



Institute Building, North Tce (corner Kintore Ave), Adelaide
PO Box 263, Rundle Mall SA 5000, Australia

Tel : + 61 (8) 8207 7287 Fax: + 61 (8) 8207 7207

info@collectionscouncil.com.au
www.collectionscouncil.com.au

Submission to the Department of the Environment
Water, Heritage and the Arts

**Response to proposed changes
to the *Aboriginal and Torres
Strait Islander Heritage
Protection Act 1984.***

12 November 2009

Authors	<p>The following people have contributed to this submission on behalf of the Collections Council of Australia:</p> <p><i>Ms Margaret Birtley</i> Chief Executive Officer Collections Council of Australia Ltd</p> <p><i>Ms Alexis Tindall</i> Project Officer Collections Council of Australia Ltd</p> <p><i>Ms Veronica Bullock</i> Development Officer Collections Council of Australia Ltd</p>
Organisation	Collections Council of Australia Ltd
Type of organisation	Not for profit; limited liability company
Address	PO Box 263 Rundle Mall SA 5000
State	South Australia
Contact details	Email: info@collectionscouncil.com.au Telephone: +61 8 8207 7287
Declaration of interests and affiliations	None of the contributors has any direct personal interest in the matters addressed by this submission.

Response on proposed changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984.*

A response to the Department of the Environment, Water, Heritage and the Arts Discussion Paper *Indigenous heritage law reform*, circulated August 2009.

About the Collections Council

The collections sector includes natural and social history museums, art galleries, libraries, archives, Indigenous keeping places and knowledge centres, historical societies and collections held in schools and universities, community and government organisations and businesses. Collections are an integral part of Australian life and play a role in documenting and interpreting Australian identity, values and achievement.

As the peak body for cultural and scientific collecting organisations in Australia, the Collections Council of Australia (CCA) was initiated and is supported by the Cultural Ministers Council. We speak for collections in Australia, on matters of shared interest.

The Council's vision is to see all Australians and their governments committed to policies and practices that ensure Australia's collections inspire, amaze, inform and delight all Australians and the world forever.

Keys to achieving this vision include:

- Coordination of effort across the collections sector;
- Strengthening of links between the collections sector and other sectors such as community, education, industry, government and research; and
- Stimulation of greater awareness and use of collections.

Information about our full range of activities is available at www.collectionscouncil.com.au.

This submission

The CCA appreciates the opportunity to comment on the proposed changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act), and congratulates Department of the Environment, Water, Heritage and the Arts on the discussion paper *Indigenous heritage law reform*.

We note that this legislation has a challenging history and has previously been reviewed, without successful reform. The CCA hopes that the outcomes of the current review are positive and result in improvements to the Indigenous heritage protection regime.

The ATSIHP Act refers to the management of traditional areas and objects. The CCA has answered selected questions from the discussion paper that are relevant to collections sector organisations and workers. This submission also responds to some questions about management of traditional areas, as many of those working in the collections sector find themselves working across movable cultural heritage and the management of built and environmental heritage. Museums and other custodians of Indigenous collections are also frequently consulted in relation to the management of traditional areas.

Observations

The CCA welcomes reform of the ATSIHP Act. Our observations generally concur with those expressed in the discussion paper that the effectiveness of this Act has been limited. Conflicting and divergent legislation between states and territories and the Commonwealth has not resulted in positive outcomes for any interested party. Poor navigation of the maze of legislation relevant to Indigenous heritage protection has caused rifts within and between Indigenous and heritage communities, and has rarely led to satisfactory outcomes.

The CCA supports DEWHA's proposal to accredit state and territory Indigenous heritage protection legislation as long as it is considered, consultative and respectful. The aim should be to **provide clarity** to Indigenous communities and their representatives, developers, heritage workers and collecting organisations, and to ensure that legislation **meets appropriate standards**.

Reform should not be read as an opportunity for the Federal Government to phase out responsibilities in this area, or simply to streamline administrative processes. The ATSIHP Act was initiated as an Act of last resort, protecting areas and objects when state and territory legislation was not adequate or not enforced, and should continue to play this role.

Proposal 1: Clarifying the purposes of the legislation

The points outlined in the *Indigenous heritage law reform* discussion paper express the purpose of the legislation clearly and emphatically. The CCA's only concern is the loss of intention of the legislation as an avenue of protection, when existing legislation was *not enforced* as well as absent or inadequate.

Proposal 2: Making terminology consistent with the purposes

The CCA broadly endorses the proposed definitions of traditional area and traditional object as outlined in the *Indigenous heritage law reform* discussion paper.

