own customs and according to cultural protocols and appropriate cultural contents.

Aboriginal tradition and 'of particular significant' is not necessarily an ambiguous phrase, and legislation should not be constantly trying to massage definitions to fit a prescribed purpose.

It is not a difficult word to understand or grasp. Aboriginal tradition is not a 'one-size fit all' terminology that non-Indigenous legislation or English language can accommodate. It is not for this legislation to impose further stereotyping of Indigenous cultural heritage and tradition.

Irrespective of the definition, the balance of power is already well established against Indigenous peoples, because the final decision still remains with the Commonwealth Minister. Relying on definitions in the legislation is an approach which overlooks that fact that these are already recognised principles and standards requiring protection of Aboriginal cultural heritage, and that these should not be compromised by legislative definitions.

All Indigenous Australian groups have a strong 'oral tradition' and customs that have been handed down from generation to generation. It is too simplistic, to think that these can all be encapsulated in English definitions, because quite frankly, the English language does not have the ability to give justice to the meaning of Aboriginal tradition or 'particular significance.'

It seems that the real issue at hand, is whether the legislation has the ability to meet the 'intent' of the legislation to operate in 'good faith', or does it aim to give intent within a very confined and limited nature of recognition in general.

★ **Question 2.3: Would the proposed definitions apply to additional areas or objects that are not covered by the current legislation?**

yes - please explain why no

Once again, legislative reforms should address the core problems and hurdles that Indigenous Australians confront. The core problems are not strictly matters of 'definitions', but real problems that lie at the heart of the legislations current flaws. The imbalance of power and control that the legislation establishes in the very first instance is the type of problems that need addressing. All other matter such as definitions would then be dealt in an appropriate manner.

At the present, Indigenous groups are being asked to provide input, but the already pre-determined nature of this reform process has to some degree 'compromised' the context and nature of this input.

Proposal 3: Accreditation

Accreditation is a method for promoting national standards for Indigenous heritage protection laws in the states and territories. The new legislation could allow the Australian Government to accredit individual states and territories if their laws are effective. Accreditation would mean the Australian Government would not intervene in a decision of an accredited state or territory. This would give the states and territories an incentive to meet the standards and have effective legislation. Details of how this could work are set out on page 15 of the discussion paper.

Note that the content of possible national standards is covered separately under Proposal 4.

★ **Question 3.1: Overall, what do you think about this proposal?**

If accreditation means that the Commonwealth Government would not intervene in a decision of an accredited state or territory, then there is no merit or advantage for Indigenous Australians to be gained.

If accreditation allows the States/Territories allows the Commonwealth Government to abrogate its responsibilities and obligations to Indigenous Australians then this proposal should not be considered.

Once again, the political, social and legal context in which accreditation is being proposed must be made clear. The proposal in its current context does not take into account the changing political nature of Australia's Federal/State/Territory relations. It is already well known that Indigenous Australians have not received their rightful recognition and rights under such a political structure and relationship.

'Accreditation' in the context proposed, could be viewed as a 'veil' behind which the Commonwealth/State/Territories could hide. In other words, as a 'tool', accreditation may well be counter-productive.

★ **Question 3.2: Could the proposed method of accreditation be improved?**

yes - please explain why no

Accreditation without any conditions, provisos or escape routes for the Commonwealth/State Governments is not a solution to the current legislative problems.

It is our view, that any 'accreditation' is a matter to be considered under the auspice of an Australian Indigenous heritage body. It is not for Governments to undertake, because the consequences once again, is a process of taking control and management away from Indigenous peoples.

As previously mentioned, 'accreditation' could also act as an 'escape' mechanism, and actually cause more problems.

- ★ **Question 3.3: If the Australian Government Minister could provide advice for ministers of accredited state or territories to consider when making decisions, could this help make accreditation work effectively?**

] yes

] no - please explain why not

This is a matter that should be undertaken by an Indigenous Heritage body, not government.

This proposal 3.3 already makes the assumption that accreditation is an accepted option.

