



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

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Other contact details (optional): (08) 9263 8709; craig.muller@glc.com.au

.....

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): <http://www.glc.com.au/>

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

yes - please specify no

[The Goldfields Land and Sea Council](#)

.....

.....

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

[I am, and the GLSC is, concerned with increasing the effectiveness of processes to protect Aboriginal heritage](#)

.....

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?**

This submission refers to the situation in the Goldfields region of Western Australia, where Aboriginal heritage protection is implemented under the Western Australian *Aboriginal Heritage Act 1972* (‘the AHA’) and the Native Title Act.

Aboriginal people in the Goldfields experience several main problems with the current heritage protection system in Western Australia:

- (1) Most importantly, this system falls far short of providing adequate protection.

While some private (mining and exploration) companies show great responsibility in their approach to Aboriginal heritage there is insufficient control over the minority that do not.

The result is all too often damage to and destruction of significant Aboriginal heritage sites and objects of importance.

The reason this damage and destruction occurs – and therefore the issue that needs to be addressed – is that there is a lack of respect (both within and outside of government) for Aboriginal heritage. The solution is twofold: Non-Indigenous Australians need to be educated to the importance of Aboriginal heritage. Indigenous heritage is a vital component of the national heritage, but it is not always treated with the respect this deserves; and Aboriginal heritage protection by government needs to be made effective, that is, a process whereby sites and objects of importance are protected, rather than (as now occurs in Western Australia) having a process that provides a clear avenue for developers to get permission to destroy sites.

- (2) Aboriginal Traditional Owners – the people with most at stake – do not have any control over the protection of their sites and objects. That is, the vital decisions about protection or otherwise are taken out of the hands of the Traditional Owners and made by non-Aboriginal people.

The solution is to give Aboriginal people a greater role in the decision making process.

- (3) Heritage protection is usually only invoked when there is an immediate danger to sites, by which time it is often too late to put in place effective protection.

Developers need to understand the importance of Aboriginal heritage so that there is a willingness to learn ahead of development what sites and objects need protection and implement a heritage protection management plan.

- (4) Bureaucrats and politicians are often reluctant to use the legislation on behalf of Aboriginal people.

Again, the key here is developing sufficient respect for Aboriginal heritage so that development is not automatically given higher priority because it's seen as being of greater importance.

- (5) There is inadequate resourcing to ensure legislation implemented on the ground: The Western Australian Department of Indigenous Affairs is, by their admission, stretched too thin and often cannot provide practical protection in remote Western Australia – exactly where protection is often most needed;

Further funding is required to ensure better heritage protection. This could come in the form of payments to Wardens in remote areas to monitor and report on heritage issues.

- (6) The AHA tends to focus on the material side of heritage rather than religious/spiritual.

This issue is tied in with the issue of lack of respect and understanding of Aboriginal heritage issues. The importance of sites that are associated with spiritual stories and legends (for example, Dreaming sites) is sometimes not realised. As an example, in the relatively flat Goldfields region an entire range of hills may be a Dreaming site, but the scale of the site is not accepted by mining companies, nor by the Department of Indigenous Affairs.

Aboriginal sites are part of the fabric of Aboriginal society. They provide a framework for Aboriginal culture and identity and a mechanism for ensuring cultural continuity. It is not just that 'Indigenous cultural heritage could be damaged by the activities of land users or developers through ignorance' (p12) but that Aboriginal well-being is affected because Aboriginal culture is seen as being under attack. The destruction of a site tears the fabric of local (and often not-so-local) Aboriginal life. The GLSC agrees that the rewritten legislation should note the right of "Indigenous Australians... to be fully involved in the processes for making decisions about land use and development that could affect traditional areas, or about the use of traditional objects."

- (7) The system in Western Australia (through the Department of Indigenous Affairs) is predicated upon identifying and listing sites and often that list is at least partially open to the public, whereas there are numerous instances where Traditional Owners do not want sites and the information about them identified.

Sites need to be protected relying on appropriate, verified information from Traditional Owners.

* * *

The result of all the above is that many Aboriginal people feel that in Western Australia the AHA does not protect sites but allows their destruction if such destruction is required for development to go ahead (Section 18 of the AHA allows the Minister to issue an order for the destruction of a site). In other words, there is inadequate Aboriginal heritage protection in Western Australia.

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

Point two ('Acknowledge that Indigenous Australians are the primary source of knowledge of their traditional laws and customs and have responsibilities to protect their traditional areas and objects') should be extended to note also that those Indigenous Australians who have responsibilities for protecting traditional areas and objects should be involved in the decision making about those area and objects.

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?**

The definition of laws and customs in the Evidence Act seems clear; it does not require interpretation (from anthropologists and/or government employees) but rather, requires Aboriginal people to state what are their traditions, customary laws etc.

The GLSC supports this proposal, assuming it places more emphasis on Aboriginal people to determine what are areas or objects 'of particular significance to Aboriginals in accordance with Aboriginal tradition.' That is, Aboriginal people should determine the criteria.

