



# Protection of Indigenous Heritage in Selected Jurisdictions

Australia • Brazil • Canada • Mexico • New Zealand  
Norway • Peru • Russia • South Africa • Taiwan  
European Union

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# Comparative Summary

*Luis Acosta*

*Chief, Foreign, Comparative, and International Law Division II*

This report by the foreign law research staff of the Law Library of Congress's Global Legal Research Directorate includes surveys of eleven selected jurisdictions on the legislative and policy frameworks affecting the protection of sacred places of indigenous peoples, their graves, remains, related artifacts, and indigenous cultural property generally.

In the United States, a 1990 law, the Native American Graves Protection and Repatriation Act (NAGPRA) addresses the identification, repatriation, protection, regulated excavation, and custody of indigenous human remains and related cultural objects.<sup>1</sup> The individual surveys in this report reflect research on whether there are corresponding laws in the selected jurisdictions similar to NAGPRA, and more generally discuss the protection of indigenous cultural patrimony.

## **I. Native American Graves Protection and Repatriation Act**

NAGPRA authorized development of a “process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.”<sup>2</sup>

NAGPRA required most federal agencies and museums that received federal funds to inventory human remains and associated funerary objects and attempt to determine the cultural affiliation of each item.<sup>3</sup> The law required agencies and museums to notify affected Indian tribes and Native Hawaiian organizations, and to provide a written summary describing the objects, acquisition information, cultural affiliation, and related information.<sup>4</sup> NAGPRA requires agencies and museums to repatriate human remains and funerary objects, as well as other sacred objects or objects of cultural patrimony, to lineal descendants, Indian tribes, or Native Hawaiian organizations that are known or whose cultural affiliation can be determined.<sup>5</sup>

NAGPRA provides that any person who wishes to excavate human remains, funerary objects, sacred objects, or objects of cultural patrimony from federal or tribal lands may do so only after

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<sup>1</sup> Pub. L. 101-601, 104 Stat. 3048 (1990), codified at 25 U.S.C. §§ 3001-3013 (2012). NAGPRA is one of several federal statutes affecting indigenous cultural property. For a comprehensive overview of federal and state law affecting cultural property in the United States, see SHERRY HUTT, CAROLINE MEREDITH BLANCO & STAN N. HARRIS, *CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES* (2d ed. 2017).

<sup>2</sup> 43 CFR § 10.1(a) (2018).

<sup>3</sup> 25 U.S.C. § 3003.

<sup>4</sup> 25 U.S.C. §§ 3003, 3004.

<sup>5</sup> 25 U.S.C. § 3005.

obtaining a permit.<sup>6</sup> Such a permit is conditioned on meeting specified requirements,<sup>7</sup> including complying with the Archaeological Resources Protection Act (ARPA),<sup>8</sup> and consultation with and consent of interested Indian tribes or Native Hawaiian organizations.<sup>9</sup>

Any person who inadvertently discovers such cultural items must immediately notify the responsible federal agency official with respect to federal lands or the responsible Indian tribe official with respect to tribal lands.<sup>10</sup> If the discovery occurs during ongoing activity like construction or mining, the activity must cease and a reasonable effort must be made to protect the items.<sup>11</sup> If on federal lands, the responsible federal official must take immediate steps to secure and protect the items, notify and consult with interested lineal descendants, Indian tribes or Native Hawaiian organizations, and ensure that any excavation and disposition is carried out lawfully.<sup>12</sup> If on tribal lands, the responsible tribal official may similarly take appropriate steps to protect the items and ensure any excavation or disposition complies with specified requirements and procedures.<sup>13</sup>

NAPRA vests custody, ownership, and control of discovered or excavated human remains and funerary objects in lineal descendants, if they can be ascertained.<sup>14</sup> With respect to remains or funerary objects for which such descendants cannot be determined, or with respect to other types of cultural items, custody, ownership, and control is vested in the Indian tribe aboriginally occupying the federal land, or the tribe or Native Hawaiian organization with the strongest demonstrated relationship with the cultural items.<sup>15</sup> Federal agencies with unclaimed cultural items must care for and manage them in a manner consistent with detailed regulations.<sup>16</sup>

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<sup>6</sup> 25 U.S.C. § 3002(c); 43 CFR § 10.3.

<sup>7</sup> 43 CFR § 10.3.

<sup>8</sup> 16 U.S.C. §§ 470aa–470mm (2012). ARPA was enacted in 1979 with the goal of preserving and protecting archaeological sites on public and Indian lands. 16 U.S.C. § 470aa(b). ARPA prohibits the unauthorized excavation and removal of archaeological resources, and provides for a permitting process for private persons to be allowed to excavate. 16 U.S.C. § 470cc. Excavation of such without a permit is subject to criminal or civil sanction. 16 U.S.C. §§ 470ee, 470ff. If the federal land manager in charge of the application determines that a permit may result in harm to a religious or cultural site, the manager must notify any Indian tribe that may consider the site as having religious or cultural importance. 16 U.S.C. § 470cc(c). Any permit for excavation or removal of an archaeological resource located on Indian lands may be granted only after obtaining the consent of the Indian tribe having jurisdiction over such lands, and shall include such terms and conditions as the tribe requests. 16 U.S.C. § 470cc(g)(2).

<sup>9</sup> 43 CFR § 10.3(b)(2).

<sup>10</sup> 43 CFR § 10.4(b).

<sup>11</sup> 43 CFR § 10.4(c).

<sup>12</sup> 43 CFR § 10.4(d).

<sup>13</sup> 43 CFR § 10.4(e).

<sup>14</sup> 43 CFR § 10.6(a)(1).

<sup>15</sup> 43 CFR § 10.6(a)(2).

<sup>16</sup> 43 CFR § 10.7.

## II. Comparative Analysis

The jurisdictional surveys in this report reflect broad differences around the world in how governments seek to protect indigenous cultural property.

The survey on Australia describes a complex array of Commonwealth, state, and territorial legislative regimes. Commonwealth law protects indigenous heritage in areas of national significance, prohibits the export of protected objects, and provides backstop protection where state or territorial laws are ineffective. A Commonwealth statute, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, sets forth requirements governing the discovery of Aboriginal remains, including reporting such discovery to the government, consultation with Aboriginals with interest in the remains, and repatriation or safekeeping of such remains. Each state and territory in Australia has laws that protect indigenous heritage sites and objects, and provide procedures with respect to the discovery of human remains.

In New Zealand, statutes are in place that ensure the involvement of Māori in decision-making with respect to activities that could impact areas of interest to Māori, regulate the handling of Māori artifacts and provide a process for determining ownership of such items. In addition, government guidelines address the legal requirements and management of human remains that have been uncovered through accidental discovery, excavation, or natural processes such as coastal erosion that are Māori in origin, and provide for recognition of the role of Māori in managing such remains.

In Norway, comprehensive legislation provides for the recognition of the rights of the indigenous Sami people, and cultural objects of the Sami are protected by general cultural heritage legislation. Sami human remains have been repatriated by Norwegian cultural institutions, although the government has not passed legal requirements for the conservation and return of Sami human remains. Excavation and archeological studies of Sami graves are subject to the control or regulation of the government.

In Russia, archaeological activities, including the discovery and treatment of artifacts, graves, sacred places, and places of worship, are regulated by a general cultural heritage statute. Archaeological activities require permits, and the discovery of items of cultural heritage must be reported to governmental authorities. In the event of an accidental discovery of an object of archaeological heritage, the person making the discovery must immediately suspend work and report the discovery to the regional body for the protection of objects of cultural heritage, which will assess the cultural and historic value of the discovery. Objects of archaeological heritage are under state ownership.