The Commonwealth Minister should not have the ultimate decision making power and control: it should be done by the Indigenous peoples. Accreditation is a secondary matter, as stated.

- ★ **Question 3.4: Do you think that periodic reviews would help make accreditation work effectively, especially if the Minister can add to the standards for accreditation?**

] yes

] no - please explain why not

As stated, 3.4 operates on the assumption that accreditation would make the Minister's task more effective. This is all well and good, but the question has to be asked? What about the Indigenous people and their priorities. Periodic reviews would add further layers to the problems.

Proposal 4: Standards

The new legislation could specify standards for the states and territories to meet before they could be accredited. Possible standards are set out on pages 18–22 of the discussion paper. The proposed standards aim to identify the positive outcomes that good legislation can achieve, including strong protection for traditional areas and objects, a central role for traditional custodians in decision-making, and efficient, fair and transparent decision-making processes.

- ★ **Question 4.1: Would these standards, if adopted, help to improve the ways that Indigenous traditional areas or objects are protected in your state or territory?**

] yes

] no - please explain why not

Indigenous Australians are entitled to the have good standards and practises in any case. Positive outcomes and good legislation are instrumental to protection, however, it is the Indigenous Australians that are quite capable and able to devise such standards as they see fit. It is patronising that the Commonwealth Government has not seen fit and proper to approach these matter from a different perspective, and allow our peoples to undertake this responsibility. But once again, we are being asked to comment and contribute our knowledge, expertise and cultural values to the discussion. This is not empowering our people to have control, management and decision making over our cultural heritage.

The point of view adopted earlier in reference to 'definitions' can also be applied to 'standards'.

★ **Question 4.2: Do the standards need to be specified differently, or in more detail?**

x yes - please suggest changes] no

The question has to be asked, would standards specified differently help Indigenous Australians or would they aid developers and government processes. Give Indigenous Australians true control over their cultural heritage and 'standards' would be a matter that each peoples could themselves specify according to their own cultural practises and values.

However, it is worth noting, that Indigenous Australians would expect that Commonwealth Legislation would adhere to common law principles of negligent, duty of care, administrative law and various environmental/cultural heritage laws as well. International standards already recognise the extent and breath of Commonwealth obligations to Indigenous Australians, and ultimately it is these standards and ethics that need to apply.

Standards already exist, but this doesn't prevent continue disregard for Aboriginal cultural heritage by developers and even government agencies. The standards alone may not be the problems, it may well be the actual level of enforcement and compliance issues that are causing problems. Enforcement and compliance of Aboriginal cultural heritage under past and current regimes has failed to deter breaches, nor have enforcement and compliance mechanism, which are generally 'controlled' via State/Territory agencies had any real impact.

Enforcement of penalties and fines for breaches may need to be reviewed, however, other forms of 'compensation' may also be worth considering for the future.

Proposal 5: Traditional custodians

The new legislation could recognise that many traditional custodians have achieved legal entitlements to their heritage, for example native title rights. Other people should not be able to apply to protect that heritage. Details of how this could work are set out on page 23 of the discussion paper.

★ **Question 5.1: Overall, what do you think about this proposal?**

These proposals deal with matters that are important, but they are matter which can be undertaken and clarified by Indigenous Australians as apart of overall heritage reforms, not only in the context of legislative reform. As a starting point, Indigenous cultural heritage should be fully controlled under an Indigenous Australian 'auspice' body, and then the type of matters raised in this proposal could follow. The fundamental concern that arises of course, is that legislation alone will not create change, there needs to other measures adopted as part of a 'package' approach to improving Indigenous cultural heritage management. Legislative change is only one approach, but it relies heavily on also changing the 'mind-set' of stakeholders, particularly developers, and indeed government agencies who coincidentally have more control, power and say that Indigenous people.

The Commonwealth Government has commenced this reform, but this proposal has been presumptuous in its approach, because despite good intentions, it has taken away our rights to be apart of this process in the first instance. What is now occurring is a pattern well worn to date, with the consequences of relegating our people to being 'submission' participants, and such a process only works to the advance and aid of developers, governments, land management agencies, not necessarily the Indigenous people for whom this legislation is suppose to serve and protect.