The Review should consider the challenge of protecting objects in collections that have become disconnected from their traditional owners. The definition of traditional objects asserts that “the object is protected or regulated under traditional laws and customs”. This may not be the case in some communities that have interrupted histories, or are presently reviving and re-invigorating traditional practices.

In a related issue, the definition of “traditional” could be contested, as Indigenous communities have evolving, living cultures. Testing the veracity of “traditions, customary laws, customs, observances, practices, knowledge and beliefs” may prove challenging in some circumstances.

The CCA notes that the 1996 Evatt Review of the ATSIHP Act recommended that protection should be extended to include “films, photographs and tapes, especially those of ceremonial practices, or other secret information of significance” (Recommendation 12.3). This may be an issue that could be addressed by different Acts or under different administration, but should also be considered in relation to the protection of traditional areas and objects.

Proposal 3: Promoting effective laws through accreditation

The CCA welcomes efforts by the Federal Government to improve Indigenous heritage legislation, and to make the legal process more uniform and better understood by all interested parties. The CCA supports elements of this proposal that retain a role for the Federal Minister in advising an accredited state or territory to “call in” an activity for approval, and that allow for the review of accreditation. The CCA also supports elements of the proposed accredited standards that allow for input from the Australian Government, and an ability for Indigenous Australians and others to seek legal review of the process.

Periodic review of accreditation is essential to maintain standards in heritage protection. The CCA also supports the proposal that accreditation could cease automatically in such circumstances as are outlined in the discussion paper.

Consideration should be given to the management of traditional objects under a system in which all states and territories may be accredited to protect their own Indigenous heritage. Minimum standards for state and territory heritage protection legislation must include encouragement to co-operate with other states and territories. If such laws are restricted to apply solely to the heritage of local Indigenous communities, objects that have been removed from their appropriate location before coming to the attention of authorities may be at risk. This would apply to objects held in collecting organisations or private collections that may be identified years or decades after they were collected in other parts of Australia.

Proposal 4: Specifying standards for effective protection

The CCA supports the standards for accrediting state and territory laws, as detailed in the *Indigenous heritage law reform* discussion paper.

The CCA would like to emphasise our agreement with the comment that “secret or sacred traditional information should not be divulged”, and assert that sensitive and sensible handling of such information is integral to the success of protection regimes. Strong frameworks and guidelines to protect secret and sacred traditional information, which are publicized and used, can create an environment of trust that will have positive outcomes for Indigenous communities, governments and business. Poor handling of such information can destroy protection regimes through the consequent breakdown of relationships.

Proposal 5: Ensuring that, if legally recognized traditional custodians exist, only they can seek Commonwealth protection

The CCA is of the strong belief that a proposal to limit the ability to apply for Commonwealth heritage protection to legally recognized traditional custodians will create difficulties in the protection of Indigenous traditional objects. The records of the provenance of some significant objects in collecting organisations and private collections are incomplete, and the identification of an appropriate custodian in a short time frame may be difficult. The ease and speed of the international trade in looted objects can require an emergency declaration to be made well before any appropriate traditional custodian could be identified.

Proposal 6: Ensuring that Commonwealth protection would not prevent an act authorised under a registered Indigenous land use agreement

The CCA has no recommendations or comments on this proposal.

Proposal 7: Removing duplication of state and territory protection for Indigenous remains

The CCA supports efforts to better coordinate legislation between the states, territories and Federal Government.

Proposal 8: Addressing gaps in state and territory laws to ensure respectful treatment of Indigenous secret and sacred objects and remains

Export of secret sacred objects and remains is prohibited under the *Protection of Movable Cultural Heritage Act 1986*, and their sale or trade is prohibited under some state and territory acts.

Most collecting domains have produced guidelines for the handling and care of sensitive objects. These documents generally advise against the display of such items.

These documents include:

- Museums Australia *Continuous Cultures, Ongoing Responsibilities*

- Australian Library and Information Association *Aboriginal and Torres Strait Islander protocols for libraries, archives and information services* (also endorsed by the Australian Society of Archivists and the National Association for the Visual Arts' Document *Valuing Art, Respecting Culture*)
- National and State Libraries Australasia *National Policy Framework for Aboriginal and Torres Strait Islander Library Services and Collections*.

In addition, Policy Statements 2, 5, 8 and 9 in the *National Conservation and Preservation Policy* (1995) express principles toward the care and handling of Aboriginal and Torres Strait Islander collections, which are also reflected in the *Code of Ethics and Code of Practice* for materials conservators (Australian Institute for the Conservation of Cultural Material 2002). Cultural heritage conservation operates across all collecting domains.

The CCA endorses the recommendation to prohibit display of personal remains and secret sacred objects.

