

National Library of Australia

FROM THE OFFICE OF THE DIRECTOR-GENERAL

SUBMISSION

I am writing on behalf of the National Library of Australia in response to the Stand-alone Legislation for Indigenous Knowledge: Interim Scoping Study. We welcome the chance to comment.

The Library supports the comments provided to IP Australia by National and State Libraries Australasia (NSLA) and endorses their recommendations.

The Library also provides its own specific comments on the IP Australia proposal below. The Library has recently responded in a similar manner to the Productivity Commission's Draft Report on Aboriginal and Torres Strait Islander Visual Arts and Crafts and further background and context to our comments may be found in this submission.

NATIONAL LIBRARY OF AUSTRALIA AND INDIGENOUS KNOWLEDGE

The cultural sector has long worked alongside First Nations people to better recognise Traditional Knowledge (TK) and Traditional Cultural Expression (TCE), usually framed within the cultural sector as Indigenous Cultural and Intellectual Property (ICIP), in relation to material in our collections. The National Library of Australia (the Library) is both a keeper of memories—in the form of its collections—and a server of people. Our collections are rich in the documentation of Aboriginal and Torres Strait Islander cultures, collected and created by Indigenous and non-Indigenous people alike. They are full of art, culture, language and knowledge—full of truths, half-truths and frank misunderstandings. They have the power to grow, to heal and to wound. They are understood and interpreted differently by individuals, by communities and over time.

The value of our collections grows through the services we provide, through the relationships we develop with communities, and through the generosity of communities who share their knowledge with us. Our challenge is in strengthening trust and working relationships between First Nations communities and institutions with colonial origins.

We cannot underestimate the importance, complexity and necessary expense of the work involved in ensuring that collections are acquired, described, and accessed in culturally appropriate ways. This includes continual retrospective work on collections acquired since the Library began collecting in 1901. The Library, in alliance with NSLA, acknowledges that management of First Nations collections is based on conventional western parameters and laws have failed to fully or appropriately take into account the intangible and tangible cultural and heritage significance of these items for Aboriginal and Torres Strait Islander peoples. These management systems were not designed for the benefit or participation of First Nations peoples.

All NSLA member libraries, including the National Library, acknowledge their collective, individual and moral responsibilities to ensure that management and access to these collection materials is culturally informed and respectful. This includes recognition and protection of the ongoing, communal nature of ICIP rights.



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SUMMARY OF THE LIBRARY'S POSITION

In summary, the Library supports the fundamental proposal to introduce legislated recognition of TK and TCE. However, we note that any proposal to introduce such legislative rights will necessarily impact upon cultural institutions and the management of their collections, and call upon IP Australia to include these impacts in its consideration.

The Library supports the common elements of the models for legislative protection proposed by IP Australia and the Productivity Commission. In particular we support:

- The implementation of the new rights through stand alone legislation, rather than amendments to other intellectual property regimes such as copyright. As IP Australia notes, TK and TCE are substantially different from other intellectual property rights, not least because they are ancient and perpetual in nature and do not depend on requirements such as originality. An appropriately designed legislated right would be extremely valuable in support of the Library's own work to ensure that the rights of First Nations peoples to control their cultural heritage is respected and protected. It could also inform and guide libraries on their responsibilities in relation to TK and TCE.
- The new TK and TCE rights being in addition to other intellectual property protection. TK and TCE rights should not overlap, replicate or confuse existing rights, and consideration should be given to the potential outcomes where Indigenous people are rights holders of both IP rights and TK and TCE rights.
- The recommendation that the protection of cultural assets be automatic. We agree with both the Productivity Commission and IP Australia that a compulsory registration process would be likely to negatively impact uptake, although voluntary processes designed to assist rights holders in enforcing their rights could be of benefit.
- The establishment of a government authority to assist with enforcement under the scheme, to reduce costs for communities and ensure rigor and accountability in the system. However, the establishment of and processes for decision making by such an agency would need to be led and verified by First Nations people. Additional support should also be provided to individual communities wishing to establish and defend their own rights, such as through a dedicated IK legal aid service or cultural advisory body.

We provide additional comments on the specifics of the IP Australia proposal below.