★ **Question 5.2: Does it make sense to rely on existing legal processes like native title processes to identify traditional custodians?**

yes

no - please explain why not

Let Indigenous Australians makes such determinations, let us devise our own culturally appropriate mechanism for such important matters. Asking yes/no type question can be misleading. Basically the legislation is suppose to provide protection, "if it doesn't" which seems to be the case in Australia, then relying on existing legal processes may not necessarily help

★ **Question 5.3: Is it fair to allow only recognised traditional custodians, using their representative bodies and processes, to apply to protect traditional areas and objects, if there are recognised traditional custodians?**

yes

no - please explain why not

Once again, using Native Title legislative mechanisms seems a solution on the surface, however, This allows the Commonwealth to abrogate once again, and its narrows the opportunity for Indigenous Australians to participate in managing their cultural heritage. A narrow approach makes it easier for government and developers, but there are many Indigenous Australians who have a rights to their cultural heritage and participate, 'they are not necessarily Native Title holders recognised by the Australian Government or courts.'

Heritage legislation should not be trying to put itself in the shoes of another legislation and taking away the rights of Indigenous Australians to make their own choices.

- ★ **Question 5.4: Should Indigenous persons who are not native title parties be able to apply for Commonwealth heritage protection over areas where native title rights and interests have already been recognised?**

yes - please explain why no

Developers are not subject to these types of conditions or prerequisites, so why impose them on Indigenous Australians. It is possible, that this could place restrictions and constraints on Indigenous Australia's, 'the very people for whom the legislation aims to service'.

- ★ **Question 5.5: Are prescribed bodies corporate the appropriate organisations to apply for Commonwealth heritage protection over areas where native title rights or interests have been recognised?**

yes no - please explain why not

Once again, legislative reform is one thing, but imposing tight conditions or prerequisites on Indigenous Australians impose further eligibility hurdles for our people. These are hurdles that developers, government or other stakeholder are faced with, and indeed such conditions could well be counterproductive for Indigenous Australians, and an unfair advantage to other parties.

Proposal 6: Indigenous land use agreements (ILUAs)

The new legislation could support native title holders by not overriding a registered ILUA. Details of how this could work are set out on page 25 of the discussion paper.

- ★ **Question 6.1: Overall, what do you think about this proposal?**

Native title holders would already assume rights to negotiate and for all other transparent processes to occur. ILUAs that exist are of course matters that governments and developers already deal with.

★ **Question 6.2: Is it fair to stop applications to protect traditional areas and objects from an activity if the activity is allowed under a registered ILUA?**

] yes

] no - please explain why not

Much depends on the individual circumstances, and there maybe a need for case by case basis.

It must be reaffirmed that these matters should not be deal with by adopting a 'one-ft-all' approach. Our view to making such decisions, is that Indigenous Australians have their own individual culturally appropriate customs or practises that could address such situations. Leave these matters to our people, and concentrate on making this legislative reform process substantive and meaningful.

★ **Question 6.3: If not, is some other reform needed to prevent applications from impacting on ILUAs?**

] yes - please suggest reform

] no

Certainly, the Commonwealth Government should establish an Australian Indigenous Cultural Heritage 'body/auspice' and hand back control and management to the Indigenous Australian peoples. This would be the first step needed, and then incorporate the 'systematic internal' reviews and reforms such as looking at ILUA, definitions and the complex operations.

★ **Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not native title parties to become involved in negotiations?**

] yes - please explain impacts

] no

This proposal operates on the assumption that other proposed measure reflects our views and opinions. It is a very simplistic approach that has been adopted, is assumes a position of paternalism and control, and whilst it may well have 'good intentions' and well meaning, it over-rides the fact that Indigenous Australians are the owners of their culture heritage. Therefore, these reform processes should adopt a preferable approach, which could be:

- Step one Set-up Indigenous Australian governance structure and undertake legislative management and control. Provide such an 'Australian Indigenous Cultural Heritage Body' with adequate funding and resources to carry out the responsibilities of the various legislations.
- Step two – Undertake reforms, reviews and restructure required to re-establish and give affect to the legislation.

