



**Australian Government**

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**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](http://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](mailto: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 Susan McIntyre-Tamwoy, President Australia ICOMOS

Postal address:

Australia ICOMOS Secretariat

C/- Cultural Heritage Centre for Asia and the Pacific,

Faculty of Arts

Deakin University

Burwood VIC 3125 Australia

Other contact details (optional): susan.mcintyretamwoy@jcu.edu.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.icomos.org/australia/>

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

yes - please specify  no

### Australia ICOMOS

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

Australia ICOMOS is a non-government organisation devoted to improving conservation philosophy and practice for culturally significant places

ICOMOS (International Council on Monuments and Sites) is primarily concerned with the philosophy, terminology, methodology and techniques of conservation. It is a non-government professional organisation formed in 1965. It is closely linked to UNESCO with national committees in some 100 countries with the headquarters in France. Members in these countries are formed into national committees and have the right to participate in the ICOMOS General Assemblies held every three years.

Australia ICOMOS acts as a national and international link between public authorities, institutions and individuals involved in the study and conservation of all places of cultural significance. Australia ICOMOS is the pre-eminent professional body for heritage conservation in Australia. We were established in 1976 and now have over 500 members including architects, archaeologists, historians, planners and many other heritage professionals, as well as government agencies. Our members include a range of heritage specialists some of whom work in the area of Indigenous heritage conservation and who have a commitment to seeing positive heritage outcomes for Indigenous heritage sites, objects and places.

In this document we have confined our comments to sections 1-8 as these are the sections that deal with the scope of the Act and the definitions of heritage. There are fundamental problems underlying some of the assumptions in the discussion paper and it is these we focus on here. The sections from 8 onwards that deal with application forms, processes and penalties seem straightforward but our concern is if the aim and focus of the legislation is not clear and sound it will not matter how streamlined the process is.

Australia ICOMOS would be happy to discuss further any of the issues we have raised in this Submission.

## 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?**

Overall Australia ICOMOS supports the attempt to update the legislation, streamline the process and make penalties more effective, however our members have concerns over the following important elements:

- a) There is considerable ambiguity in the document about whether the purpose of any new legislation would be to protect the specific subset of Indigenous heritage places and objects (i.e those significant by way of 'tradition') or ALL indigenous heritage places and objects. This confusion leads to fundamental concerns with many aspects of the proposal.
- b) The definition of Indigenous heritage as it is used in the Discussion Paper is limited and would not protect the full range of values in Indigenous sites, places and objects.
- c) The accreditation standards will not necessarily achieve the outcomes intended
- d) The apparent misconception that 'areas of special significance to Traditional Owners'.... Is the sum total of valuable Indigenous heritage rather than a very important subsection of places and objects in the full range of Indigenous heritage places.
- e) The assumption that the only people with a right to speak are those who have been identified through the Native Title process; and the apparent counter assumption that any other indigenous voice is necessarily counterproductive or mischievous is not supported.

Australia ICOMOS has long argued that Indigenous heritage is of national interest and the Commonwealth should maintain a direct role. The Commonwealth has a clear responsibility to ensure the highest standards of Indigenous heritage conservation at any level of government and the Commonwealth has a clear responsibility to ensure the highest standards of Indigenous heritage conservation at any level of government.

In 1998 Australia ICOMOS made a recommendation in a submission on the changes proposed at that time:

*that Indigenous people have a central role in making decisions about their heritage places and relevant mechanisms and procedures be incorporated.... to ensure this, such as recommended by Evatt (Recs.3.2, 6.3, 6.6).*

While we acknowledge that the changes appear to aim at enabling a direct participation and involvement by relevant Aboriginal and Torres Strait Islander peoples, we nevertheless are concerned that the proposal as outlined does not represent the best outcome for Indigenous heritage. This is in a large part because of the apparent narrow definition of Indigenous heritage which does not consider the full range of potential significant values and partly because of attempt to move away from a significance based assessment process as the keystone of any national heritage system.

In particular after reading the Discussion document, there is a concern that archaeological heritage may not continue to be recorded or protected, although it is of heritage significance, if Traditional Owners are unaware of, are not interested in the scientific significance of such sites; or alternatively if being aware they are nevertheless persuaded by developers (or governments) to 'off-set' or trade-off the loss of these sites for other perceived benefits.

It is recommended that any new legislation or national system includes standards consistent with other Commonwealth heritage conservation standards, including the endorsed the Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (the Burra Charter) as its standard for best practice cultural heritage conservation.

**Regarding Legislation accreditation:** Accreditation is not a one-off process but requires ongoing monitoring to ensure the maintenance of appropriate standards.