In Taiwan, a law known as the Indigenous Peoples Basic Law provides for the consultation and participation of indigenous groups in determinations regarding land development, resource utilization, ecology conservation, or academic research on or adjacent to indigenous land. Protection of indigenous cultural heritage is governed by a general cultural heritage preservation law and subsidiary legislation on indigenous heritage. While not required by law, some instances of the return of indigenous peoples' human remains reportedly have occurred in Taiwan.

In South Africa, cultural heritage protection, including the protection of graves and sacred spaces, is governed by a general law known as the National Heritage Resources Act. The law provides for preservation of gravesites of cultural significance, and for consultation with communities that have an interest in the gravesites. The unexpected discovery of graves during development activities requires stopping the activity and alerting the responsible heritage resources authority, which must consult with interested communities and make arrangements for exhumation and re-interment or other appropriate measures.

In Canada, there are some federal laws relating to indigenous heritage protection, and there is a set of national standards and guidelines relating to the recognition, management, and conservation of historical places in Canada, but most cultural heritage legislation is at the provincial and territorial level. Each province and territory has developed legislation to address cultural heritage and indigenous relations. The Canada survey provides a detailed description of cultural heritage law and policy in British Columbia, which among other things provides significant protections for burial places of historical or archaeological value, and of human remains and associated heritage objects.

In Brazil, archeological sites, including Indian ones, belong to the government and are considered part of the national historical heritage. Federal agencies are responsible for preserving the country's cultural heritage. Indigenous sacred spaces and gravesites are not the subject of separate legislation but rather are covered by general laws governing the preservation of cultural heritage.

Similarly, Peru does not have specific legislation on the protection of sacred indigenous spaces, but instead indigenous art, materials, graves discovered in archeological excavations, and discoveries are considered part of the nation's cultural patrimony and are governed by a general law on the protection of cultural heritage of Peru and its regulations.

Likewise, in Mexico, historic artifacts and human remains are the property of the nation and are managed exclusively by the Mexican State. All archeological research must be either conducted directly by Mexico's National Institute of Anthropology and History or by scientific institutions authorized by that institute.

Lastly, in the European Union, while general EU policies support the promotion of the rights of indigenous peoples—including their right to maintain, protect, and develop the manifestations of their cultures, such as archaeological and historical sites and artefacts—recognition of indigenous groups' status, self-determination, and autonomy is left to the competency of the individual Member States.

# Australia

*Kelly Buchanan*  
*Foreign Law Specialist*

**SUMMARY** Australian states and territories have primary responsibility for the protection of indigenous heritage. Legislation at the federal level applies to areas of national significance and to the export of certain objects from Australia. It also provides backstop protection for indigenous heritage areas and objects where state and territory processes have been exhausted. Federal native title legislation may also provide an avenue for indigenous groups to protect their cultural heritage.

State and territory legislation contains protections for both indigenous heritage areas and objects, which may be defined to include human remains. The different laws may include offenses for harming or removing indigenous cultural heritage, processes for registering areas and objects, powers to issue stop work orders, and processes for issuing permits to conduct work that may affect cultural heritage. Each state and territory has developed mechanisms for consulting or otherwise involving indigenous people in the relevant processes. Procedures to be followed on the discovery of human remains generally involve contacting the police and/or relevant heritage agencies, a requirement to stop work, and involvement of local indigenous people in determining what should happen with the remains.

The legislation related to protecting indigenous heritage has been the subject of reforms in the past three to four decades, with some jurisdictions currently considering changes that seek to give indigenous people greater control in the management of their own cultural heritage. The various reforms can be seen in the context of shifts in the relationships between indigenous people and Australian governments. Historically, this relationship involved “protectionist” policies and assimilation, including the establishment of reserve areas and the taking of indigenous children by governments during the early to mid-twentieth century. There were later shifts to recognize certain land rights, policies related to self-determination, and a more recent focus on reconciliation. This has included apologies, a focus on partnership in the context of environmental and heritage protection, and greater involvement of indigenous people in decisions that affect them. However, the overall effectiveness of indigenous heritage protections remains affected by inconsistencies in legislation across the country.

## I. Legislative and Policy Framework

The Commonwealth (i.e., federal) Department of the Environment and Energy states that

[g]enerally Australia’s state and territory governments are responsible for the protection of Australia’s Indigenous heritage places. All states and territories have laws that protect various types of Indigenous heritage.

The Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant, or that are situated on land that is owned or managed by the Commonwealth. This protection operates under the *Environment Protection and Biodiversity Conservation Act 1999*.<sup>1</sup>

Other relevant Commonwealth laws include the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHP Act) and the Protection of Movable Cultural Heritage Act 1986 (Cth). Laws related to the recognition of Aboriginal land rights and native title include the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Native Title Act 1993 (Cth). There are multiple state and territory laws that are relevant to the protection of Aboriginal sacred sites, artifacts, and human remains, as outlined in this report.

The Commonwealth government published the *Australian Heritage Strategy* in December 2015.<sup>2</sup> This document sets out a ten-year framework to address national priorities and reach desired outcomes in relation to heritage places. The outcomes are “national leadership,” “strong partnerships,” and “engaged communities.” These are underpinned by three sets of objectives, which are supported by a series of actions.<sup>3</sup> The intention is to review the strategy after five years.

Objective 9 of the Strategy relates to focusing protection efforts on indigenous heritage. The associated actions include promoting “a consistent approach to the recognition, protection and management of Indigenous heritage sites across all levels of government and other organisations.”<sup>4</sup> The commentary to the objective states that the *2011 Australia State of the Environment Report* found that

assessing outcomes for Australia’s Indigenous heritage is hampered by the lack of national coordinated management approaches, a deficiency of comparable data, and the absence of formal monitoring and evaluation programmes. Overall, the report found that increasing regulation has not reduced the rate of destruction of significant Indigenous heritage sites. At the same time, the Productivity Commission has recommended various ways to reduce regulatory overlaps in the range of Commonwealth and state laws that protect Indigenous heritage sites.<sup>5</sup>

The Strategy also notes that

[l]egislation for the management of heritage places across Australia is sometimes complex and can be inconsistent. Legislative reforms, particularly in the area of Indigenous heritage, are being pursued by a number of state and territory governments.<sup>6</sup>

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<sup>1</sup> *Indigenous Heritage Laws*, DEPARTMENT OF THE ENVIRONMENT AND ENERGY, <http://www.environment.gov.au/heritage/laws/indigenous> (last visited Feb. 20, 2019), archived at <https://perma.cc/Q9N7-L7HF>.

<sup>2</sup> AUSTRALIAN GOVERNMENT, AUSTRALIAN HERITAGE STRATEGY (Dec. 2015), <http://www.environment.gov.au/system/files/resources/cb226e0d-ba51-4946-af5a-24b628958e79/files/australian-heritage-strategy-2015.pdf>, archived at <https://perma.cc/SH2T-BVHP>.

<sup>3</sup> *Id.* at 15.

<sup>4</sup> *Id.* at 43.

<sup>5</sup> *Id.* at 42.

<sup>6</sup> *Id.* at 30.

The Strategy also refers to the National Heritage Protocol, which was agreed by Commonwealth, state, and territory governments in 2004. According to the Strategy, the Protocol “outlines the arrangements whereby the Commonwealth, state and territory systems for the protection of cultural, natural and Indigenous heritage are coordinated.”<sup>7</sup>

In 2002, the Australian Heritage Commission (which was replaced by the Australian Heritage Council in 2004), a body established by the federal government to provide advice on heritage matters, published a document titled *Ask First: A Guide to Respecting Indigenous Heritage Places and Values*.<sup>8</sup> The 2015 Strategy includes a proposed action to publish and promote a new edition of this publication.<sup>9</sup> No information was located regarding progress with this action.

