



Options Paper: First Nations cultural heritage protection reform

The need to improve protection for First Nations cultural heritage was tragically highlighted by the destruction of Juukan Gorge by Rio Tinto in May 2020 and the subsequent findings of the inquiry into that destruction.¹

The Australian Government and the First Nations Heritage Protection Alliance (the Alliance) are working in a Partnership to develop options to reform First Nations cultural heritage protections. The Partnership is undertaking a national engagement process to work in genuine partnership with First Nations peoples who will be impacted by heritage protection reform. This national engagement aligns with Priority Reform One of the *National Agreement on Closing the Gap*, which aims to empower First Nations peoples to share decision-making authority with governments through establishing formal partnership arrangements.

The first stage of national engagements, undertaken in early 2022, informed the reform options that are presented in this paper, which aim to lift the standard of First Nations cultural heritage protections. The second stage of national engagements, taking place in late 2022 and early 2023, will seek views on these options from all interested community members, as well as business and industry. This paper outlines these initial reform options, which will be further developed as we continue to be informed by your views throughout the engagement process. We will release additional information in a second Options Paper, including more detail and any proposed changes to the options, in early 2023.

The overwhelming message from the first stage of national engagements is that reform of First Nations cultural heritage protections is urgent and necessary, in the context of the ongoing destruction of First Nations heritage. This is consistent with the findings of the 2021 State of the Environment report.²

Doing nothing is **not** a viable option. This is consistent with the Australian Government's clear commitment to legislative reform for First Nations cultural heritage protection.

Your feedback during this second stage of the national engagements process will inform the recommendations for reform that will be provided to the leadership of the Alliance, and to the Minister for the Environment and Water for consideration.

Importance of the United Nations Declaration on the Rights of Indigenous Peoples and self-determination

Australia has clear obligations to protect First Nations cultural heritage under the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**. The principles outlined in UNDRIP are fundamental in developing options to reform First Nations cultural heritage protections. Key

¹ Joint Standing Committee on Northern Australia (2020), *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report*, Commonwealth of Australia, Canberra; and (2021) the Final Report, *A Way Forward*.

² "Destruction of Indigenous heritage is occurring at an unacceptable rate and the reported experience of Indigenous Australians is that they are denied their right to speak for, make decisions about, protect, access and manage their heritage." State of the Environment Report 2021, accessed 16 September 2022 at <https://soe.dcceew.gov.au>.



amongst these is that, as far as possible, First Nations peoples are empowered to make decisions about their own cultural heritage.

Prioritising **self-determination** is part of a wider international effort³ to ensure appropriate participation in decision making for First Nations peoples affected by government decisions. It is an important and central consideration for First Nations cultural heritage protection reform.

Without self-determination it is not possible for First Nations Australians to fully overcome the legacy of colonisation and dispossession. Further to this, the *National Agreement on Closing the Gap* is an extension of this overarching push towards the principles of self-determination.

Design principles

In addition to self-determination, any reform will need to meet the following design principles, which were identified through the first stage of national engagements. These are:

- Fairness
 - Processes should be free of power imbalances and facilitate fair outcomes.
- Data sovereignty
 - First Nations communities should be the custodians of their own cultural heritage data and information.
- Certainty and consistency
 - Cultural heritage should be considered early in the development process, before other approvals are sought.
 - Cultural heritage protections should be consistent between jurisdictions as well as with international law and best practice.
- Clarity and transparency
 - Decision-making processes should be clear and transparent to all parties, with decisions made in a timely manner.
- Accountability
 - Decision makers should be accountable for their decisions.
- Value and connection
 - Cultural heritage protections should reflect the true value of cultural heritage for First Nations peoples as well as non-indigenous Australians.
 - Reforms should promote the celebration of First Nations cultural heritage and connections to Country.

Options for reform

Below we outline three possible options for how the reform may be structured, which emerged from the first stage of national engagements. The three options have the potential to meet the principles of UNDRIP and self-determination, and the design principles set out above, in an efficient and effective manner. The second stage of national engagements is aimed at determining how these options could apply and operate, and which model may be preferred.

