



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: Dr Philip A. Clarke, Head of Anthropology.....
.....

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): <http://www.samuseum.sa.gov.au/page/default.asp?site=1>

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

yes - please specify no

South Australian Museum

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

As an anthropologist in a state-funded museum, I am frequently called upon to assess the heritage value of Aboriginal material culture. However, the main reason is help define what heritage objects are covered by the proposed legislation.

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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

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 proper definition of ceremonial objects as ‘Secret Sacred’ or ‘Restricted’ is rarely precise, often involving considerable anthropological fieldwork with Senior Custodians. While Central Australian and Western Desert communities routinely avoid public display of certain types of objects (known in Australian English as churingas), in the tropical north it’s the ceremonial history of individual pieces (i.e. rangga) that is important, so here it is not possible to prescribe categories of objects on sight alone.

- ★ **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

Sorcery objects would probably still pose a problem.

★ **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

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?**

No comment

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

yes - please explain why no

No comment

★ **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

No comment

★ **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

No comment

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

No comment

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?**

No comment

★ **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

No comment

★ **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

No comment

★ **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

No comment

★ **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

No comment

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?**

No comment

★ **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

No comment

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

yes - please suggest reform

no

No comment

★ **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

No comment

★ **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

No comment

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

yes no - please explain why not

No comment

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?**

No comment

- ★ **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

No comment

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

No comment

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 objective is good, however in practice the process to determine what is Secret Sacred in some cases will not be straightforward without substantial anthropological involvement and Indigenous community discussion. There are also the less clear cut categories of objects, such as pearl shell ornaments and thread-crosses, which are treated by Aboriginal Senior Custodians as public objects in some regions, but are highly restricted in others. Aboriginal Australia is culturally complex and therefore it is difficult to legislate precise definitions of 'secret sacred objects'.

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

yes - please describe no

Sorcery objects, such as kadaitcha slippers and pointing-objects, should not be displayed because they cause offence to some Aboriginal people. In some cases these objects were originally made as tourist items in remote regions, but are now treated as sorcery objects not fit for display by southern based communities. There should be a voluntary code that all museums, galleries and publishing houses should avoid displaying such items.

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

The SA Museum, like many state funded institutions, will only display items and storylines that are acceptable to a broad range of Indigenous communities. Anything that causes offence is be avoided. So the adoption of the protocols discussed will not directly cause offence, as long as the Museum is allowed to consult in 'grey areas', such as with pearl shell ornaments.

★ **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

As explained above, sorcery objects will need to be considered.

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

yes - please describe no

No comment

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?**

No comment

★ **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

No comment

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

yes

no - please explain why not

No comment

★ **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

No comment

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

No comment

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

yes - please describe no

No comment

★ **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

No comment

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

yes - please describe no

No comment

★ **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

No comment

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?**

No comment

★ **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

No comment

★ **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

No comment

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

yes - please describe

no

No comment

★ **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

No comment

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

No comment

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

yes - please describe no

No comment

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?**

No comment

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

No comment

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

No comment

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