- ★ **Question 6.5: (a) Would ILUA negotiations be more difficult if native title parties could not ask the Minister to protect traditional areas and objects from activities permitted under an ILUA?**

yes - please explain why no

Legislative reform should not be about providing hurdles for any group to approach Minister for protection orders.

- ★ **(b) Or would the ILUA be a stronger agreement as a result?**

yes no - please explain why not

Legislative reform should concentrate on the actual process within it, but avoid trying to control all aspects of Indigenous Australians for whom the legislation is meant to service in a positive manner, not a restrictive confined one.

Proposal 7: Discovered remains

To reduce duplication of state and territory laws, the requirement to report all discoveries of Indigenous personal remains to the Australian Government could be removed, except for discoveries on land that is managed by the Australian Government. Details are set out on page 26 of the discussion paper.

- ★ **Question 7.1: Overall, what do you think about this proposal?**

Duplication should not remove the requirement to report all discoveries of Indigenous personal remains. Maybe a preferable streamline reporting process could be implemented to ensure improved cooperation.

- ★ **Question 7.2: Do the states and territories have adequate processes for reporting discovered human remains that are suspected to be those of Indigenous people, and to ensure that discovered Indigenous personal remains are treated in a culturally sensitive manner?**

yes

no - please explain why not

It can only be pointed out that many Indigenous communities do not hold the power, resources and control to do this. There is a dangerous assumption being made here, because from our experience, the State agency seems to have more control and power, and the Indigenous community/ies tend to be consulted or involved when contacted (if contacted).

- ★ **Question 7.3: If not, how could Commonwealth legislation be used to encourage improvements without always overlapping state and territory responsibilities?**

Commonwealth Government should enforce its legislative responsibilities despite overlapping State/Territory issues.

Proposal 8: Secret sacred objects and remains

The new legislation could address key Indigenous concerns about some traditional objects by making it an offence to display these objects in public. Probably this would require new definitions such as 'secret sacred object' and 'Indigenous personal remains'. Details are set out on page 27 of the discussion paper, including examples of situations where it might be necessary to prohibit or allow display.

- ★ **Question 8.1: Overall, what do you think about this proposal?**

Yes, however preferable to leave such definitions to be determined by Indigenous Australians, because the consequences of translating Indigenous meanings into 'English' language could have a negative impact.

- ★ **Question 8.2: Are there other situations where it might be necessary to prohibit or allow display?**

yes - please describe no

Without making generalisations and assumptions, the matter of prohibiting or allowing display should be recognised as essential, but that these also be determined according the appropriate cultural protocol for the peoples concerned.

- ★ **Question 8.3: How would prohibiting the public display of these objects affect your business?**

Adopt and enforce the full breath of the common law, statutes, equity, property, all domestic and international laws.

- ★ **Question 8.4: Would the proposed definitions exclude any objects that might need to be protected from public display because they have a special meaning in Indigenous traditions?**

yes - please explain why no

The proposed definition should not be seen as a 'blanket' attempt to fulfil or stop inappropriate public display etc.

Proposal 9: Applications

In states and territories that are not accredited Indigenous Australians could apply to the Australian Government to protect traditional areas and objects from activities that are not already dealt with in a registered ILUA. The new legislation could set out what information to include in applications and say when applications could not be accepted. Details are on pages 30 of the discussion paper.

★ **Question 9.1: Overall, what do you think about this proposal?**

Indigenous Australians expect to be able to apply for protections in any case. Whether these activities are dealt with in a registered ILUA is another matter. It would be dangerous for any new legislation to 'say when applications could not be accepted'. This flies in the face of the spirit of the legislation even further.

★ **Question 9.2: Does the legislation need to specify the content of applications?**

yes

no - please explain why not

But once again, these are material matters, and not substantive. Such matters could be further specified by the proposed Australian Indigenous Cultural Heritage body.