Nongovernmental heritage organizations have also produced charters and guidance documents related to heritage protection that are utilized by government regulators and decision makers throughout the country. In particular, the Burra Charter<sup>10</sup> was first developed in 1979 and has been updated periodically “to reflect developing understanding of the theory and practice of cultural heritage management.”<sup>11</sup>

## II. Commonwealth Legislation

### A. Protection of Indigenous Heritage Sites and Objects

#### 1. *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

The Environment Protection and Biodiversity Conservation Act 1999 (Cth)<sup>12</sup> (EPBC Act)

establishes the National Heritage List, which includes natural, Indigenous and historic places that are of outstanding heritage value to the nation. Under the EPBC Act there are penalties for anyone who takes an action that has or will have a significant impact on the Indigenous heritage values of a place that is recognised in the National Heritage List.

The Act also establishes the Commonwealth Heritage List, which includes places on Commonwealth lands and waters or under Australian Government control that have Indigenous heritage significance.

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<sup>7</sup> *Id.* at 9.

<sup>8</sup> AUSTRALIAN HERITAGE COMMISSION, *ASK FIRST: A GUIDE TO RESPECTING INDIGENOUS HERITAGE PLACES AND VALUES* (2002), <http://content.webarhive.nla.gov.au/gov/wayback/20171114035941/http://www.environment.gov.au/system/files/resources/4afff65c-00dd-4001-878b-a28d8831293a/files/ask-first.pdf>, archived at <https://perma.cc/8J3S-4D26>.

<sup>9</sup> AUSTRALIAN HERITAGE STRATEGY, *supra* note 2, at 43.

<sup>10</sup> Australia ICOMOS, *Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance* (2013), <https://australia.icomos.org/wp-content/uploads/The-Burra-Charter-2013-Adopted-31.10.2013.pdf>, archived at <https://perma.cc/8JPM-R77Z>.

<sup>11</sup> *Charters*, AUSTRALIA ICOMOS, <http://australia.icomos.org/publications/charters/> (last visited Feb. 20, 2019), archived at <https://perma.cc/VU3V-FGZY>.

<sup>12</sup> Environment Protection and Biodiversity Conservation Act 1999 (Cth), <https://www.legislation.gov.au/Details/C2018C00440>, archived at <https://perma.cc/3F3P-CDNN>.

In addition the Act protects heritage on Commonwealth land and from actions undertaken by the Commonwealth.<sup>13</sup>

The Australian Heritage Council, which was established by the Australian Heritage Council Act 2003 (Cth),<sup>14</sup> “assesses nominations for the National Heritage List and the Commonwealth Heritage List and makes recommendations to the Minister for the Environment. The final decision on listing is made by the Minister.”<sup>15</sup> The Council includes indigenous heritage experts and, when it considers that a nominated place may have indigenous heritage values, “the Council must endeavour to identify the Indigenous people with rights and interests in the place. It must then invite their views on whether the place should be included in the list. The Minister takes those submissions into account when making a decision about listing the place.”<sup>16</sup> In addition, the Indigenous Advisory Council, established under the EPBC Act, “advises the Minister on the operation of the EPBC Act taking into account their knowledge of the land, conservation and use of biodiversity.”<sup>17</sup>

Once an area with indigenous heritage significance has been added to either the National or Commonwealth Heritage lists, indigenous Australians “are involved in developing management plans.”<sup>18</sup> Where places on the National Heritage List are on indigenous land, these “can be managed through conservation agreements, which operate in the same way as Indigenous Protected Areas”<sup>19</sup> (see below, Part II(A)(5), for information on such areas).

## 2. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

The purpose of the ATSIHP Act<sup>20</sup> “was to address a gap in state laws and to encourage states to improve or enact legislation to protect traditional Aboriginal sites and objects.”<sup>21</sup> The Department of the Environment and Energy states that the Act “enables the Australian Government to respond to requests to protect important Indigenous areas and objects that are under threat, if it appears that state or territory laws have not provided effective protection.”<sup>22</sup> It further states that

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<sup>13</sup> *Indigenous Heritage Laws*, *supra* note 1.

<sup>14</sup> Australian Heritage Council Act 2003 (Cth), <https://www.legislation.gov.au/Details/C2012C00249>, archived at <https://perma.cc/3FNE-YHBP>.

<sup>15</sup> AUSTRALIAN HERITAGE STRATEGY, *supra* note 2, at 17.

<sup>16</sup> *Indigenous Heritage*, DEPARTMENT OF THE ENVIRONMENT AND ENERGY, <http://www.environment.gov.au/heritage/about/indigenous-heritage> (last visited Feb. 20, 2019), archived at <https://perma.cc/D2KR-FFX3>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), <https://www.legislation.gov.au/Details/C2016C00937>, archived at <https://perma.cc/A255-NQZ8>.

<sup>21</sup> AUSTRALIAN HERITAGE STRATEGY, *supra* note 2, at 9.

<sup>22</sup> *Indigenous Heritage*, *supra* note 16.

[t]he Australian Government can make special orders, called declarations, to protect traditional areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition from threats of injury or desecration. However the government cannot make a declaration unless an Indigenous person (or a person representing an Indigenous person) has requested it. The power to make declarations is meant to be used as a last resort, after the relevant processes of the state or territory have been exhausted.<sup>23</sup>

The government has developed reform proposals with respect to the ATSHIP Act, but these have not yet been introduced.<sup>24</sup> The *Australian Heritage Strategy* notes that

[t]hree decades on, and despite significant changes in the Indigenous heritage protection laws of all jurisdictions, including passage of the Native Title Act 1993 and the EPBC Act, the ATSHIP Act has not been updated to reflect the improvements in the legislative protections for Indigenous heritage. Any changes to the ATSHIP Act would require the support of Indigenous stakeholders.<sup>25</sup>

### 3. *Protection of Movable Cultural Heritage Act 1986 (Cth)*

The Protection of Movable Cultural Heritage Act 1986 (Cth)<sup>26</sup> is administered by the Department of Communication and the Arts.<sup>27</sup> It establishes the National Cultural Heritage Control List,<sup>28</sup> which includes two classes of Australian protected objects: Class A objects that cannot be exported from Australia and Class B objects that can be exported only after an export permit has been granted.<sup>29</sup> Class A objects, which are listed in the Protection of Movable Cultural Heritage Regulations 2018 (Cth), include the following Aboriginal and Torres Strait Islander material:

- sacred and secret ritual objects
- bark and log coffins used as traditional burial objects
- human remains
- rock art
- dendroglyphs (carved trees)<sup>30</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> AUSTRALIAN HERITAGE STRATEGY, *supra* note 2, at 9.

<sup>26</sup> Protection of Movable Cultural Heritage Act 1986 (Cth), <https://www.legislation.gov.au/Details/C2016C01056>, archived at <https://perma.cc/QX9K-DQTR>.

<sup>27</sup> See *Movable Cultural Heritage*, DEPARTMENT OF COMMUNICATIONS AND THE ARTS, <https://www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage> (last visited Feb. 20, 2019), archived at <https://perma.cc/BVE8-83FQ>.

<sup>28</sup> The Control List is contained in the Protection of Movable Cultural Heritage Regulations 2018 (Cth), <https://www.legislation.gov.au/Details/F2018L01710>, archived at <https://perma.cc/Y56Q-7LTC>.

<sup>29</sup> *The National Cultural Heritage Control List*, DEPARTMENT OF COMMUNICATIONS AND THE ARTS, <https://www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage/exporting-cultural-property-australia/national-cultural-heritage-control-list> (last visited Feb. 20, 2019), archived at <https://perma.cc/5UGI-DP6N>; Protection of Movable Cultural Heritage Regulations 2018 (Cth) reg 1.3.