Australia ICOMOS recommends that the accreditation of State processes should include ongoing monitoring to ensure the maintenance of appropriate standards, and include the opportunity for merit review of particular cases. We note that the Evatt Report recommended the inclusion of an Aboriginal Heritage Protection Agency (Rec.3.2), to have such an oversight role rather than the Minister. Regardless, such review should include input from Aboriginal and Torres Strait Islander people.

If accreditation is aimed at ensuring a comprehensive and adequate national system for Indigenous heritage then accreditation should ensure that the full range of cultural heritage values are considered and protected by State and Territory governments in addition to the specific value of such places and objects to Traditional Owners.

### **Separation of Significance from Land Use Decisions**

A fundamental principle of heritage conservation is the absolute separation of decisions about heritage value from decisions about what happens to those heritage places, such as land use decisions regarding development or their management. This is acknowledged by Evatt (Rec.6.4) and is a principle of primary importance in the Burra Charter (Australia ICOMOS 1999). Best practice demands that conservation of a cultural heritage place or object should be based on its cultural significance. However this separation recognises that on occasions management decisions may be made on other grounds such as political, social or economic reasons. Such decisions do not change the cultural significance of a place, and should not be made by arguing that a place is not significant.

Decisions on heritage value should be made independent of management considerations, and in addition they should be made by appropriately qualified and experienced specialists. This accords with best practice and can be found, for example, in most non-Indigenous heritage legislation in Australia. In relation to heritage places and objects of traditional significance to Aboriginal and Torres Strait Islander people, then appropriate people and communities may be the most relevant 'experts' but this is not necessarily the case for ALL indigenous heritage places and objects where a range of expertise might be required.

For this reason, assessment of heritage value should not be made by the Minister, but left to independent expert assessment. Where Aboriginal and Torres Strait Islander individuals, communities or organisations are expected to provide such independent assessment they should

be resourced to do so. Significance assessment should be consistent with other Commonwealth and State heritage significance assessment standards, based on the Burra Charter, such as the criteria used by the Australian Heritage Council.

### **Defining the term 'Indigenous Heritage'**

Cultural heritage, like any form of property, is constantly subject to valuation and revaluation. Cultural heritage values are mutable qualities that change over time, they are variable between individuals and communities as well as between various socio-economic layers within any society. Subsuming all values of all Indigenous heritage places into one value i.e Indigenous value or value to Traditional Owners will not always be appropriate for every place or object and is over simplistic. The existing ATSIHP Act related to only a portion of the full range of Indigenous heritage and was never intended to protect all Indigenous heritage places and objects. If the legislation is to be replaced with an Act/system that purports to establish a comprehensive national standard for indigenous heritage conservation in Australia then a more comprehensive understanding of Indigenous heritage is required than that indicated in the Discussion Document.

### **Resource Indigenous individuals and groups to make informed decisions**

The Discussion Document implies that the proposed system would allow certain Indigenous parties to authorise the destruction of cultural heritage, as if it is their personal property. This is to ignore that in some circumstances they might be ill-equipped to make decisions on the wider value of the heritage. The proposed changes as described are likely to result in many cases in inequitable negotiations where decisions may be influenced by financial imperatives that should be irrelevant to the assessment of heritage. For example an impoverished Aboriginal community may feel pressure to accept monetary compensation for the destruction of cultural heritage for the perceived greater good of the community with little regard for the intrinsic value of the heritage for the wider community and for future generations. There are numerous circumstances when other potential decision makers have a legitimate interest that is not accredited in the discussion document as it stands. Any shift of the government's decision making role should be balanced by the adequate resourcing of Indigenous community groups in terms of dollars, training and access to expertise.

Any accreditation process should ensure that there are adequate checks and balances in place to ensure that a) significant heritage places and objects are protected for current and future generations; b) the situation does not arise where Aboriginal and Torres Strait Islander people feel forced to trade-off their cultural heritage places as their only saleable commodity.

## 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

This question gets to the heart of our concern with the Discussion Document and the ambiguity over the scope and purpose of the proposed legislation. While these points do express the purposes of the legislation as it stands- it is not clear from the rest of the Document that the aims describe the purpose of the proposed legislation which seems to have developed into a mechanism for establishing a National system for conservation and management of ALL Indigenous heritage. There is a risk that through differences in definitions of objects and places between States and Commonwealth the legislation could be read to apply to all objects, sites and places.

It would be worthwhile to clarify that this legislation (as is the case with the current ATSIHP Act) does not replace the need for states and territories to protect other items of Indigenous heritage e.g significant archaeological sites that might have high scientific values but due to various reasons such as disruption to traditional practice and livelihoods are not known to Indigenous Australians or of particular significance to them.