PART A: Challenges for Indigenous Knowledge Protection

The Library commends the work that IP Australia has undertaken in this space and supports the fundamental proposal to introduce legislated recognition of ICIP. It is understood that the discussion in the report is framed primarily as a solution to the issue of unauthorised use of Aboriginal and Torres Strait Islander ICIP in the production of fraudulently produced art and craft. However, as custodians of collections rich in ICIP, cultural institutions will be necessarily affected by the proposed scheme, and the legislated rights will apply to

both the contemporary and heritage materials in our collection. As such libraries have a strong interest in ensuring that our collections can continue to be managed and shared in culturally appropriate ways.

We support the position that ICIP protection be implemented through a new, specially designed legal instrument, and not just an amendment to an existing area of law such as copyright or other intellectual property law. This will avoid unintended consequences and allow the protection to be appropriately tailored to best suit the needs of First Nations communities. An appropriately designed legislated ICIP right would be extremely valuable in support of the Library's own work to ensure that the rights of First Nations peoples to control their cultural heritage is respected and protected. It could also inform and guide libraries on their responsibilities in relation to ICIP.

PART B: Models for Sui Generis legislation

The Library receives daily requests for access to and use of ICIP material within its collection. We also make significant use of them in our own engagement activities, such as publishing, exhibition and education. Sharing this material in an appropriate and culturally sensitive manner is essential to preserve, revitalise and strengthen First Nations cultures, histories and achievements. Requests for access and Library engagement activities relate to published or unpublished materials produced over the span of several centuries, from pre-colonial time to contemporary electronic deposit. These requests are received from across the full spectrum of the Australian population, including both First Nations and non-Indigenous individuals and organisations.

Many of these requests are from individuals and organisations (including media representatives and publishers) wishing to re-use ICIP material in public and commercial ways which lie beyond the visual arts and crafts sector, but which should none-the-less be subject to the proposed ICIP framework. The Library therefore recommends that the proposed ICIP right apply beyond the visual arts and crafts sector and extend to uses such as research and academic applications, publishing and display.

Our current practice when dealing with material with ICIP, is to require users to obtain permission from communities before use. Wherever possible, the Library defers to the appropriate cultural authorities for decisions relating to ICIP material. Having a legal framework to support this practice would help formalise the requirements of users of ICIP in the Library's collection as well as providing welcome support and cultural safety for First Nations Library staff providing advice on those requirements. The Library welcomes an ICIP scheme that is also grounded in the concept of community authorisation.

With this in mind, the Library supports the notion that it be the responsibility of third parties to obtain free, prior and informed consent of Traditional Owners for the use of their IK. Some thought should be given to how the model would define Traditional Owners, particularly in cases where several groups may claim Traditional Ownership over TK or TCE. A dispute resolution mechanism might be considered and thought given to the potential for formal licensing arrangements to become a point of contention to the detriment of Traditional Knowledge Owners.

The Library also supports the IP Australia proposal to include exceptions in the system to allow its practical application. We note that such exceptions should be carefully framed to avoid conflict and misuse, and support the proposal that they be designed in consultation with Indigenous communities.

We support the inclusion of education and news reporting exceptions, noting of course that these should not apply where use of the material constitutes mis-use or appropriation. Factors such as the intent, the extent of

the use and the potential for harm could, for example, be considered in determining whether an exception applies.

We also urge IP Australia to consider including research and library and archive uses in the list of exceptions. Such exceptions are particularly important for libraries and other cultural institutions to manage materials they hold, including those where records, including provenance, do not indicate which groups or communities hold TK and TCE rights over the material.

It is highly likely and desirable that the ICIP protection provided by the scheme will apply to library use of materials. Under the current settings of the copyright regime, cultural institutions cannot generally supply or make use of material under the broader exceptions for research and study etc, and instead must rely on their own specific exceptions. If this model were replicated in the ICIP scheme, it is likely that innocent library activities would be unintentionally captured by the legislation.

For example, it is unclear what rights or responsibilities libraries would have when seeking to preserve material, or if a claimant were requesting access to collection material to support their claim over the ICIP. This problem already occurs in Native Title and confirmation of Aboriginality spaces and can be difficult for institutions to navigate.

It is important to ensure that libraries can continue to support communities in preserving, strengthening and communicating their culture within the context of appropriate ICIP policies and protocols, without fear of innocent infringement.

Finally, subject to the considerations around appropriate framing discussed above, we support the recommendation of the Our Culture, Our Future report that a specific exception for traditional and customary uses be included in the scheme, to ensure that it does not unintentionally become a barrier to the First Nations communities' cultural practice.

Yours sincerely

A solid black rectangular box redacting the signature of Dr Marie-Louise Ayres.

Dr Marie-Louise Ayres FAHA
9 November 2022