<sup>30</sup> *The National Cultural Heritage Control List*, *supra* note 29.

The Act was the subject of a review conducted in 2015, which resulted in proposals for a new regulatory model based on various principles, including “adherence to principles of Aboriginal and Torres Strait Islander decision-making” and “a distinction between Ancestral remains and objects.”<sup>31</sup> No legislative amendments have been enacted following the review, although a bill to modernize the Act was listed by the government as one of the items to be introduced in 2018.<sup>32</sup>

#### 4. *Native Title Act 1993 (Cth)*

According to a native title lawyer, the provisions and processes of the Native Title Act 1993 (Cth)<sup>33</sup> may interact with Commonwealth, state, and territory legislation regarding indigenous heritage protection, and also provides for the right to protect places that are culturally significant:

The Native Title Act provides a framework for recognising and protecting the traditional rights and interests of Aboriginal and Torres Strait Islander people on areas of land and waters where native title has not been extinguished. This can include vacant Crown land and reserves, forests and parks, as well as seas and inland waters.

Most significantly, the Native Title Act provides for determinations of native title by the Federal Court that recognise the continuing native title rights and interests of Aboriginal and Torres Strait Islander people. As noted above, this may include a right to protect places and areas that are important under traditional law and custom.

It may be possible to protect these places and areas in some circumstances by applying to a Court for a legal remedy such as an injunction to prevent an activity that would damage them. Protection of this nature may be available in the absence of, or in addition to, protection available under other State, Territory or Commonwealth cultural heritage laws.<sup>34</sup>

The Act also contains provisions that require notification, consultation, and negotiation that apply to ensure that the relevant indigenous corporate entity is “made aware of proposed activities that may have an impact on cultural heritage.”<sup>35</sup> It also “makes provision for native title holders to reach a number of different types of agreements with governments and proponents who want to carry out future act activities.”<sup>36</sup> However, the cultural heritage protection available

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<sup>31</sup> *Review of the Protection of Movable Cultural Heritage Act*, DEPARTMENT OF COMMUNICATIONS AND THE ARTS, <https://www.arts.gov.au/have-your-say/review-protection-movable-cultural-heritage-act> (last visited Feb. 20, 2019), archived at <https://perma.cc/L7GJ-VE7V>.

<sup>32</sup> DEPARTMENT OF THE PRIME MINISTER AND CABINET, LEGISLATION PROPOSED FOR INTRODUCTION IN THE 2018 SPRING SITTINGS 3, <https://www.pmc.gov.au/sites/default/files/publications/2018-spring-public-list.pdf>, archived at <https://perma.cc/W2W9-WMP6>.

<sup>33</sup> Native Title Act 1993 (Cth), <https://www.legislation.gov.au/Details/C2019C00054>, archived at <https://perma.cc/5AUC-6H4W>.

<sup>34</sup> Austin Sweeney, *The Interaction of Cultural Heritage and Native Title*, PBC, <https://www.nativetitle.org.au/learn/native-title-and-pbcs/interaction-cultural-heritage-and-native-title> (last updated Aug. 16, 2018), archived at <https://perma.cc/E63D-3HUS>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

under the Act “is confined to areas of land and waters where native title may exist or has been determined to exist” and, even where such title has been determined to exist, “native title rights and interests do not provide absolute protection or a right of veto over development activities.”<sup>37</sup>

### 5. *Indigenous Protected Areas*

Indigenous Protected Areas (IPAs) are part of Australia’s National Reserve System, “the network of formally recognised parks, reserves and protected areas across Australia.”<sup>38</sup> IPAs, which have been part of the reserve program since 1997, are “land and sea country owned or managed by Indigenous groups, which are voluntarily managed as a protected area for biodiversity conservation through an agreement with the Australian Government.”<sup>39</sup> In addition, to conservation, IPAs are intended to “protect cultural heritage into the future, and provide employment, education and training opportunities for Indigenous people in remote areas.”<sup>40</sup> There are currently seventy-five IPAs, making up about 45% of the National Reserve System’s total area.

## **B. Protection of Human Remains**

The ATSIHP Act contains specific provisions regarding discovery of Aboriginal remains and also includes such remains in the definition of “significant Aboriginal objects” to which additional provisions apply.<sup>41</sup> The provisions specifically related to Aboriginal remains state as follows:

### 20 Discovery of Aboriginal remains

- (1) A person who discovers anything that he or she has reasonable grounds to suspect to be Aboriginal remains shall report his or her discovery to the Minister, giving particulars of the remains and of their location.
- (2) Where the Minister receives a report made under subsection (1) and he or she is satisfied that the report relates to Aboriginal remains, he or she shall take reasonable steps to consult with any Aboriginals that he or she considers may have an interest in the remains, with a view to determining the proper action to be taken in relation to the remains.

### 21 Disposal of Aboriginal remains

- (1) Where Aboriginal remains are delivered to the Minister, whether in pursuance of a declaration made under section 12 or otherwise, he or she shall:
  - (a) return the remains to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition;
  - (b) otherwise deal with the remains in accordance with any reasonable directions of an Aboriginal or Aboriginals referred to in paragraph (a); or

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<sup>37</sup> *Id.*

<sup>38</sup> *Indigenous Protected Areas*, DEPARTMENT OF THE ENVIRONMENT AND ENERGY, <http://www.environment.gov.au/land/indigenous-protected-areas> (last visited Feb. 20, 2019), archived at <https://perma.cc/592L-N2AA>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 3(1).

- (c) if there is or are no such Aboriginal or Aboriginals—transfer the remains to a prescribed authority for safekeeping.
- (2) Nothing in this section shall be taken to derogate from the right of any Aboriginal or Aboriginals accepting possession, custody or control of any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.<sup>42</sup>

### III. State and Territory Legislation

Each Australian jurisdiction has laws and processes in place to protect places and objects that are of significance to the cultural heritage of indigenous Australians. Only two jurisdictions, the Australian Capital Territory and New South Wales, do not have separate legislation related to Aboriginal heritage protection. The laws include offenses for interfering with protected places and objects, as well as processes for the issuing of permits to do work in such areas, subject to conditions. Each jurisdiction has established mechanisms for consulting with, or otherwise involving, indigenous people in relation to making decisions with respect to such places and objects.

The Department of Environment and Energy states that

[m]ost of Australia’s states and territories maintain registers of Indigenous heritage sites. Developers need to be aware that these registers may not be comprehensive records of all the Indigenous sites that are protected under state and territory laws. Where there is a risk that a planned activity could have adverse impacts on Indigenous heritage it is advisable to contact the state or territory government agency that is responsible for protecting Indigenous heritage and maintaining the register.<sup>43</sup>

Some state and territory legislation includes human remains within the overall system for protecting objects. In addition, the legislative framework applicable to the discovery of indigenous human remains may involve coronial and public health legislation. Guidance provided by government entities with respect to ancestral remains is included below.

#### A. Australian Capital Territory (ACT)

##### 1. *Protection of Indigenous Heritage Sites and Objects*

ACT Heritage states that, under the Heritage Act 2004 (ACT),<sup>44</sup>

[u]nlike natural and historic heritage places and objects which must be nominated, provisionally registered or registered for the Act to have effect, *all* Aboriginal places and

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<sup>42</sup> *Id.* ss 20 & 21.

<sup>43</sup> *Protection Under State and Territory Laws*, DEPARTMENT OF THE ENVIRONMENT AND ENERGY, <http://www.environment.gov.au/heritage/laws/indigenous/protection-under-state-and-territory-laws> (last visited Feb. 20, 2019), archived at <https://perma.cc/A7QA-G8ZB>.