This needs to be made clear or there is potential for some governments to downgrade protection for those places and for the protection of such places to become negotiable.

## 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?**

While it is agreed that consistency in definitions is a good thing it is unclear what the basis is for linking heritage protection with the Evidence Act 1995? In doing so it seems that the proposal moves away from consistency with accepted cultural heritage practice and methodologies by moving away from the concept of 'significance'. It is not clear how this benefits 'heritage conservation' or Indigenous Australians. The rationale as expressed seems to be about avoiding the need for the Minister to make assessments.

Whatever definitions are adopted will still require the minister to determine whether places meet the criteria in the definitions. This means that it is almost inevitable that some assessment process will be required unless the traditional area or object has already been documented and assessed in some way.

Australia ICOMOS does not support the proposal to remove 'significance' as the criterion for valuing cultural heritage as this has been the test for decades, any new definition will almost certainly lead to dispute and legal action for the interpretation of the new definitions.

The Federal Court have established a definition of 'significant' as meaning '*important, notable or of consequence, having regard to its context and intensity*'.<sup>1</sup> This confirms that any defining of significance has to take into consideration context and site based information- which means that it is in essence a question of fact.<sup>2</sup> At least this has been established by the judiciary and it would appear to be appropriate to maintain this rather than introduce new terminology.

**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

Possibly yes. Having to meet both criteria in the definition to be considered a Traditional Area would exclude many significant places. For example many places exist that are undeniably significant to Aboriginal or Torres Strait people but that are not protected and regulated by traditional laws and customs e.g places of undeniable heritage significance from the post contact era such as the Myall creek massacre site (currently on the National List). Arguably such tragedies were not part of 'tradition' and the significance is a product of a contemporary understanding of the historical significance of this place in the history of Indigenous/non-Indigenous relations in Australia.

There are many places and sites that are also no longer regulated by traditional laws and customs not because they have lost their significance to Aboriginal people but because Indigenous rights have been forcibly extinguished or other management regimes put in place. An example might be a sacred mountain that is known to be sacred to Aboriginal people but owned or managed by another authority. Under the definitions proposed such places would seem to be excluded from consideration.

The criteria also fails to take into account that Traditions change and adapt.

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<sup>1</sup>Booth v Bosworth (2001) FCA 1453 at [99] and [100] and Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741 (11 June 2004) at [192].

<sup>2</sup> Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741 (11 June 2004) at [192].

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

[ X ] yes - please explain why                       [ ] no

The definition removes significance assessment from the consideration. So the definition of Traditional object as it stands would include ALL Aboriginal artefacts where as the previous legislation used the term 'particular significance' to protect only those objects of high cultural significance to Aboriginal people. The definition of Traditional Place could be argued to apply equally to all Aboriginal homelands to which Aboriginal people still have access regardless of significance.

In particular the current legislation was envisaged to fill a gap in the suite of State and Territory laws relating to the protection of natural ceremonial and other places where there might be no physical remains or modifications as well as places that did have such remains but which through a lack of commitment or will the states could protect but chose not to.

The current Act does not necessarily presume that Indigenous heritage demonstrating criteria other than 'significance to Aboriginal or Torres Strait Islander people' is not protected or worthy of protection: it merely leaves these (majority) of Indigenous heritage places to the States and territories to protect. It focuses instead on that subset of sites of particular significance to A&TSI people, providing a 'last resort' process for their protection.

Australia ICOMOS argues that the management of cultural sites, objects and places should be based on an assessment of their significance. In this case the legislation is seeking to protect objects and places of particular cultural significance to Traditional Owners/Custodians. This is inarguably important however the key is to understand the 'significance.'

### **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?**

Certainly Australia ICOMOS would support the adoption of agreed National standards. Any such should be viewed as minimum standards and the states and territories should be encouraged develop new and effective ways to conserve and promote Indigenous heritage. Along with accreditation, some sort of recognition of excellence would help to encourage this. While the concept of accreditation is good, several extra points would need to be considered.

Firstly, will the criteria for accreditation achieve the objectives of the legislation. There is still some confusion in the discussion document about:

- a) whether the new legislation would seek to protect the same range of places and objects of particular importance to Aboriginal people, while also expecting the states and Territories to continue to protect the much broader range of Indigenous objects and places with other values (This is suggested by Proposal 1 dot point 1 p11); In which case

the standards are probably appropriate but would result in a dual heritage system – the small range of heritage values that were protected through accreditation and the rest of Indigenous heritage places and objects that remained to be protected in some other way by States and territories. OR

b) whether the Commonwealth government thinks that the definition on p14 fully encompasses the range and scope of Indigenous Heritage in Australia. The latter is implied in the use throughout the document of the term 'indigenous heritage'. Unfortunately it is clear that the definitions and criteria proposed along with the removal of the concept of 'significance' would then result in reduced protection for Indigenous heritage and a less effective system overall.