³ As well as the United Nations Declaration on the Rights of Indigenous Peoples, the criticality of self-determination is also highlighted in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.



The three options are:

1. Overarching federal standalone legislation and repeal of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act)
2. Federal accreditation of state and territory legislation where mandatory national standards are met, and repeal of the ATSIHP Act
3. 'Model' legislation, and exemption from the operation of the ATSIHP Act once enacted.

The first two options would involve the repeal of the ATSIHP Act, whereas the third option would see it no longer applying to any states or territories that have enacted model legislation. The ATSIHP Act was developed as an interim measure in the 1980s and was originally intended to be replaced with more comprehensive legislation for First Nations land rights and heritage protection.⁴ The Act is often characterised as 'legislation of last resort' when other mechanisms have not provided an avenue of protection. This means that it can introduce uncertainty late into the development planning process and does not satisfy the design principles described above.

The second two options require consultation with states and territories and may take longer to implement.

Other options considered

Other options we considered include:

- reforming existing primary federal laws for First Nations heritage protection, i.e. the ATSIHP Act and the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)
- developing limited federal legislation that would 'fill the gaps' in state and territory heritage protections
- developing an intergovernmental agreement about First Nations cultural heritage
- developing voluntary federal national standards for First Nations heritage protection and encouraging states and territories to adopt and apply them within their jurisdictions.

These options are not considered fit for purpose, due to their limited scope and/or the time that would be required to develop and implement them, given the importance and urgency of the lifting the standard of First Nations cultural heritage protection.

Option one: Overarching federal standalone legislation and repeal of the ATSIHP Act

This option would introduce a new national regime for cultural heritage protection, replacing all current federal legislation, and state and territory regimes.

Overview

The Australian Government would establish standalone federal legislation to protect First Nations cultural heritage. This would replace the ATSIHP Act with legislation that provides an overarching national regime for cultural heritage protection. The new legislation would override existing state and territory First Nations heritage protection legislation, providing a consistent and high standard of protection nationally. Protection for First Nations cultural heritage already in place under the

⁴ Elizabeth Evatt, Parliament of Australia, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Report no. 170 of 1996, July 1996).



heritage listings of EPBC Act would remain, and could be supplemented by further protections under the new legislation.

This legislation would be separate from, and would replace, existing federal, state and territory legislation, and other protections provided at the state and territory level under heritage, planning and environmental laws. Under this option, the ATSIHP Act would be repealed once the new legislation came into effect, with legacy ATSIHP Act cases managed through to their conclusion.

New National Body

Under this model, a National Body would be created. This body would be representative of First Nations from each state and territory, and its central role would be to appoint and empower local First Nations groups to make decisions about their cultural heritage.

There are still many questions to be explored about this National Body, for instance:

- (i) How should people be appointed to the National Body?
- (ii) Should it have a bigger role than just appointing local First Nations groups?
- (iii) What funding would be required, and how could this be secured?

Local First Nations bodies

Decision-making about impacts upon cultural heritage would, as far as possible, be handled by local First Nations bodies. They would assess proposed developments at the beginning of the process, and be able to issue Cultural Heritage Management Plans (or similar) where works can proceed without destroying heritage. If cultural heritage could not be adequately protected, they would have the right to prevent works, or insist they be redesigned to take account of cultural heritage concerns.

There are still many questions to be explored about local First Nations bodies. For instance:

- (i) What type of bodies should be appointed? For example, organisations such as Prescribed Bodies Corporate (PBCs), local land councils or other First Nations groups.

This legislative approach and implementation would need to be supported by significant capacity and capability support for local bodies, as well as clear audit and accountability provisions. In areas where no local body has been appointed, the National Body could undertake consultation with affected First Nations peoples.

Benefits and risks

Nationally consistent heritage protection legislation with First Nations peoples as the decision-makers could establish a high standard of heritage protection, including for cultural heritage sites that cross jurisdictional boundaries. Importantly, this option puts First Nations peoples at the centre of decision-making in relation to their own cultural heritage. It could also simplify processes and improve certainty for business. A risk of this approach is that it may not interact well or consistently with state and local planning and other relevant legislation. The efficacy of this model would in part be dependent on appropriate resourcing for local decision-makers, and ensuring that good governance processes were followed in local decision-making.