<sup>44</sup> Heritage Act 2004 (ACT), <https://www.legislation.act.gov.au/View/a/2004-57/current/PDF/2004-57.PDF>, archived at <https://perma.cc/U4HY-C7BX>.

objects in the ACT are protected under the Act and are recorded in a centralised database maintained by ACT Heritage.

All Aboriginal places and objects have cultural value for Aboriginal people as part of their history and heritage. Some Aboriginal places and objects have cultural and/or scientific/archaeological value which is beyond the ordinary and may also meet one or more of the heritage significance criteria under the Act to warrant entry to the ACT Heritage Register.

There are specific provisions in the Act which require a person to report the discovery of an Aboriginal place or object to the Heritage Council within five working days. There are also provisions and penalties that apply if a person damages any Aboriginal place or object in the ACT.

*The Act also includes provisions for the declaration of Representative Aboriginal Organisations (RAOs). Under the Act, the Council is responsible for consulting with RAOs on a range of matters relating to Aboriginal places and objects in the ACT.<sup>45</sup>*

The Heritage Act 2004 (ACT) defines “Aboriginal object” as “an object associated with Aboriginal people because of Aboriginal tradition.”<sup>46</sup> As indicated above, it requires that any discovery of an Aboriginal object be reported to the ACT Heritage Council.<sup>47</sup> The Council must then consult with the relevant RAOs and decide whether the object should be registered.<sup>48</sup>

Each Aboriginal object owned in the territory must be kept in a place that has been declared as a repository for such objects.<sup>49</sup> If the object is located on territory land and no other person holds a legal interest in the object, and the relevant Minister has not surrendered the territory’s legal interest, the Aboriginal object is deemed to be owned by the territory government.<sup>50</sup>

## 2. Procedures on Discovery of Human Remains

No dedicated governmental guidance was located regarding procedures upon the discovery of Aboriginal remains in the ACT. However, some documents related to development activities contain information on the processes that should be followed to ensure compliance with the relevant provisions. For example, a 2014 Aboriginal cultural heritage assessment produced with respect to the ACT government’s construction of an access road included protocols to be followed in the event of unanticipated discoveries of Aboriginal archeological material, including human

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<sup>45</sup> *Heritage in the ACT*, ACT ENVIRONMENT, PLANNING AND SUSTAINABLE DEVELOPMENT DIRECTORATE - ENVIRONMENT (emphasis in original), <https://www.environment.act.gov.au/heritage/heritage-in-the-act> (last updated Nov. 20, 2018), archived at <https://perma.cc/M7T8-RLCZ>.

<sup>46</sup> Heritage Act 2004 (ACT) s 9(1).

<sup>47</sup> *Id.* s 51.

<sup>48</sup> *Id.* s 53.

<sup>49</sup> *Id.* ss 53A & 53B.

<sup>50</sup> *Id.* s 53C.

remains.<sup>51</sup> It states that, in the event suspected human remains are encountered, all ground surface work in the relevant area should cease immediately, expert opinion should be sought, and the following entities should be notified immediately: the local police; ACT Heritage; representatives from the RAOs; and the project archeologist. If the remains are determined to be of an Aboriginal person who died more than one hundred years ago, the following steps are to be followed:

- i. Ascertain the requirements of the local RAOs, the ACT Heritage Council, the development proponent, and the project archeologist;
- ii. Based on the above, determine and conduct an appropriate course of action. Possible strategies could include one or more of the following:
  1. Avoiding further disturbance to the find and conserving the remains *in situ*, (this option may require relocating the development and this may not be possible in some contexts);
  2. Conducting (or continuing) archaeological salvage of the finds following receipt of any required statutory approvals;
  3. Scientific description (including excavation where necessary), and possibly also analysis of the remains prior to reburial;
  4. Recovering samples for dating and other analyses; and/or
  5. Subsequent reburial at another place and in an appropriate manner determined by the RAOs and the Heritage Council.<sup>52</sup>

## B. New South Wales (NSW)

### 1. *Protection of Indigenous Heritage Sites and Objects*

The National Parks and Wildlife Act 1974 (NSW) (NPW Act),<sup>53</sup> which is administered by the Office of Environment and Heritage (OEH), “is the primary legislation for the protection of *some* aspects of Aboriginal cultural heritage in New South Wales.”<sup>54</sup> It provides “specific protection for Aboriginal objects and declared Aboriginal places by establishing offences of harm.”<sup>55</sup> The Act

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<sup>51</sup> NAVIN OFFICER, CANBERRA BRICKWORKS, YARRAMULA, ACT, STAGE 1, ABORIGINAL CULTURAL HERITAGE ASSESSMENT 21 (Aug. 2014), [https://suburbanland.act.gov.au/uploads/ckfinder/files/pdf/3\\_Commercial/Canberra\\_Brickworks/Site\\_Report2016/Attachment\\_M\\_Aboriginal\\_Cultural\\_Heritage\\_Assessment\\_\(Navin\\_Officer\).pdf](https://suburbanland.act.gov.au/uploads/ckfinder/files/pdf/3_Commercial/Canberra_Brickworks/Site_Report2016/Attachment_M_Aboriginal_Cultural_Heritage_Assessment_(Navin_Officer).pdf), archived at <https://perma.cc/7MZH-3BYY>.

<sup>52</sup> *Id.* at 22.

<sup>53</sup> National Parks and Wildlife Act 1974 (NSW), <https://www.legislation.nsw.gov.au/#/view/act/1974/80/whole>, archived at <https://perma.cc/PU2Y-69BP>.

<sup>54</sup> *Protection and Regulation of Aboriginal Cultural Heritage*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/licences/achregulation.htm> (last updated Jan. 12, 2018), archived at <https://perma.cc/MEX3-5CPY>.

<sup>55</sup> *Id.*; National Parks and Wildlife Act 1974 (NSW) pt 6.

includes defenses and exemptions to such offenses, including a defense that the harm was carried out under an Aboriginal Heritage Impact Permit (AHIP).<sup>56</sup>

Under the Act, “[t]he Minister for the Environment can declare an area to be an ‘Aboriginal place’ if the Minister believes that the place is or was of special significance to Aboriginal culture. An area can have spiritual, natural resource usage, historical, social, educational or other type of significance.”<sup>57</sup>

The OEH maintains the Aboriginal Heritage Information System, which lists notified Aboriginal objects and declared Aboriginal places in NSW.<sup>58</sup> The NPW Act also establishes the Aboriginal Cultural Heritage Advisory Committee, which is to “advise the Minister and the Chief Executive on any matter relating to the identification, assessment and management of Aboriginal cultural heritage, including providing strategic advice on the plan of management and the heritage impact permit process, whether or not the matter has been referred to the Committee by the Minister or the Chief Executive.”<sup>59</sup>

The NPW Act provides for the issuance of “stop work” orders in relation to an action that is likely to significantly affect an Aboriginal object or place as well as interim protection orders to be made in relation to an area of land with cultural significance.<sup>60</sup>

Internal guidance produced by the OEH in 2011 states that it recognizes and will act on the principles that Aboriginal people

- are the primary source of information about the value of their heritage and how this is best protected and conserved
- must have an active role in any Aboriginal cultural heritage planning process
- must have early input into the assessment of the cultural significance of their heritage and its management so they can continue to fulfill their obligations towards their heritage
- must control the way in which cultural knowledge and other information relating specifically to their heritage is used, as this may be an integral aspect of its heritage value.<sup>61</sup>

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<sup>56</sup> *Protection and Regulation of Aboriginal Cultural Heritage*, supra note 54; National Parks and Wildlife Act 1974 (NSW) s 87. Permits are governed by sections 90–90R of the Act. For detailed information on the permit process see NSW OFFICE OF ENVIRONMENT AND HERITAGE, GUIDE TO ABORIGINAL HERITAGE IMPACT PERMIT PROCESSES AND DECISION-MAKING (version 2, Aug. 2011), <https://www.environment.nsw.gov.au/resources/cultureheritage/110397guideahipprocess.pdf>, archived at <https://perma.cc/YBE3-CPF7>.

