

# National Library of Australia

FROM THE OFFICE OF THE DIRECTOR-GENERAL

9 September 2022

I am writing on behalf of the National Library of Australia, a government body, in response to the [Draft Report on Aboriginal and Torres Strait Islander Visual Arts and Crafts](#). We welcome the opportunity to comment.

## National Library of Australia and Indigenous Cultural and Intellectual Property

The cultural sector has long worked alongside First Nations people to better recognise Indigenous Cultural and Intellectual Property (ICIP) rights of traditional owners 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 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 National and State Libraries Australasia (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.<sup>1</sup> 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.

## General support

The Library commends the work that the Productivity Commission 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 and the model proposed 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 PC recommendation 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 on 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.

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<sup>1</sup> See further <https://www.nsla.org.au/resources/indigenous-cultural-and-intellectual-property-icip>

## **Overlap with copyright**

The Library notes that any potential impact on other areas of law should be guarded against. First Nations individuals and communities should be given ICIP rights in addition to any rights they have under, for example, copyright. Their ICIP rights should not overlap, replicate or confuse these existing rights. With this in mind, we recommend that the PC consider potential outcomes where Indigenous people are both copyright holders and ICIP rights holders, and the anomalous situations this may give rise to.

We particularly note that any changes which reverse or undermine the recent amendments to the Copyright Act 1968 relating to the duration of copyright protection for unpublished works will have catastrophic impacts. These hard-won changes came into effect in 2019, and significantly simplified and unified copyright terms. For example, the outdated concept of perpetual concept was removed from our Act and copyright terms for unpublished works were brought into line with other works, so that copyright for all works now expires 70 years after the death of their author.

These changes made it possible for cultural institutions to provide online access to large parts of their historic collections, opening these collections to much broader audiences. Applying changes which are intended to protect ICIP in the Copyright Act would be a seriously retrograde step, as would any changes which unintentionally reintroduced perpetual or effectively perpetual copyright.

Similarly, any changes which created special term rules for specific creators would act to create uncertainty and confusion. Where Indigenous creators have been denied copyright in the past they should be compensated directly for any lost income and should be granted full ongoing ICIP rights to ensure they ongoing rights over future uses, rather than extending copyright.

## **Need to minimise bureaucracy**

It is of prime importance that the new ICIP protection be readily accessed and enforced by communities. With this in mind, the Library urges that the ICIP model be designed specifically to minimise bureaucratic burdens that would discourage uptake of the system.

We support the PC recommendation that the protection of cultural assets be automatic. We agree with the PC that a compulsory registration process would be likely to negatively impact uptake.

The option to create a register of ICIP and authorised community representatives would make managing Library requests more straightforward but, as noted in the Clayton Utz summary, would be burdensome for communities and their representatives. If it is deemed desirable, a voluntary registration system that could provide evidence in court cases and simplify contact for users could be explored. However, this should not replace or limit protections for unregistered assets. The PC may also want to consider whether a compulsory or voluntary register for users of ICIP would provide benefits in terms of certainty and reduce the enforcement burden for communities. NSLA Library experience supports the need for improved protocols and collaborative technologies that avoid overloading First Nation individuals or communities with cultural labour in fielding multiple requests from different institutions across Australia.<sup>2</sup>

The Library also supports the PC recommendation that there be no time limit on the protections. Time limits are inappropriate for traditional or customary rights, which are living in nature.

Finally, we support there being no material form requirements, in line with the international model laws. We recommend a clear, plain English definition of what a cultural asset is that is sufficiently flexible to recognize the wide range of ways in which culture may be expressed. We recommend that the definition of cultural asset be non-exclusive and include both original use of cultural assets and documented cultural history such as written or oral descriptions of practice, photographs and others.

## **Identification of Traditional Owners**

The Library does, however, have concerns around the use of the existing native title/land claim scheme as a model for demonstrating connection to assets and establishing standing. The Native Title claims process requires labor intensive and expensive research effort to document traditional laws and customs, which must

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<sup>2</sup> See further <https://www.nsla.org.au/sites/default/files/2022-08/nsla-submission-national-cultural-policy-2022.pdf>

often be borne by those with minimal sources of funding. The process has often highlighted the mismatch between customary and western law and its demands at times conflict with expectations or cultural obligations of traditional owners.

In particular, the requirement to prove continuous connection is a point of contention with regards to Native Title, as it can make it difficult for members of the Stolen Generations, and other Indigenous people who have been disenfranchised from their community through no fault of their own, to access legal rights. It is likely to be even less appropriate and helpful in an ICIP context. Adapting a Native Title model may lead to counterclaims of traditional ownership and prove divisive and contentious.