Proposal 9: Specifying the information needed for applications for protection

The CCA supports the proposed minimum content for information to be included in applications for protection. It is likely that better informed applicants, and more consistency, will result in a greater number of successful applications and better outcomes for heritage protection.

The CCA also supports the suggestion included in the discussion paper that the applicant would be "advised and given a reasonable opportunity to provide the missing information" if their application was incomplete.

The CCA strongly supports the requirement that applicants will be informed that the applications will be read by other parties, and the ability to indicate that there is sensitive information that may not be able to be included in the application.

The CCA believes that the minimum content for applications should be specified and could be included in regulations. Other Acts relating to cultural heritage protection, including the *Protection of Moveable Cultural Heritage Act 1986*, and the *Environment Protection and Biodiversity Conservation Act 1999*, specify similar instructions in regulations.

Proposal 10: Using conferences to consider how best to deal with the issues

The CCA supports the proposed model of conferences for the appropriate resolution of issues in Indigenous heritage management. This approach can minimize lengthy legal negotiations, and encourage a more collaborative approach to resolution.

The CCA recommends that such conferences could be overseen by a *National Indigenous Cultural Authority*, as described in Terri Janke's essay *Beyond Guarding Ground*. This body could assist in identifying interested parties and

advice about conference processes. It could also mediate relationships between relevant parties and collecting organisations that may be able to act in an advisory role, or provide context and supporting evidence.

Proposal 11: Protecting sensitive information

The proposed method for protecting sensitive information appears to address some of the deficiencies in the existing ATSIHP Act. Reformed legislation should impose penalties for deliberate mishandling of sensitive information.

The CCA believes that appropriate handling of sensitive information is integral to the success of this legislation, as it can generate a trusting collaborative environment which should result in better outcomes for all interested parties.

Proposal 12: Clarifying the reasons for providing and revoking interim protection

Proposal 13: Clarifying the reasons for providing and revoking longer-term protection

The CCA has no recommendations or comments on these proposals.

Proposal 14: Updating the penalties and improving the enforcement powers

The CCA supports the application of criminal and civil penalties to actions that:

- contravene a protection order;
- involve the deliberate display of secret sacred objects and Indigenous personal remains;
- contravene the Minister's decision about maintaining confidentiality, especially in relation to handling sensitive information.

Proposal 15: Reviewing the effectiveness of legislation at regular intervals

The CCA supports the proposal to plan regular reviews of the proposed Indigenous heritage protection legislation, and accreditation scheme.

Scheduled reviews would indicate a strong commitment by the Australian Government to getting this protection regime right, particularly given the troubled history of the ATSIHP Act.

Other Issues

The CCA endorses Terri Janke's initiatives to promote a *National Indigenous Cultural Authority*, as developed in *Beyond Guarding Ground*. This paper develops her earlier recommendation for such an authority to be the peak advisory body on Indigenous Cultural and Intellectual Property rights. Janke explores the possibilities for this body to manage intellectual property in relation

to Indigenous cultural expression, and to help define what constitutes Indigenous Cultural and Intellectual Property.

The CCA is of the opinion that such a self-determining body could assist in the management of Indigenous heritage protection for both tangible and intangible heritage. This is more in line with Indigenous holistic notions of heritage. It could also meet some of the recommendations of the Evatt Review which called for a national “Aboriginal-controlled” body to “have a role in monitoring Aboriginal heritage protection nationally, and in coordinating laws and programmes that have an impact on Aboriginal heritage”.

The CCA would like to take this opportunity to acknowledge and commend the collections sector’s experience in encouraging and facilitating the repatriation of secret sacred objects and personal remains to Indigenous communities. The sector’s work in caring for sensitive material in circumstances where there is no other appropriate keeping place and management of relationships with relevant communities should be commended. The collections sector has a troubled historic relationship with Indigenous communities, but in recent years has worked constructively to improve this situation. Particular examples of this include the Bunjilaka Keeping Place at Museum Victoria, and the National Museum of Australia’s role in international repatriation of sensitive material.

Conclusion

The CCA appreciates the opportunity to contribute to this Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act*.

Australia has an obligation to Indigenous and non-Indigenous citizens to protect traditional objects and areas in order to encourage diversity of cultural expression, now and for the future. Australia also has international obligations in this area through our accession to the *International Convention on Civil and Political Rights*, our formal support of the *UN Declaration on the Rights of Indigenous Peoples*, and our recent decision to become a party to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* to support Indigenous Australians’ right to maintain traditional cultural and spiritual practices.

This Review provides an opportunity for the Australian Government to consider and improve Indigenous heritage protection. It is expected that the resulting revised legislation will be clearer and function better for the benefit of Indigenous communities, governments, business and other interested parties.

The CCA welcomes the opportunity to discuss this submission in greater detail.