<sup>57</sup> *Protection and Regulation of Aboriginal Cultural Heritage*, supra note 54.

<sup>58</sup> National Parks and Wildlife Act 1974 (NSW) s 90Q.

<sup>59</sup> *Id.* ss 27 & 28.

<sup>60</sup> NSW OFFICE OF ENVIRONMENT AND HERITAGE, OPERATIONAL POLICY: PROTECTING ABORIGINAL CULTURAL HERITAGE 22 (version 2, July 2011), <https://www.environment.nsw.gov.au/resources/cultureheritage/110396oppolach.pdf>, archived at <https://perma.cc/X5TW-RFRK>.

<sup>61</sup> *Id.* at 5.

The guidance also includes encouraging “early and ongoing engagement” between clients and Aboriginal people and ensuring consultation has been appropriate.<sup>62</sup> Additional guidance has been produced in relation to requirements for consulting Aboriginal people about cultural heritage in the context of applications for AHIPs.<sup>63</sup> Another guide relates to the process for investigating and assessing Aboriginal cultural heritage and producing a report in connection with such applications.<sup>64</sup>

The NPW Act provisions related to Aboriginal objects include an offense of harming or desecrating an Aboriginal object or moving the object “from the land on which it has been situated.”<sup>65</sup> People who find an Aboriginal artifact are advised to leave it where it is and immediately report it to the OEH.<sup>66</sup>

Certain Aboriginal objects are deemed to be government property,<sup>67</sup> and the government is responsible for the proper care, preservation, and protection of Aboriginal objects.<sup>68</sup> Objects may be transferred to an Aboriginal owner.<sup>69</sup> With regard to such transfer, the Office of Environment and Heritage states as follows:

Many Aboriginal communities wish to have care of Aboriginal objects which have been excavated, disturbed or moved by development activities, erosion or other processes.

The NPW Act allows the transfer of Aboriginal objects to an Aboriginal person or Aboriginal organisation for safekeeping. The person or organisation must enter into a care agreement with OEH.

A care agreement is a document that sets out the obligations of OEH and the Aboriginal person or Aboriginal organisation for the safekeeping of the transferred Aboriginal object(s). The Aboriginal person or organisation does not become the owner of the Aboriginal objects.<sup>70</sup>

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<sup>62</sup> *Id.* at 10-11.

<sup>63</sup> See *Consultation Requirements*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/licences/consultation.htm> (last updated Oct. 30, 2015), archived at <https://perma.cc/K4Q7-RTYZ>.

<sup>64</sup> See *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/licences/investassessreport.htm> (last updated May 30, 2011), archived at <https://perma.cc/P832-XDYY>.

<sup>65</sup> *Aboriginal Objects*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/nswcultureheritage/objects.htm> (last updated Sept. 24, 2012), archived at <https://perma.cc/J8G8-42LX>. See also National Parks and Wildlife Act 1974 (NSW) ss 5 & 86.

<sup>66</sup> *Aboriginal Objects*, *supra* note 65.

<sup>67</sup> National Parks and Wildlife Act 1974 (NSW) s 83.

<sup>68</sup> *Id.* s 85.

<sup>69</sup> *Id.* s 85A.

<sup>70</sup> *Protection and Regulation of Aboriginal Cultural Heritage*, *supra* note 54.

## 2. *Procedures on Discovery of Human Remains*

The ancestral remains of Aboriginal people are included in the definition of “Aboriginal objects” in the NPW Act.<sup>71</sup> The OEH guidance with respect to such objects therefore also covers Aboriginal remains. Other agencies have provided specific guidance related to the discovery of skeletal remains in the context of government development work. For example, the procedures of NSW Roads and Maritime Services (RMS) regarding unexpected heritage items includes guidance on the different steps to be taken upon the discovery of such remains, depending on whether they are Aboriginal or non-Aboriginal, and less or more than one hundred years old. This includes stopping work in the vicinity of the find; consulting with a qualified forensic or physical anthropologist to determine the nature of the remains; contacting the police; and, if the human bones are archeological in nature (more than one hundred years old) and are likely to be Aboriginal remains, immediately notifying the OEH and the RMS Aboriginal Cultural Heritage Advisor, who must then contact the relevant Aboriginal community stakeholders.<sup>72</sup>

## 3. *Draft Aboriginal Cultural Heritage Bill 2018*

In February 2018, the NSW government released a draft bill that proposes “a new system for managing and conserving Aboriginal cultural heritage in New South Wales.”<sup>73</sup> The Office of Environment and Heritage states that

[t]he proposed new system offers a transformative, contemporary and respectful vision for the management of Aboriginal cultural heritage in New South Wales. The aims of the proposed new system are:

- a. broader recognition of Aboriginal cultural heritage values – by recognising in law a more respectful and contemporary understanding of Aboriginal cultural heritage
- b. decision making by Aboriginal people – by creating a new governance structures that gives Aboriginal people legal responsibility for and authority over Aboriginal cultural heritage
- c. better information management – improving outcomes for Aboriginal cultural heritage through new information management systems and processes that are overseen by Aboriginal people
- d. improved protection, management and conservation of Aboriginal cultural heritage – by providing broader protection and more strategic conservation of Aboriginal cultural heritage values

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<sup>71</sup> National Parks and Wildlife Act 1974 (NSW) s 5(1).

<sup>72</sup> NSW TRANSPORT, ROADS AND MARITIME SERVICES, STANDARD MANAGEMENT PROCEDURES: UNEXPECTED HERITAGE ITEMS 33–34 (Mar. 2015), <https://www.rms.nsw.gov.au/documents/about/environment/protecting-heritage/managing-development/unexpected-heritage-items-procedure.pdf>, archived at <https://perma.cc/R7V8-MGLM>.

<sup>73</sup> *Aboriginal Cultural Heritage Reforms*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/achreform/index.htm> (last updated Dec. 12, 2018), archived at <https://perma.cc/QJH9-L94F>.

- e. greater confidence in the regulatory system – by providing better upfront information to support assessments, clearer consultation processes and timeframes, and regulatory tools that can adapt to different types of projects.<sup>74</sup>

Further consultation is currently being carried out on the proposed reforms.<sup>75</sup>

## C. Northern Territory

### 1. Protection of Indigenous Heritage Sites and Objects

#### a. Northern Territory Aboriginal Sacred Sites Act 1989 (NT)

The Northern Territory Aboriginal Sacred Sites Act 1989 (NT)<sup>76</sup> establishes the Aboriginal Areas Protection Authority (AAPA).<sup>77</sup> The AAPA's functions include "[r]esponding to requests for sacred site protection from Aboriginal custodians, including the recording and documenting of sacred site information, registration of sacred sites, the provision of related protection measures and the keeping of confidential sacred site records."<sup>78</sup> It maintains the Register of Sacred Sites and responds to applications for Authority Certificates, which set out the conditions for using or carrying out works in areas that contain, or are in the vicinity of, sacred sites.<sup>79</sup>

All sacred sites are protected by the Act, regardless of whether or not they have been recorded or registered.<sup>80</sup> The Act contains offenses related to entry onto, work on, and the desecration of sacred sites.<sup>81</sup>

A "sacred site" is defined in the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) as a "site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to

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<sup>74</sup> *Id.* See also *Heritage Reforms*, NSW ABORIGINAL AFFAIRS, <https://www.aboriginalaffairs.nsw.gov.au/policy-reform/planning-and-heritage/heritage-reforms> (last visited Feb. 20, 2019), archived at <https://perma.cc/25ZR-NH8Q>.