In drafting the final model, care should be taken to ensure that the requirements of proof for standing and protection of a cultural asset do not replicate the problems with accessibility found in the Native Title system.

There are also parallels to the Confirmation of Aboriginal or Torres Strait Islander heritage (Aboriginality) process which can often devolve into community politics and personal conflicts. The Library suggests that the PC also investigate this process with a view to identifying problems with its applications and any lessons that may also be applied to a process of claiming ICIP.

Our experience seeking to manage ICIP material in our own collections shows that a wide range of issues are likely to arise. These include:

- How will Traditional Owners be identified? Will the process be biased towards those communities who are included in the western record of the asset?
- Will self-identification by groups with concerns over specific uses of their ICIP be sufficient? Who will this disadvantage?
- If an action is taken, will other potential Traditional Owners of the ICIP be advised or given the opportunity to participate?
- Where a particular community is identified, how will contact and communication challenges be addressed? What happens when more than one possible community contact is identified?
- What is the proposed course of action in cases where several Traditional Owner groups make claims? Will all claims be valid?

We encourage the PC to give consideration to a formalised conflict resolution process. Native Title has shown that these conflicts can be fraught and should be avoided, or at least planned for, wherever possible.

The Library also cautions against an approach whereby the lack of identifiable Traditional Owners is necessarily taken as a sign that authorisation is not needed. Questions around this include:

- What would be the course of action should Traditional Owners be identified (or self-identify) at a later date?
- Can they make a case retrospectively?

The scheme rightly preferences the rights of Traditional Owners of ICIP, but the protection of ICIP as an entity in itself is important regardless of whether there is someone to speak for it or not. While the premise of the scheme is to give ICIP rights holders recourse to take legal action against the misuse of their ICIP, should it also consider providing opportunity for a third party to safeguard ICIP against misappropriation or misuse – for example, when the use is clearly inappropriate and offensive but Traditional Owners are not readily identifiable.

Library practice – and advice to users of the collections – is that all reasonable attempts should be made to identify and liaise with ICIP holders. If this is not possible, then it becomes a case-by-case question of risk. Considerations include the nature of the material, likelihood to cause offense/be considered a misuse or appropriation of ICIP, visibility of the use and the extent of attempts made to seek authorisation. It is our recommendation that similar considerations be built into the scheme.

### **Enforcement by government authority, such as a Cultural Rights Regulator**

One option discussed in the report is that a government authority be empowered to take action on behalf of ICIP authorised owners against those infringing their rights. An agency resourced to undertake such actions could support 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. It may also be inappropriate for the complex community engagement and cultural judgements required to be centralised.

The PC may wish to consider the appropriateness of alternative systems for providing support and resourcing for communities to establish authority over ICIP or pursue claims against infringement. Such support could be provided through a specialist First Nations led legal aid or cultural advisory body.

### **Application to Library**

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. Access and use of this material may be in support of research and study, publication, family history, cultural use or observation, or to inform the creation of new works. 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 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, 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 and welcomes an ICIP scheme that is also grounded in the concept of community authorisation. This would uphold the principles of NSLA's Statement and support its application. The Library is near finalizing its ICIP Protocol. It is a standard setting and guiding document for the Library and its users but is currently hampered in that it provides no legal recourse or assurances against the misuse of ICIP in the collection.

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.

### **Exceptions**

The Library supports the inclusion of exceptions in the system to allow its practical application, but urges cautious consideration of the framing of these exceptions to avoid conflict and misuse. While copyright is a legal right that can be suspended or even transferred in certain circumstances, ICIP rights can never be suspended or transferred. The research and education sectors are some of the most frequent users of ICIP and should be accountable for their use of ICIP material where it constitutes a 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 the PC to give consideration to including library and archive uses in the list of exceptions. While the report suggests replicating copyright exceptions for research, education and other areas, one of the largest and most important categories of copyright exceptions, library and archive uses, are not included in this list.

As has already been discussed, it is highly likely and desirable that the ICIP protection provided by the scheme 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, cultural institutions may need to supply materials ahead of 'authorisation' to support a 'claim'. It is unclear what rights or responsibilities libraries would have if a claimant were requesting access to collection material to support their claim over the ICIP. This problem already occurs in the 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.

This submission can be published online under the name National Library of Australia.

The main point of contact for the submission is:

Ms Rebecca Bateman  
Director Indigenous Engagement  
National Library of Australia