★ **Question 9.3: What other information might need to be included in an application?**

Any information that an Indigenous group consider relevant and appropriate to their cultural practises, particular situation or circumstances. This is a subjective approach, however, it recognised that Indigenous Australian may have their own individual protocols and values within which they operate.

- ★ **Question 9.4: Are there other reasons why the government might not be able to accept an application?**

yes - please describe no

The government should not be in control or making decisions about cultural heritage applications.

This should be the task of the proposed Indigenous Australian Cultural Heritage body. (ie control)

Proposal 10: Conferences

The new legislation could set out the procedures for responding to applications. The procedures could include specifying which people the government would need to contact, because their legal rights might be affected. Following this contact the government could hold conferences to try to resolve problems. Details are on pages 33 of the discussion paper, including details of the process for setting up and running the conferences.

- ★ **Question 10.1: Overall, what do you think about this proposal?**

This proposal needs further consideration, because it places the central control with government.

The wording of this proposal states that 'because their legal rights might be affected', however, what about the rights of the Indigenous people. Conferences could be a useful tool and may suit some Indigenous groups, and on the other hand, disadvantage others.

- ★ **Question 10.2: Are there other people whose legal rights and interests could be affected by a decision on the application?**

yes - please describe no

All stakeholders have various rights and interests, but the legislation should fundamentally protect Indigenous cultural heritage and adopt this as a benchmark.

- ★ **Question 10.3: Are conferences a good way to begin to resolve the issues raised by an application?**

yes

no - please explain why not

Yes and no type questions don't allow for the 'grey' areas of concern, and invariably that's where disputes and Indigenous concerns arise.

- ★ **Question 10.4: In practice would the process for setting up and running conferences be an efficient and fair way to decide how to respond to the issues raised by an application?**

yes

no - please explain why not

Not necessarily, as mentioned previously, there's an assumption already being made through the manner in which this question is asked ie 'leading question'.

Proposal 11: Sensitive information

To address Indigenous concerns about traditional knowledge, the Australian Government could have a power to direct the people involved in an application to protect culturally sensitive information. This would also apply to commercially sensitive information. Details are on page 36 of the discussion paper.

- ★ **Question 11.1: Would this new power provide adequate protection for sensitive information?**

yes

no - please explain why not

This is a fundamental principles – of course protection is required.

Proposal 12: Interim protection

There could be more clarity around the rules for providing protection on a short-term basis in an emergency. For example there could be more clarity around the reasons for providing and revoking this form of protection, the timing, and who would need to be informed. Details are on pages 37 of the discussion paper.

★ **Question 12.1: Overall, what do you think about this proposal?**

Just how much more clarity and reasons would Government required? Would this place the onus on Indigenous Australians to justify and prove an interim protection step.

★ **Question 12.2: Considering proposal 9, is 48 hours sufficient time to lodge an application for protection?**

yes

no - please explain why not

24 hours would be preferable. These actions are taken during critical circumstances and associated with a lot of stress as well. Shorten the period and move the process along.

★ **Question 12.3: Would having up to 6 days (i.e. 48 + 96 hours) of short-term protection provide a reasonable balance between the need to ensure that heritage can be protected while the application is being lodged and the need for businesses to avoid excessive delays?**

yes

no - please explain why not

Cultural factors and protocols could require a longer period to conduct all the necessary business within the community etc.

- ★ **Question 12.4: Would the Secretary need to consider other factors before deciding whether to provide short-term protection?**

yes - please describe

no

As mentioned previously, such decisions should not be made by Government, they should be managed and handled by Indigenous Australians. An appropriate mechanism needs to be established.

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- ★ **Question 12.5: Would temporary protection in the form of ministerial orders that last up to 28 days at a time provide a reasonable balance between the need to ensure that heritage can be protected while the application is being processed and the need for businesses to avoid excessive delays?**

yes

no - please explain why not

Ministerial orders should be adopt under the instructions of an Indigenous Australian Cultural Heritage body only. Sole control should not rest with a Government Minister. this principle should apply in regards to 'orders' of any kind.

