

## **Comments of the Arts Law Centre of Australia on the Draft Gap Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore**

The areas covered by the gap analysis for traditional cultural expressions and expressions of folklore (TCEs) are the main focus of the Arts Law through its AITB service. AITB works to assist Indigenous artists to better protect their creative endeavours including literary and artistic productions such as music, visual arts and performances of TCEs, designs, secret TCEs and Indigenous names, words and symbols. Arts Law/AITB provides legal advice, representation and advocacy to Indigenous artists, arts organisations and communities.

The comments that Arts Law expressed at the 11<sup>th</sup> session of the IGC have been discussed in this gap analysis document. Arts Law strongly supports this gap analysis and the need for an internationally binding instrument to protect TCEs. Concurrently Arts Law encourages the Australia Government and other national Governments to tackle this issue of better protection of TCEs at a national level as a matter of urgency.

Our specific comments on the gap analysis are as follows:

- Under paragraph 20, **Relevant international IP conventions and treaties-** IP protection is a matter for domestic law but there needs to be an international convention that helps to regulate the international arena and prevent exploitation from 3<sup>rd</sup> parties like multinational corporations for example. An international instrument would also set international standards and practice, encouraging countries to adopt it. It is a way of highlighting countries which deny Indigenous people better protection of their TCEs in their respective countries.
- As stated in paragraph 34, Arts Law agrees there is a profound conceptual problem with developing protection for TCEs within the IP system in view of its inherent concern with individual/private ownership rather than community ownership which is based upon customary laws. For this reason at a national level, it may be necessary for States to develop sui generis legislation to provide appropriate means of protection.
- Under paragraph 35, there is a discussion about using other non-IP mechanisms such as laws relating to "blasphemy and cultural rights etc.:. Cultural rights could be recognised under national human rights legislation.

Such laws need to be consistent with IP legislation so that there is no conflict in these laws. Some governments may also need to ratify the Declaration on the Rights of Indigenous Peoples.

- As stated in paragraph 39, Arts Law strongly argues and supports that TCEs are often closely bound up with forms of TK and cannot be separated.
- Paragraph 41 (a)- the **element of originality** in copyright protection excludes works, stories and music that are passed down the generations. For many TCEs the works may not satisfy the originality requirements despite the low thresholds applied by the courts.
- **Para 44- Performances of TCEs-** There needs to be specific protection of performances because often they are not fixed in material form by the community who owns them so are excluded from copyright protection for that community. Arts Law sees extensive exploitation in this area due to the lack of protection. Arts Law advocates for better international protection as well as for States to address this issue at a national level.
- **Paragraph 48- Secret TCEs-** The law of confidentiality provides a bandaid form of protection for secret TCEs but it may be too onerous on Indigenous communities either to bring legal action or to enter into appropriate contracts. We note that in Australia many Indigenous communities have limited literacy skills in the national language, English and live remote from city centres. The onus should therefore be placed on the user of any secret TCE to gain permission from the appropriate custodian of the community.
- **Paragraph 52 – Defensive protection- refusal to register trade marks** that are “contrary to morality or public order”. Such mechanism exists as part of Australia's trade marks law however there is no mechanism in place to prevent registration of trade marks which are offensive to Indigenous communities of New Zealand. It is essential that this issue be addressed specifically within both international and national frameworks.
- **Paragraph 55(d) - Term of protection-** Arts Law advocates for protection in perpetuity as there needs to be ongoing protection as long as a relevant Indigenous community exists in a custodial capacity.

- Paragraph 69- As stated previously, Arts Law strongly supports an international instrument which will highlight to national governments the need to implement appropriate national laws. It can establish international best practice and place pressure on national governments to sign the international instrument.
- Paragraph 80- Arts Law supports a special, stand alone law to provide protection for TCEs to address the gaps as the focus and foundation will be geared to Indigenous TCE and not a Western approach. Current IP and Trade practices laws are based on Western ideas and cannot accommodate for Indigenous culture. See previous comments re paragraph 34.
- Paragraph 82 discusses **Indigenous communal moral rights**. The 2003 Australian draft Bill was NEVER introduced into parliament and in fact given very limited circulation. This draft Bill was far too onerous for Indigenous communities in terms of the requirements they had to satisfy to qualify for the protection it purported to provide. If communal moral rights are introduced, there must be extensive consultation with communities and the rights provided should arise automatically in the same way that moral rights automatically arise for individual creators.

### **Comments of the Arts Law Centre of Australia on the Draft Gap Analysis on the Protection of Traditional Knowledge**

#### Qualification for protection through specific legal mechanisms

##### Paragraph 4 and 41

Paragraphs 4 and 41 effectively set out a possible qualification test for protection of Traditional Knowledge (TK). Arts Law notes that the draft uses the expression ‘TK **may** need to be...’ (emphasis added). This suggests to us that the Committee is uncertain as to whether this qualification test be applied. Arts Law does not support the current proposal for the qualification test.

The three stage test would be difficult for many Aboriginal and Torres Strait Islander communities to establish because of the disruption and dislocation many Indigenous communities have experienced in Australia. Across many generations the Australian government has enforced policies and practices aimed at disrupting, diluting and