



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: Genevieve Jones

Postal address: PO Box 340, Bli Bli, Qld, 4560

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): n/a

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

yes - please specify no

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

My suggestions for points of consideration for the suggested proposals and reforms arise from my work with local Aboriginal Traditional Owners on the Sunshine Coast, South East Queensland. My submission raises points as to how the Queensland Government's *Aboriginal Cultural Heritage Act 2003* and the Commonwealth Government's *Native Title Act 1993* works against the majority of Aboriginal Traditional Owners in regards to their current position of managing their physical cultural heritage on the Sunshine Coast.

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?**

- ★ **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

- ★ **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?**

The situation with Native Title claims and the link to other heritage law needs to be carefully considered. If the definition of Aboriginal Parties depends on that which is offered by State Legislation eg Queensland Government's *Aboriginal Cultural Heritage Act 2003*, then this will result in acts of State-sanctioned ethnocide. If there is no current and registered claim application then the last registered native title claim applicants are then recognised as the *Aboriginal Party for consultation*. They (the Party) are not necessarily representative of the majority of the Aboriginal Traditional Owners for that area. The Sunshine Coast situation provides an example of this situation, whereby the majority of Aboriginal Traditional Owners are excluded by legislation, in accessing and managing their physical cultural heritage, as they are not part of the last registered and then de-registered claim.

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

yes - please explain why no

In the case where native title claims/applications and applicants are not inclusively representative (and/or the claim applications have been de-registered) of the majority of Aboriginal Traditional Owners for a particular clan estate area, then *Indigenous Land Use Agreements* should be promptly resourced and put in place to ensure the majority of Aboriginal Traditional Owners are referred to in accessing and managing their physical cultural heritage.

- ★ **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

Particularly in the situation whereby the current State Government legislation is failing to consult the majority of Aboriginal Traditional Owners for a particular clan estate area.

- ★ **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

In the case where native title claims/applications and applicants are not inclusively representative (and/or the claim applications have been de-registered) of the majority of Aboriginal Traditional Owners for a particular clan estate area, then *Indigenous Land Use Agreements* should be promptly resourced and put in place to ensure that the majority of Aboriginal Traditional Owners are referred to in accessing and managing their physical cultural heritage.

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

Although it should not be assumed that current Native Title and State Government legislation is effectively and properly recognising the majority of Aboriginal Traditional Owners for a particular clan estate area. In the cases whereby a native title claim application is not yet registered or has been de-registered, then an *Indigenous Land Use Agreement* and appointment of an inclusive Cultural Heritage Body must be promptly resourced and put in place for the People of that area.

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?**

Native title claims and recognition has not been finalised for all traditional estates across Australia. In the case where native title claims/applications and applicants are not inclusively representative (and/or the claim applications have been de-registered) of the majority of Aboriginal Traditional Owners for a particular clan estate area, then *Indigenous Land Use Agreements* should be promptly resourced and put in place to ensure that the majority of Aboriginal Traditional Owners are referred to in accessing and managing their physical cultural heritage.

★ **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

In the case where native title claims/applications and applicants are not inclusively representative (and/or the claim applications have been de-registered) of the majority of Aboriginal Traditional Owners for a particular clan estate area, then *Indigenous Land Use Agreements* should be promptly resourced and put in place to ensure that the majority of Aboriginal Traditional Owners are referred to in accessing and managing their physical cultural heritage.

★ **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

The current processes for arriving at formal recognition of Traditional Custodians of the physical cultural heritage are flawed. In the case where native title claims/applications and applicants are not inclusively representative (and/or the claim applications have been de-registered) of the majority of Aboriginal Traditional Owners for a particular clan estate area, then *Indigenous Land Use Agreements* should be promptly resourced and put in place to ensure that the majority of Aboriginal Traditional Owners are referred to in accessing and managing their physical cultural heritage.

★ **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

It gives other Knowledge Holders the opportunity to protect cultural heritage areas or artefacts not identified or overlooked in an ILUA.

★ **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

It gives other Knowledge Holders the opportunity to protect cultural heritage areas or artefacts not identified or overlooked in an ILUA.

★ **(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?**

★ **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

★ **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?**

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

yes - please describe no

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

★ **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?**

It gives other Knowledge Holders the opportunity to protect cultural heritage areas or artefacts not identified or overlooked in an ILUA.

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

yes

no - please explain why not

★ **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?**

This process should include all interested Aboriginal Traditional Owners, particularly where native title has not yet been settled or granted for a specific traditional estate area.

★ **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

This process should include all interested Aboriginal Traditional Owners, particularly where native title has not yet been settled or granted for a specific traditional estate area.

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

yes

no - please explain why not

★ **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

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

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?**

This is a good proposal.

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

yes

no - please explain why not

Maybe 72 hours (over business hours) would be more helpful.

- ★ **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

★ **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

★ **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

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?**

★ **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

★ **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

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

yes - please describe

no

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

yes - please explain why

no

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

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

yes - please describe no

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