Questions



- ***What are your views on overarching national legislation for First Nations cultural heritage protection? Risks and opportunities?***
 - ***What should this legislation protect?***
 - ***Is national legislation the best model to achieve the objects of the legislative reform process?***
- ***What are the challenges and opportunities associated with local decision-making?***
- ***How could a national body fairly appoint local decision-makers? What are the risks with this?***
- ***How extensive should a national body's remit be?***
- ***How could a national body for oversight be established? For example, could this be done on the basis of:***
 - ***Traditional Ownership,***
 - ***Native Title outcomes,***
 - ***or through recognition of existing the current government-established (Westernised) state or territory based structures?***

Option two: Federal accreditation of state and territory legislation with default overarching federal legislation

This option would establish 'national standards'. The cultural heritage regime in each state and territory would have to comply with these standards, and if not, the Australian Government would step in.

Overview

Under this option, the Australian Government would develop a set of best practice national standards, consistent with the principles of self-determination and the design principles referred to above. These national standards could be developed using existing publications, such as the 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation' included in *Dhawura Ngilan*. State and territory legislation that met those national standards could be accredited. If state and territory legislation was not accredited, federal legislation would apply. This federal legislation would be similar to that referred to in option one.

A role for a National Body

This option would also have a role for a National Body, with a different role. Under this option, the National Body would assess state and territory regimes against a set of best practice National Standards. If the state or territory regime met the standards they would be 'accredited,' and that accredited regime would be the primary mechanism for First Nations cultural heritage protection. The National Body would carry out regular audits to ensure continued compliance of the state or territory regime with the National Standards.

In circumstances where state or territory regimes do not meet the standards, the National Body could appoint local First Nations bodies, as in option one.

What should be in the National Standards?

The first stage of national engagements clearly demonstrated that any National Standards would need to be informed by UNDRIP, and enshrine the right to free, prior and informed consent and the



right to self-determination. Consistent with UNDRIP, the first stage of engagements emphasised that National Standards would likely require local First Nations bodies to be the decision-makers about their own cultural heritage.

Such standards could enhance and improve cultural heritage protections by ensuring that local First Nations make decisions about their own cultural heritage at the beginning of any development process.

Benefits and risks

Under this option, states, territories and local Traditional Owner groups could retain (or amend) existing arrangements for cultural heritage management, where they met the best practice requirements established by the federal framework. This would allow states and territories to continue providing heritage management protections suited to their jurisdictions which would work in conjunction with other state/territory development planning mechanisms. However, unlike in option one, under this model there may be inconsistency in heritage regulation between jurisdictions, which may be problematic where there are cross-jurisdictional issues. As with option one, it would be important to consider how to support and resource local decision-making bodies to undertake this work.

Questions

- ***What are your views on this accreditation model? Risks and opportunities?***
- ***What should best practice standards under this option look like? How can we ensure they meet the design principles?***
 - ***How could best practice standards consider accountability for decision-makers?***
- ***How should it be decided whether states and territories meet the standards for accreditation?***
 - ***How could First Nations' data sovereignty be managed at the national level, if some states and territories are accredited and others are not?***
- ***How could states and territories sustain their accreditation in the long term and continue to meet best practice standards?***
 - ***How can consistency under an accreditation model be ensured in the long term?***

Option 3: 'Model' legislation and repeal of the ATSIHP Act

This option would see the Australian Government develop 'model' best practice legislation, and then negotiate with each state and territory to have it implemented.

Overview

Under this model, the Australian Government would draft overarching model legislation to protect First Nations cultural heritage, which would implement UNDRIP, including the right to free, prior and informed consent, and self-determination in relation to First Nations heritage protection. This legislation would be adopted and implemented by the Australian Government and states and territories within their individual jurisdictions, subject to the agreement of those jurisdictions. As this legislation is enacted within a state or territory, it would replace the current state and territory legislation, and the ATSIHP Act would no longer be in effect other than to manage legacy cases. This would be because, if successfully implemented, states and territories that enact the 'model'



legislation would have sufficient heritage protections and no longer require the last resort protections offered by the ATSIHP Act.