<sup>75</sup> *The Reform Process*, NSW OFFICE OF ENVIRONMENT AND HERITAGE, <https://www.environment.nsw.gov.au/achreform/ACHreformprocess.htm> (last updated Dec. 12, 2018), archived at <https://perma.cc/RA42-A42B>.

<sup>76</sup> Northern Territory Aboriginal Sacred Sites Act 1989 (NT), <https://legislation.nt.gov.au/Legislation/NORTHERN-TERRITORY-ABORIGINAL-SACRED-SITES-ACT-1989>, archived at <https://perma.cc/UFH6-T72V>.

<sup>77</sup> *Id.* s 5.

<sup>78</sup> *Northern Territory Aboriginal Sacred Sites Legislation*, ABORIGINAL AREAS PROTECTION AUTHORITY, <https://www.aapant.org.au/about-us/northern-territory-aboriginal-sacred-sites-act> (last visited Feb. 20, 2019), archived at <https://perma.cc/3LEA-H3X4>.

<sup>79</sup> *Authority Certificates*, ABORIGINAL AREAS PROTECTION AUTHORITY, <https://www.aapant.org.au/our-services/authority-certificates> (last visited Feb. 20, 2019), archived at <https://perma.cc/IUZ4-WZKW>.

<sup>80</sup> *How Are Sacred Sites Protected?*, ABORIGINAL AREAS PROTECTION AUTHORITY, <https://www.aapant.org.au/sacred-sites/how-are-sacred-sites-protected> (last visited Feb. 20, 2019), archived at <https://perma.cc/2HBW-46FS>.

<sup>81</sup> Northern Territory Aboriginal Sacred Sites Act 1989 (NT) ss 33–35.

Aboriginals or of significance according to Aboriginal tradition.”<sup>82</sup> This Act gives the Northern Territory Legislative Assembly the power to make laws

providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but so that any such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.<sup>83</sup>

b. Heritage Act 2011 (NT)

The Heritage Act 2011 (NT) provides automatic protection for Aboriginal and Macassan (fishermen from the Sulawesi region of Indonesia who visited parts of northern Australia) archeological places and objects, which are declared by the Act to be heritage places and objects.<sup>84</sup> The AAPA explains that

[a]rcheological places may include artefact scatters, shell middens, earth mounds, quarries, stone arrangements, petroglyphs, rock shelters and rock art. When these sites have an Aboriginal tradition associated with them as defined under the Aboriginal Land Rights Act (1979) [sic], they are considered sacred sites for the purposes of the Sacred Sites Act.<sup>85</sup>

The Heritage Act requires approval for carrying out work on archeological places or objects, with the decision maker to obtain advice from the AAPA if the place or object is, or is in, a sacred site under the Northern Territory Aboriginal Sacred Sites Act 1989 (NT).<sup>86</sup> The Act also includes powers to issue stop work orders and repair orders.<sup>87</sup>

The Heritage Act defines Aboriginal or Macassan archeological objects as relics that relate to past human occupation by Aboriginal or Macassan people and that are either in an archeological place or stored in accordance with Aboriginal tradition.<sup>88</sup> A “relic” includes both artifacts and human

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<sup>82</sup> Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3, <https://www.legislation.gov.au/Details/C2016C00111>, archived at <https://perma.cc/C6DT-QEGN>.

<sup>83</sup> *Id.* s 73(1).

<sup>84</sup> Heritage Act 2011 (NT) pt 2.1, <https://legislation.nt.gov.au/Legislation/HERITAGE-ACT-2011>, archived at <https://perma.cc/G222-YUEA>.

<sup>85</sup> *Sacred Sites, Heritage and Burials*, ABORIGINAL AREAS PROTECTION AUTHORITY, <https://www.aapant.org.au/sacred-sites/sacred-sites-heritage-and-burials> (last visited Feb. 20, 2019), archived at <https://perma.cc/5B2Q-KFBF>.

<sup>86</sup> Heritage Act 2011 (NT) s 75(1)(d).

<sup>87</sup> *Id.* pts 3.4 & 3.5.

<sup>88</sup> *Id.* s 8(2).

remains.<sup>89</sup> It is an offense to cause damage to such an object.<sup>90</sup> It is also an offense to fail to report the discovery of an object to the relevant government agency.<sup>91</sup>

The Northern Territory government states that “[t]he Heritage Branch has the final decision about what happens to artefacts [sic]. There is a preference for them to be handed over to traditional owners.”<sup>92</sup> Under the Act, Aboriginal or Macassan archeological objects can only be removed from the territory with the consent of the person or group who, according to Aboriginal tradition, have a right to possess it.<sup>93</sup>

## 2. Procedures on Discovery of Human Remains

The AAPA states that

Aboriginal skeletal remains are considered Aboriginal archaeological places and objects under the Heritage Act. When skeletal remains are found in the Northern Territory, it is the police who should be contacted in the first instance. If they determine that the remains are not of a suspicious nature and may be of traditional Aboriginal origin, they will contact the Heritage Branch responsible for administering the Heritage Act. The Heritage Branch routinely works with the Authority in order to consult the relevant custodians, and be advised of the location of sacred sites in the vicinity of the burial area.

Under the Heritage Act it is an offence to interfere with archaeological places and objects without authorization under that Act.

If you do encounter skeletal remains, it is your responsibility by law to stop any work that is occurring and report such disturbance to the police immediately. If you have reason to believe the remains are those of an Aboriginal burial, this should be reported to the Heritage Branch.<sup>94</sup>

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<sup>89</sup> *Id.* s 9.

<sup>90</sup> *Id.* s 111.

<sup>91</sup> *Id.* s 114.

<sup>92</sup> *Indigenous Heritage Information*, NORTHERN TERRITORY GOVERNMENT, <https://nt.gov.au/leisure/arts-culture-heritage/indigenous-heritage-information> (last updated July 5, 2018), archived at <https://perma.cc/CNX2-HLTY>.

<sup>93</sup> Heritage Act 2011 (NT) s 89(3).

<sup>94</sup> *Sacred Sites, Heritage and Burials*, *supra* note 85.

## D. Queensland

### 1. Protection of Indigenous Heritage Sites and Objects

The Aboriginal Cultural Heritage Act 2003 (Qld)<sup>95</sup> and Torres Strait Islander Cultural Heritage Act 2003 (Qld)<sup>96</sup> are nearly identical laws that are administered by the Cultural Heritage Unit of the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP).<sup>97</sup> DATSIP states that the Acts

- provide blanket protection of areas and objects of traditional, customary, and archaeological significance[.]
- recognise the key role of Traditional Owners in cultural heritage matters[, and]
- establish practical and flexible processes for dealing with cultural heritage in a timely manner.<sup>98</sup>

Under the Acts, Aboriginal and Torres Strait Islander cultural heritage includes significant areas, significant objects, and evidence of occupation in an area.<sup>99</sup> The Acts require that “[a] person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm” Aboriginal or Torres Strait Islander cultural heritage.<sup>100</sup> It is an offense to harm any aspect of Aboriginal or Torres Strait Islander cultural heritage or to excavate, relocate, take away, or possess such heritage, other than in accordance with the Acts.<sup>101</sup> Protection measures available under the Acts include the ability to issue stop work orders to require a person to cease, or not start, any activity that will harm cultural heritage or have a significant impact on the cultural heritage value of such heritage.<sup>102</sup>

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<sup>95</sup> Aboriginal Cultural Heritage Act 2003 (Qld), <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2003-079>, archived at <https://perma.cc/E2SM-GM77>.