Secondly, Australia ICOMOS strongly considers that effective heritage conservation should be based on an understanding of cultural significance. This should consider all the values of a place or object and may include scientific significance. This concept is elaborated on in the Burra Charter (Australia ICOMOS 1999). There is now a large and credible literature on significance assessment and methodologies and while of course the Minister of the day may not have expertise in this area he/she will always have access to independent specialist advice.

Thirdly, assuming the accreditation criteria and definitions are satisfactorily resolved, any accreditation process needs to have a review or oversight mechanism built into it. Rather than waiting 7 years the review of accreditation would be 'safer' if it involved some iterative system involving Commonwealth dialogue with the States through say the first 3 years to ensure the system is working. Many significant irreplaceable places and objects could be lost in 7 years if the system is proved to be defective. Given the stated aims of the legislation then this process should involve appropriate Aboriginal and Torres Strait Islander people.

Australia ICOMOS considers that a system that does not involve significance assessment including the full range of cultural heritage values that may be relevant i.e social, scientific..... will fail to provide adequate protection.

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

[X ] yes - please explain why [ ] no

Define Indigenous heritage appropriately i.e to cover the full range of values and ensure that any accreditation system considers the effectiveness of state and territories in dealing with the full range of values including the value of places and objects to their Traditional Owners.

Develop a review mechanism that ensures that the system in any state or territory is achieving the desired results before moving to 10 year reviews.

Some sort of last resort mechanism is still desirable - the discussion document suggests that this would be the court system (p 18). This is a costly option. There is no mention of resourcing communities/ individuals to fund and direct such actions.

Independent assessment based on the advice of Indigenous people is an essential requirement for the identification and protection of Indigenous heritage of particular importance to Aboriginal and Torres Strait Islander people (Proposal 4 p17). However there also needs to be some acknowledgement that to adequately provide the assessment Indigenous communities and organisations would need to be resourced and supported. Accreditation would need to ensure that such support was in place in the States and Territories.

- ★ **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 possibly, assuming the issues in preceding sections especially 3.1 have been addressed in the formulation of the proposed legislation.

- ★ **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

Yes assuming the above.

## 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

Again the question gets to the confusion over the 'intent' of the proposed legislation/system. Once again the focus is on a narrow set of Indigenous heritage places and objects for which the proposal sees the only possible heritage value lying in their value to Traditional Owners (not necessarily including all Indigenous people).

However the discussion relating to standards seems to suggest that rather than relating only to this subset of places and objects they are envisaged as applying nationally to all Indigenous heritage places and objects and would provide a higher standard of protection than is available in most States and Territories.

States and Territories differ somewhat in the detail of their approach to the conservation of cultural heritage sites and places. Currently most states protect a broader range of sites/places/and objects through a consideration of the full range of significance or values.

In putting the entire focus for protection on agreements between some Indigenous people and developers, that once made cannot be changed and cannot be challenged by other others including other Indigenous people who might have legitimate interests the proposed legislation could be seen as pro-development mechanism rather than a mechanism for protecting Indigenous heritage.

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

[X] yes - please suggest changes       [ ] no

Australia ICOMOS supports the idea of establishing a national standard for Indigenous heritage conservation. However to be effective and to elevate and maintain best practice heritage conservation the standards need to be more comprehensive. They need to include at least:

- a requirement for significance based assessment generally;
- consideration and protection for the full range of heritage values

The system needs to be developed so that the aims, scope and standards are unambiguous and aligned.

In relation to the protection of cultural places of significance to Indigenous Australians and standards concerning the opportunity /responsibility to negotiate and reach agreements and/or the opportunity/requirement for Indigenous people to provide independent assessments – such a system needs to include a standard on resourcing and supporting them.

