



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: Western Australian Museum.....

Postal address: Locked Bag 49, Welshpool, WA, 6986.....

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):

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

yes - please specify no

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

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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?**

Have only seen the current Act (ATSIHP) referred to or its clauses called upon when State Govt Minister responsible for heritage issues has made a decision that some or many local Traditional Owners have disagreed with. The application under Federal Act became in effect a delaying tactic, since the State decision was upheld. It is not clear to me that further collection of information from source communities, or further detailed research were undertaken to interrogate State decisions.

Under what circumstance might the Federal Act overturn a State Ministerial decision – perhaps examples of this need to be made clear

It is unclear to what extent the PMCH Act remains effective – the conditions of what constitutes material that should be retained by the nation may not reflect the rarity of some [good quality] traditional items - SW traditional artefacts e.g. are not necessarily prescribed but are of great significance to TOs. Representation in one or more State collections does not adequately serve the interests of traditional custodians.. The WA Museum has not seen an application to export in many years – are these being handled by a different agency?

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

Yes – however it must also be recognised that some development cannot proceed without disturbing/ altering beyond recognition/ preventing access/ etc important traditional areas.

Should the notions of compensation be assessed at federal level?

Should an independent negotiator be appointed at Federal level?

Dot point 7 – Notions of ‘fair, transparent, timely and unnecessary’ are all areas of intense debate

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?**

Yes, this is much better worded and less ambiguous –

it also notionally allows for the interests of persons practising traditional law and custom who are not traditional owners to be encompassed. It is important to remember that many significant places are important to people who are not the Traditional Owners in the sense that has developed under Native Title legislation. Eg significant Dreaming stories may have ‘land nodes’ in many different traditional ‘countries’

- ★ **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

How would significant resource acquisition zones fare under these definitions?

How would rock art that is no longer part of active practice, or for which knowledge has been lost, fare under these proposed definitions?

How are archaeological sites protected under these definitions?

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 proposal appears to have merit, but what constitutes a measure of 'effectiveness'?

States can have extremely high standards, but if the final Ministerial decisions about protection or development are predicated on balancing protection vs economic development for the 'good of the state or nation' protection may still not be afforded to heritage places.

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

yes - please explain why no

★ **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

★ **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

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

The issue of 'independence' is complex – external expert consulting companies hired by development proponents are not truly independent; neither are assessing bodies truly independent of the State administrative body nor the Minister that makes the ultimate decision

For assessment of significance it may sometimes be necessary to request secret or sacred information, if this is so, provisions must be made for gender, age sensitivities, and non recording of information that allows deliberation by a determining body

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?**

Heritage matters are not only the preserve of traditional custodians as defined under Native Title. Other people may have interests in protection of heritage places. Dreaming lines for example can have nodes of significance across the boundaries of many peoples; destruction of individual nodes can have drastic impact on people other than the traditional custodians as determined by Native Title.

People other than NT traditional custodians may have detailed knowledge of places, it is important that this is not devalued

It is important that the views of traditional custodians be sought, they should perhaps even be given priority, but they should NOT be the only views

★ **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

★ **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, see above

- ★ **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

yes – sometimes the significance of heritage places extends far beyond the boundaries of land attachment as recognised under Native Title

- ★ **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

PBCs do not always represent all peoples with rights over country as determined by NT, or implicit in knowledge of heritage places. Individuals or communities should also have the right to apply for protection

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?**

If it were clear that ILUAs also took into account the interests of non claimants peoples or groups in heritage decisions [and currently they don't and this would not be supported by the legal framework of NT and funding for rep bodies] then this would be an appropriate proposal

★ **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

given the above, that rep bodies [usually instrumental in striking ILUAs] are not resourced to seek wider input, then yes.

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

yes - please suggest reform

no

★ **Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not native title parties to become involved in negotiations?**

yes - please explain impacts

no

★ **Question 6.5: (a) Would ILUA negotiations be more difficult if native title parties could not ask the Minister to protect traditional areas and objects from activities permitted under an ILUA?**

yes - please explain why no

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

yes no - please explain why not

Proposal 7: Discovered remains

To reduce duplication of state and territory laws, the requirement to report all discoveries of Indigenous personal remains to the Australian Government could be removed, except for discoveries on land that is managed by the Australian Government. Details are set out on page 26 of the discussion paper.

★ **Question 7.1: Overall, what do you think about this proposal?**

WA has developed a streamlined process for the discovery and reporting of human remains – there is no need for the Federal Govt to be involved in this.

- ★ **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?**

Definitions seem reasonable, as is proscription re display – Since I suspect that most places displaying material do so through ignorance, perhaps some form of public education is necessary.

If source communities have given permission [and this needs to be requested prior to every installation, not once in an objects institutional lifetime] for the display of any such objects this permission should over-ride the policy.

What this proposal doesn't address, and nor does it appear to be covered elsewhere, is the situation where restricted material surfaces on the market or on display in another state, eg. WA material offered for sale in Tasmania. In an ideal world it would be worthwhile to have a mechanism that would enable this material to be acquired and returned to a State collecting institution or to be placed into existing repatriation programs. Perhaps the ability of state legislation to address this issue is one of the standards contained in the accreditation process.

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

yes - please describe no

There are objects that may be open and public in one region but become restricted in a different region. If the object to be displayed was produced and sourced from its region of origin and permission is gained from custodians allowing public display, then, with an appropriate warning at the front of the display, the object could be displayed. An example might be incised pearl-shell from the West Kimberley.

★ **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 would be ideal if applications for both protection or disturbance could be mandated to fit within detailed guidelines.

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

yes

no - please explain why not

The greater clarity re useful information, the easier it is to make assessment

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

Historic data supporting claims of significance

★ **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?**

Conferencing should potentially streamline the process

★ **Question 10.2: Are there other people whose legal rights and interests could be affected by a decision on the application?**

yes - please describe no

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

yes

no - please explain why not

★ **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?**

Good idea – can submissions or applications be made orally?

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

yes

no - please explain why not

Possibly – see above

★ **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

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?*

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

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

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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