- ★ **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

It would be necessary that whatever system of heritage protection be used it does not necessarily require the public listing of important sites.

★ **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

Not sure

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?**

The GLSC supports this proposal, contingent on the ATSIP being written to ensure the standards of accreditation are clear and sufficient. Indigenous heritage is national heritage and should not be placed on a lower tier in various states. Instead, state heritage regimes must provide effective Aboriginal heritage protection, and accreditation should only be made if the standard required of the states achieves this.

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

yes - please explain why no

Accreditation looks only at the heritage protection laws as they are written, not as they might be applied, that is, heritage policy implementation. So where it is stated 'For example the Minister could revoke accreditation if the accredited state or territory government changes its laws in a way that affects compliance with the standards' this does not allow for States changing the way they apply the same laws over time.

- ★ **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

Yes, it could make it work more effectively

- ★ **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

Review of accreditation should involve the State reapplying, rather than having accreditation roll-over if there are no objections to that particular state being accredited.

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

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

yes - please suggest changes no

They should be the level of international heritage protection standards

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?**

Such a requirement would mean (in Western Australia) a significant tightening of conditions as they are currently under the AHA 1972 – which states any ‘persons with an interest’ can request protection.

There is therefore some concern with this restriction, because there may be some circumstances where people other than the legally recognised Traditional Owners may have strong interest in having a site (or sites) or object (or objects) protected.

For instance, Law may not be strong in an area at a particular time but Law men and women living some distance away nonetheless may be very concerned with the protection of sites in that area. This is more likely to be true as governments apply strong pressure to avoid overlaps in Native Title claims – which may mean that people who have some, but perhaps not primary, interest in areas of country are not going to be Native Title holders for that country.

As a second example, even if Law is strong, and the local Traditional Owners are recognised, there may remain others interested in the Law, and sites, across an area greater than that for which they are the recognised owners – for example, along Dreaming tracks that run hundreds of kilometres. Finally, there may be some isolated cases where the recognised Native Title owners may not be in a position to apply for protection they would nonetheless strongly desire.

★ **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

Native Title could be the first, and main, process for identifying the Traditional Owners, but not the only one – for the reasons cited above.

★ **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

As above – provision should remain to allow – under specific circumstances – for Traditional Owners outside the determined area to have input into heritage protection for an area.

- ★ **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

As above (5.1)

- ★ **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

Yes, as the primary interested party

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?**
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★ **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

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

yes - please suggest reform

no

★ **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

★ **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

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

yes no - please explain why not

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?**

Perhaps all discoveries should be made to the State Minister who could then notify the Federal Minister if it is federal land

- ★ **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

Western Australian process seems to be adequate

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

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?**

The GLSC agrees to the need for this requirement – though the condition of voluntary donation of remains needs to be carefully defined. For example, if an Indigenous person makes a donation were they the proper (authorised by their group) person to do so?

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

yes - please describe no

Possibly – this would have to be monitored.

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

N/A

★ **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

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?**

Fine, as long as the process is not unnecessarily difficult for Traditional Owners, particularly to make emergency applications

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

yes no - please explain why not

Insofar as it brings applicants into the decision making process

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

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

yes - please describe no

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?**

There is some concern that once a proponent makes application, they then have ‘rights, interests or legitimate expectations’ which are equal to that of the Traditional Owners, even though such rights etc are assumed (by the proponent) rather than innate (as with the Traditional Owners).

★ **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

★ **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, although it should be understood that it is the Traditional Owners rights and interests that are threatened and that should be given greater consideration (that is, all parties do not necessarily have equal status).

★ **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

As above

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

If the Minister is making a decision, why do the parties need to share the information? The Minister could make reference to ‘culturally sensitive material’ which helped frame the decision without revealing the contents.

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?**

Agree

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

yes no - please explain why not

No – the time allowed should be extended to six days. Remote communities etc have limited access to electronic communications, which a 48 hour deadline would necessitate.

★ **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

As above

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

yes - please describe no

★ **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

It would seem to be adequate

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

yes - please describe no

★ **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

Perhaps other Aboriginal groups with an interest in the area, if there are any.

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?**

The GLSC is in favour of providing clarity of decision-making processes.

★ **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

It would be desirable

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

yes no - please explain why not

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

yes - please describe no

A clause something like the following should be added:

c. if the loss of or damage to the area or object would cause significant emotional and/or spiritual distress

- ★ **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

Information restricted because of gender or initiation level.

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

By having the Minister refer to the information without explicating the contents.

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

yes - please describe no

Revocation should require a request from more than one Traditional Owner

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

Penalties should be updated and include mandated provisions to compel clean-ups and repair of damaged sites and objects.

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?***

Seven years initially, then every ten. Accreditation should be reviewed more often – perhaps at every change of State government.

★ ***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?***

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

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