The process of enacting ‘model’ legislation

Under this option, the model legislation would be implemented by the Australian Government and each of the jurisdictions. The model legislation would lift standards and drive consistency between jurisdictions, with states and territories retaining primary responsibility for First Nations cultural heritage protection. The model legislation would centre decision-making by First Nations peoples and seek to ensure that First Nations cultural heritage was the first consideration in any development process.

The process of model legislation is sometimes used by the Australian Government to introduce national reform with the agreement of the states and territories. Examples include the national work health and safety legislation, as well as bicycle helmet laws.

Benefits and risks

While model legislation would drive national consistency, it is possible that different jurisdictions may interpret and/or implement the legislation differently. There is also a risk that the legislation may diverge over time as jurisdictions amend the model legislation. It is important to consider how this issue would be addressed in the long term, if the standards of states and territories’ management was reduced over time. Another risk is that this reform may take a considerable amount of time, as each state and territory would need to agree to the change.

Questions

- ***What are your views on ‘model’ legislation? Risks and opportunities?***
- ***Does this option ensure the legislative reform objectives are achieved?***
- ***What implications could there be if different jurisdictions interpreted and/or implemented this legislation differently?***
- ***How could states and territories be held accountable for consistency with their decisions in the long term?***

Additional ways to improve heritage protections

In addition to the options for legislative reform proposed above, there are other, non-legislative ways to improve First Nations cultural heritage protections that could supplement these options. Some of these opportunities include:

- Supporting First Nations communities to undertake cultural mapping so that developers can plan around First Nations heritage early in approval processes
- Educating all Australians about our shared history
- Supporting local governments to better understand heritage requirements to help prevent ongoing destruction at the local level.



*Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*⁵ contains many other additional ways to improve heritage protections which could also be explored alongside legislative reforms, such as prioritising the recording and digitisation of place-based traditional knowledge, achieving better equity on statutory heritage lists, and embracing truth telling about Australia's heritage.

Questions

- ***Should we consider any other additional ways to improve heritage protections, alongside legislative reform?***

How to have your say

This second stage of engagement is designed to draw out views on the proposed options for cultural heritage reform. Some of the implications, benefits, and risks for each of the options are outlined above, and your views on other implications of the models are sought.

These questions will guide the discussions to be held in the second stage of engagement and may also be used as a guide to providing written submissions to the process.

Questions for discussion

- ***Do you support any of these options? Which option(s) do you prefer and why?***
- ***Is there anything else you would like us to consider?***

What happens next?

The second stage of national engagements will be undertaken in late 2022 and early 2023. This will include face-to-face consultations where practical to do so, as well as online consultations. To book a Stage Two consultation, you can email the Australian Government Department of Climate Change, Energy, the Environment and Water at ich@environment.gov.au and/or the First Nations Heritage Protection Alliance at info@culturalheritage.org.au.

This consultation will inform the development of an Options Report, which will be provided to the leadership of the First Nations Heritage Protection Alliance and the Minister for the Environment and Water for consideration. This report will outline practical and implementable reform recommendations to reform cultural heritage protections.

Where can I find more information?

Background to First Nations cultural heritage reform is available in [Modernisation of Aboriginal and Torres Strait Islander cultural heritage protections Discussion Paper - Stage 1](#).

More information about the reform process is available on the First Nations Heritage Protection Alliance's website: <https://culturalheritage.org.au/cultural-heritage-reform/>

Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia has been central to this reform process. It is available at: <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>

⁵ Available at: <https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>



Australian Government

**Department of Climate Change, Energy,
the Environment and Water**



First Nations
HERITAGE PROTECTION
ALLIANCE

The final report of the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia, *A Way Forward*, is available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Report

Additional resources and information will be made available on the First Nations Heritage Protection Alliance's website throughout Stage Two national engagements.