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- ★ **Question 12.6: Would the Minister need to consider other factors before deciding whether to provide or revoke temporary protection?**

yes - please describe

no

Our position on the Minister's power has already been emphasised.

★ **Question 12.7: Would any other people need to be consulted before a protection order is made, or notified after the order is made?**

yes - please explain why no

Proposal 13: Longer-term protection

The rules for providing and revoking longer term protection could be clarified to strengthen the basis for the Australian Government Minister's final decision. For example there could be more clarity around the reasons for providing and revoking this form of protection, including the factual basis of the decision. Details are on pages 41 of the discussion paper.

★ **Question 13.1: Overall, what do you think about this proposal?**

Same principle as previous discussed should be recognised and adopted. Give Indigenous Australians real control over their cultural heritage. Long term protection orders are great, but how has the decision and control making power in the first instance to make these orders relevant or effective.

★ **Question 13.2: Is it important to have a person who is independent from the Minister assess the facts?**

yes no - please explain why not

Establish an independently established Indigenous Australian Cultural Heritage Body to manage the legislative responsibilities of the Commonwealth and apply the same principle to the States and Territories.

★ **Question 13.3: Is the proposed method for preparing the statement of facts a fairway to assess the facts about the situation?**

yes

no - please explain why not

Material matters that can be clarified at later date.

★ **Question 13.4: Would the Minister need to consider other factors before deciding whether to make a final protection order?**

yes - please describe

no

Minister need to consider ways and means of delegating powers to the proposed Indigenous body and promoting much needed change in Commonwealth/State relations around Indigenous cultural heritage.

★ **Question 13.5: Would the Minister need to consider any information that could not be included in the statement of facts?**

yes - please explain why

no

★ **13.6: If so how this could be done fairly and without undue delay?**

★ **Question 13.7: Would the Minister need to consider other factors before deciding whether to revoke a final protection order?**

yes - please describe

no

Proposal 14: Penalties and enforcement

The discussion paper includes a range of suggestions for how to ensure that the new legislations enforced adequately. Details are on pages 46 of the discussion paper.

- ★ **Question 14.1: Are there other, better ways to promote compliance and enforce protection?**

yes - please describe

no

Enforcement and penalties need to be strengthened.

Compensation should also be included, as well as common law legal rights to Indigenous Australians for breaches.

It is all well and good to have these penalties and enforcement, but clearly, they are not working, or enough to have any influence.

Maybe there's a real need to actually look at just who's responsible for enforcement and penalties. It has already been pointed out in this submission, giving this responsibility to Indigenous Australians could be a feasible alternative. Take enforcement out of the hands and control of non-Indigenous agencies and government departments where 'conflicts of interest' and other political influences negatively impact on their ability to fulfil their legislative responsibilities.

Proposal 15: Reviews

The effectiveness of the legislation, especially the accreditation scheme, could be reviewed at regular intervals to ensure it is achieving its aims. Details are on page 49 of the discussion paper.

- ★ **Question 15.1: What would be the best intervals for reviewing the legislation?**

Hand this responsibility over to Indigenous Australians and allow us to undertake this responsibility.

- ★ **Question 15.2: What would be the best way to review the effectiveness of accreditation?**

- ★ **Question 15.3: What specific aspects of accreditation would need to be reviewed?**

Additional space for comments

If the comment is about one of the proposals, please specify the number of the proposal

It is our view that the legislation as it operates does not protect Indigenous cultural heritage.

Developers and government agencies responsible for legislative administration and management have taken away Indigenous control of their heritage.

We would like to see reforms undertaken under the auspice of a proposed Australian Indigenous Cultural Heritage Body. The Commonwealth Government must allow our people to have the infrastructure, resources and mechanisms to address this challenge.

The Australian Commonwealth Government must hand over control of Indigenous Cultural Heritage to Indigenous Australians. Until this happens, then very little will change.

More information

Additional information is available online at www.heritage.gov.au/indigenous/lawreform

If you need more information about making a submission please contact:

Phone: 1800 003 164

Email: atsihpa@environment.gov.au