

"Land in the State of New South Wales was traditionally owned and occupied by Aborigines. Lands of spiritual, social, cultural and historical importance to Aborigines fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land. Aborigines accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation."

fact sheet



New South Wales
Aboriginal Land Council
www.alc.org.au

Changes proposed to the protection of Aboriginal culture and heritage at the Federal level

This Fact Sheet provides general information about some of the changes being proposed by the Federal Government to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). The ATSIHP Act provides for the protection of Aboriginal and Torres Strait Islander culture and heritage. These fact sheets have been developed for Local Aboriginal Land Councils (LALCs) by the NSW Aboriginal Land Council (NSWALC).

Please Note: While all care has been taken in the preparation of this fact sheet, it is not a substitute for legal advice in individual cases. The information in this fact sheet is current as of September 2009.

What is being proposed?

While the State Government has the main responsibility for Aboriginal culture and heritage in NSW, the Federal Government also has some additional powers to protect culture and heritage. The main Federal law is called the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).¹

The Federal Government suggests that the ATSIHP Act is "intended to be used only where state or territory laws and processes prove to be ineffective."² According to section 4 of ATSIHP Act: "The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aborigines in accordance with Aboriginal tradition."

On 3 August 2009 the Hon. Peter Garrett, Federal Minister for the Environment, Heritage and the Arts announced a review of this law. A Discussion Paper: 'Indigenous heritage law reform', was released proposing a number of changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

A copy of the discussion paper is available at: <http://www.heritage.gov.au/indigenous/lawreform>

How do these proposed changes relate to proposed reforms of the NSW *National Parks and Wildlife Act 1974*?

The NSW Department of Environment, Climate Change and Water (DECCW) recently proposed changes to the main law in NSW which can protect Aboriginal cultural heritage, the *National Parks and Wildlife Act 1974*.

The proposed changes to the Federal ATSIHP Act are separate to the changes proposed to the NSW *National Parks and Wildlife Act 1974*.

For more information about the law in NSW and NSWALC's response to the proposed changes to the *National Parks and Wildlife Act 1974* see NSWALC's submissions and separate culture and heritage Fact Sheets 1 – 6.³

FACT SHEET



Culture and Heritage

How does the current ATSIHP Act protect Aboriginal cultural heritage?

The ATSIHP Act gives the Federal Minister for the Environment, Heritage and the Arts, currently the Hon Peter Garrett, the power to make declarations for the protection of Aboriginal objects and areas.

Any Aboriginal or Torres Strait Islander person or their representative⁴ can apply to the Minister for the protection of an object or area of “*particular significance to Aboriginals in accordance with Aboriginal tradition*”.⁵

Where the Federal Minister is satisfied that the object or area is under threat of injury or desecration he or she *may* make a declaration for its protection. There is also a power for emergency declarations to be made where there is a serious and immediate threat of injury or desecration to an object or area.⁶

The Federal Minister must remove a declaration where he is satisfied that a state law, such as the *National Parks and Wildlife Act 1974*, makes “effective provision” for the protection of the Aboriginal area or object.⁷

Why are changes to the ATSIHP Act being proposed?

The Federal Government has decided to review the ATSIHP Act because it has acknowledged that: “*The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects*”.⁸

According to the Federal Government only 7% of applications have resulted in declarations since the ATSIHP Act commenced in 1984. This equates to 24 declarations in 25 years.⁹ Some of the declarations made by the Federal Minister have been overturned by the Federal Court.

The Federal Government has suggested that the primary aims of the proposed changes are to:

1. Ensure that Indigenous Australians will have the best opportunities to protect their heritage.
2. Cut duplication and red tape.¹⁰

What is the Federal Government proposing to change?

The Federal Government’s Discussion Paper outlines a number of proposals for reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act*.