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## 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?**

This proposal relates to restricting the identification of traditional custodians in the future, whereas under the current mechanism the legislation provides that any person can apply to the Commonwealth for a declaration. Whilst there is some merit in proposing that only appropriate people should be able to seek to protect their heritage, linking this determination with native title and other non-indigenous legal systems is problematic and will not in all cases lead to an equitable determination of the appropriate persons. The reasons for this are as follows:

1. Many areas of Australia are not available to native title – because of extinguishment. There is no reason that cultural heritage should be dependant on tenure, particularly where a historical tenure that has no bearing on the contemporary situation has eradicated native title.
2. Vast areas that are available to native title determination applications have not been claimed, often this is simply a matter of funding and prioritisation under the Native Title Act and does not reflect a lack of traditional ownership. This process of identification of “legally recognised” traditional owners can have the effect of unfairly promoting the interests of those native title holders who have had a determination of native title compared with those native title holders who have not.
3. There are many areas that are under a native title determination application for which no determination has yet been made, where the application is disputed or the connection material has not yet been sufficiently detailed to include all traditional owners, these legal documents are restricted from public access and may not reveal the disputing parties.

Once a native title determination has been finalised, we consider that this is an appropriate starting point for the identification of traditional custodians if this is in dispute. This should not automatically exclude other parties from making an application.

★ **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

The key word of concern here is ‘rely’.

As a starting point and in the absence of other collated material identifying traditional custodians it makes sense to draw on existing legal processes as a mechanism for identifying custodians, however this should not be a reliance to the extent that it could exclude legitimate traditional custodians. As detailed above there are circumstances when native title does not adequately address the issue of appropriate traditional custodianship.

There may be traditional custodians who are not native title holders, there may also be circumstances where cultural heritage is relevant to the wider indigenous group rather than the specific native title holders.

- ★ ***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

In many circumstances it may be appropriate for the representative body to provide information on the relevant traditional custodians however this would not be “fair” in all circumstances for all the above detailed reasons. In addition the representative bodies are, for numerous reasons, not appropriate to be responsible for cultural heritage. The Representative Bodies are defined and regulated under the Native Title Act 1993 (“NTA”). The functions under 203BB do not specifically refer to cultural heritage, the representative bodies are also required to prioritise their functions under the NTA. This prioritisation could mean that cultural heritage matters are left dormant when more pressing native title matters are prioritised. The representative bodies are frequently not adequately funded to fulfil all of their existing statutory functions. Additionally, in the event of contested native title, the representative bodies do not represent the disputing party (s. 203BB) in this case there would be the opportunity for bias or lack of adequate representation of a legitimate party.



- ★ **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

In some circumstances yes! The Commonwealth legislation should not be subject to an agreement between native title holders and a development proponent. The purpose of cultural heritage legislation should be to provide protection to **heritage** not **protection to developer's agreements**. In the event that the Agreement was manifestly unfair or does not protect significant heritage the Commonwealth must have a mechanism to intervene either on its own or at the behest of affected individuals or groups. An ILUA is fundamentally just a contract, registered just meaning that it is binding on the native title group and not only the signatories.

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

yes - please suggest reform

no

No a private Agreement between a developer and native title holders should not be determinative of the value of heritage. The parties have remedies in law if the contract is breached.

- ★ **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?**

Agreed- but noting our response to 7.2-where there exists requirements to notify States and Territories this is more appropriate.

**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

Australia ICOMOS has not recently undertaken a review of all State Territory provisions in this regard.

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

The proposed Standards could be expanded in this area. Proposed Standard 4 only requires someone making a discovery to report it and to consult with Indigenous persons.

This raises questions such as which person(s) and what arrangements are there when there are competing claims and demands and consensus on how to manage the remains cannot be reached. The default position should be (at least for burials/internments) that the remains are managed insitu. However, there are many circumstances where this might not be possible, i.e they have been already disturbed through erosion or earthworks before they are discovered. Therefore a standard that identifies a safe repository such as a keeping place or museum for

protection of the remains until such time that consensus can be reached is important. The importance of specialist assessment to confirm the finds should not be overlooked. E.g. I (McIntyre-Tamwoy) know of at least two cases where remains were kept (by a state agency) as Aboriginal and assumed to have been the result of a disturbed Traditional burial but were not assessed and later (in one case 15 years later) found not to be Aboriginal. There are numerous cases also of Aboriginal remains being unnecessarily exhumed by police 'just in case' – where disturbance could have been avoided with appropriate advice.

This raises the possibility of serious implications arising from mis-identification and in appropriate processes. A reasonable standard then would be for the State or territory to have in place a process that enabled a timely response involving both Indigenous custodians and appropriate specialists (physical anthropologists) to the identification and safe storage of Indigenous skeletal remains in co-operation with police and coroners departments; and for that process to be widely known to all parties'.

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## **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?**

In principal Australia ICOMOS would support this proposal.

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

yes - please describe       no

Unknown

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

N/A

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- ★ **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

N/A

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<sup>i</sup> Thorne, A; Donlon, D and McIntyre-Tamwoy S. 2002 *Aboriginal Skeletal Remains Manual* NPWS, Hurstville NSW.