The key changes propose to:

1. Introduce a system for “accreditation”. If the Federal Minister accepts that a state has ‘effective’ legislation, such as the *National Parks and Wildlife Act 1974* in NSW, the state could receive accreditation and then any application for protection at a Federal level will be referred back to the state. The state or territory would only be required to “consider” any information or advice provided by the Federal Minister. This change would remove the ability of the Federal Minister to step in and take action in ‘accredited’ States, even if that State has failed to protect a particular site.¹¹
2. Provide standards for accreditation.¹²
3. Limit which Aboriginal people can apply for a declaration to “legally recognised traditional custodians”.¹³ The discussion paper states that “*Where there are no Indigenous people who clearly have a statutory responsibility for the land...any Indigenous person could apply for protection.*”
4. Introducing new criteria for when a declaration will be made.¹⁴
5. New timeframes and new criteria for the making of emergency declarations.¹⁵
6. Provide that declarations cannot be made where the activities are permitted under an Indigenous Land Use Agreement under the *Native Title Act 1993*.¹⁶
7. Changes to the definitions of Aboriginal objects and areas.¹⁷
8. Updating penalties and introducing new offences relating to the display of “sacred objects” and “personal remains”.¹⁸
9. Introducing new powers to issue remediation orders¹⁹
10. New procedures for dealing with

applications for declarations including procedures that would apply to “sacred objects”, “personal remains” and sensitive information.²⁰

11. Removing a separate obligation to report the discovery of Aboriginal “personal remains” to the Federal Minister.²¹

Where can I get more information about the proposed changes?

More detail about the changes proposed by the *Discussion Paper: Indigenous heritage law reform* can be found in NSWALC Fact Sheet 8 – Summary of key proposed changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

Information sessions are being held by DEWHA in (7) locations in NSW

in *Coffs Harbour, Tamworth, Dubbo, Bourke, Queanbeyan, Sydney and Wagga Wagga* between 21 -29 September 2009.

More information can also be accessed at the DEWHA website: www.heritage.gov.au/indigenous/lawreform

Can I have a say about the *Indigenous Heritage Law Reforms*?

Yes. DEWHA has invited submissions from the

community on the proposals outlined in the Discussion Paper.

The closing date for written submissions is **Friday 6 November 2009**.

Comments can be emailed to atsihpa@environment.gov.au or posted to:

Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water,
Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

Submissions should include your name, address, contact phone numbers and email address. DEWHA have indicated that all submissions they receive will be published on their website unless you indicate otherwise.

Local Aboriginal Land Councils wanting to discuss the changes and the NSW Aboriginal Land Council's response should contact their local Zone Office or the Land, Policy and Research Unit on TEL: (02) 9689 4444.

NSWALC will also be preparing a submission. LALCs are encouraged to send any comments to the Land, Policy and Research Unit at NSWALC.

(Footnotes)

- ¹ The ATSIHP Act is a Commonwealth Act administered by the Federal Department of Environment, Water, Heritage and the Arts (DEWHA). A current version of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* can be accessed at http://www.austlii.edu.au/au/legis/cth/consol_act/aatsihpa1984549
- ² Department of Environment and Heritage, *'The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making'*.
- ³ Available at <http://www.alc.org.au/resources/c+h/index.htm>
- ⁴ See sections 9 & 10 of the ATSIHP Act.
- ⁵ See section 3 of the ATSIHP Act.
- ⁶ See sections 9 & 18 of the ATSIHP Act.
- ⁷ See section 13(5) of the ATSIHP Act.
- ⁸ See page 4 of the Discussion Paper: *'Indigenous heritage law reform'* available at <http://www.heritage.gov.au/indigenous/lawreform>. Justice Elizabeth Evatt's 1996 Review of the ATSIHP Act outlines a range of reasons why the Act is considered ineffective, including its lack of detail, lack of Aboriginal involvement and lack of respect for Aboriginal customs. A summary of the Evatt Review can be accessed at: <http://www.austlii.edu.au/au/journals/AILR/1997/38.html>
- ⁹ See page 4 of the Discussion Paper: *'Indigenous heritage law reform'*
- ¹⁰ See page 3 of the Discussion Paper: *'Indigenous heritage law reform'*
- ¹¹ See proposal 3 of the Discussion Paper: *'Indigenous heritage law reform'*.

- ¹² See proposal 4 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹³ See proposal 5 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁴ See proposal 13 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁵ See proposal 12 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁶ See proposal 6 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁷ See proposal 2 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁸ See proposals 8 and 14 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ¹⁹ See proposal 14 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ²⁰ See proposals 9 & 11 of the Discussion Paper: *'Indigenous heritage law reform'*.
- ²¹ See proposal 7 of the Discussion Paper: *'Indigenous heritage law reform'*.