<sup>96</sup> Torres Strait Islander Cultural Heritage Act (Qld), <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2003-080>, archived at <https://perma.cc/FG7B-BSK2>.

<sup>97</sup> See generally *Aboriginal and Torres Strait Islander Cultural Heritage*, DEPARTMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS (DATSIP), <https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage> (last updated Feb. 19, 2019), archived at <https://perma.cc/9YMW-532K>.

<sup>98</sup> *What Is Cultural Heritage*, DATSIP, <https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage/what-cultural-heritage> (last updated July 26, 2018), archived at <https://perma.cc/P7TF-M56G>. See also Aboriginal Cultural Heritage Act 2003 (Qld) ss 5 & 6; Torres Strait Islander Cultural Heritage Act (Qld) ss 5 & 6.

<sup>99</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 8; Torres Strait Islander Cultural Heritage Act (Qld) s 8.

<sup>100</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 23(1); Torres Strait Islander Cultural Heritage Act (Qld) s 23(1).

<sup>101</sup> Aboriginal Cultural Heritage Act 2003 (Qld) ss 24–26; Torres Strait Islander Cultural Heritage Act (Qld) ss 24–26.

<sup>102</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 32; Torres Strait Islander Cultural Heritage Act (Qld) s 32.

The Acts provide for the registration of indigenous cultural heritage bodies<sup>103</sup> and the establishment of cultural heritage databases and registers,<sup>104</sup> and contain requirements related to carrying out cultural heritage studies, with the findings of such studies included in the registers based on a decision by the relevant agency.<sup>105</sup> Cultural heritage plans may be required to be developed and approved for a project.<sup>106</sup>

The Acts also contain provisions regarding ownership of significant objects.<sup>107</sup> A “significant Aboriginal object”<sup>108</sup> is “an object of particular significance to Aboriginal people because of either or both of the following—(a) Aboriginal tradition; (b) the history, including contemporary history, of an Aboriginal party for an area.”<sup>109</sup> Similar provisions are contained in the Torres Strait Islander heritage legislation.<sup>110</sup> There is an intent that,

as far as practicable, Aboriginal cultural heritage should be owned and protected by Aboriginal people with traditional or familial links to the cultural heritage if it is comprised of any of the following—  
(a) Aboriginal human remains;  
(b) secret or sacred objects;  
(c) Aboriginal cultural heritage lawfully taken away from an area.<sup>111</sup>

## 2. *Procedures on Discovery of Human Remains*

The two Acts contain specific provisions regarding the ownership, custody, and possession of Aboriginal and Torres Strait Islander human remains.<sup>112</sup> A person who has knowledge of such remains must report their existence and location to DATSIP.<sup>113</sup> DATSIP has published a guidance document on the discovery, handling, and management of human remains.<sup>114</sup> It explains the legislative framework, which includes the following:

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<sup>103</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 36; Torres Strait Islander Cultural Heritage Act (Qld) s 36.

<sup>104</sup> Aboriginal Cultural Heritage Act 2003 (Qld) pt 5; Torres Strait Islander Cultural Heritage Act (Qld) pt 5.

<sup>105</sup> Aboriginal Cultural Heritage Act 2003 (Qld) pt 6; Torres Strait Islander Cultural Heritage Act (Qld) pt 6.

<sup>106</sup> Aboriginal Cultural Heritage Act 2003 (Qld) pt 7; Torres Strait Islander Cultural Heritage Act (Qld) pt 7.

<sup>107</sup> Aboriginal Cultural Heritage Act 2003 (Qld) pt 2; Torres Strait Islander Cultural Heritage Act (Qld) pt 2.

<sup>108</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 8; Torres Strait Islander Cultural Heritage Act (Qld) s 8.

<sup>109</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 10.

<sup>110</sup> Torres Strait Islander Cultural Heritage Act (Qld) s 10.

<sup>111</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 14(3). *See also* Torres Strait Islander Cultural Heritage Act (Qld) s 14(3).

<sup>112</sup> Aboriginal Cultural Heritage Act 2003 (Qld) ss 15–18; Torres Strait Islander Cultural Heritage Act 2003 (Qld) ss 15–18.

<sup>113</sup> Aboriginal Cultural Heritage Act 2003 (Qld) s 18; Torres Strait Islander Cultural Heritage Act 2003 (Qld) s 18.

<sup>114</sup> DATSIP, Guidelines for the Discovery, Handling and Management of Human Remains, <https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/guidelines-human-remains.pdf> (last visited Feb. 20, 2019), archived at <https://perma.cc/NC2A-385F>.

- Criminal Code Act 1899 (Qld): Provides that it is an offense to improperly or indecently interfere with a human body or human remains.
- Coroners Act 2003 (Qld): Provides that, when human remains are located, the person finding the remains must report them to a police officer or the Coroner. If the Coroner's investigation shows that the body is Aboriginal or Torres Strait Islander traditional burial remains, the investigation must stop and, if the remains were removed from the area where they were found, the Coroner must release the remains to the Minister responsible for administering the two indigenous heritage statutes.
- Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld): Under these laws, "Aboriginal or Torres Strait Islander people who have a traditional or familial link with Aboriginal or Torres Strait Islander human remains are the owners of those remains, regardless of who may have owned them before commencement of the Acts."<sup>115</sup>

In terms of procedures on discovery of human remains, the guidance document states that,

[i]n all cases when human remains are located it is important to remember:

- The discovery of any human remains must as soon as possible be reported to the police.
- It is an offence to interfere with human remains, whether buried or not.

The Police or Coroner must be advised of the presence of any human remains. An appropriate officer will then establish the area as a potential crime scene.

Police will undertake appropriate scientific or other procedures to assist the Coroner in making an appropriate determination about the remains.

If the remains are thought to be neither Aboriginal nor Torres Strait Islander, related to criminal activity or are of doubtful determination, the Police may remove the remains for further analysis.

If however the remains are determined to be ancestral remains without the need for removal, the relevant Traditional Owners of the remains will be responsible for their management.

In cases where remains are removed by Police and subsequently determined by the Coroner to be of Aboriginal or Torres Strait Islander origin, the remains will be released to the Minister responsible for administering the Acts.

The Department of Aboriginal and Torres Strait Islander Partnerships is then responsible for coordinating the return of the remains to the relevant Traditional Owners.<sup>116</sup>

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<sup>115</sup> *Id.* at 1-2.

<sup>116</sup> *Id.* at 2. See also *Human Remains*, DATSIP, <https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage/human-remains> (last updated July 26, 2018), archived at <https://perma.cc/WS5L-JKDA>.

## E. South Australia

### 1. Protection of Indigenous Heritage Sites and Objects

The Aboriginal Heritage Act 1988 (SA)<sup>117</sup> protects “[s]ites of significance according to Aboriginal tradition and sites significant to Aboriginal archaeology, anthropology and history.”<sup>118</sup> It establishes the State Aboriginal Heritage Committee, which provides advice to the state premier on a range of matters, including “measures that should be taken for the protection or preservation of Aboriginal sites, objects or remains” and Aboriginal heritage agreements.<sup>119</sup> The Act also requires the maintenance of three registers: the Register of Recognised Aboriginal Representative Bodies (RARBs), the Register of Aboriginal Sites and Objects, and the Register of Agreements.<sup>120</sup>

Under the Act, it is “an offence to damage, disturb or interfere with an Aboriginal site, object or remains without an authorisation from the Premier, as the Minister responsible for Aboriginal Affairs and Reconciliation.”<sup>121</sup> The Act provides for “local heritage agreements” to be made between a land use proponent and an RARB and then approved by the Premier. These agreements deal “with the impact of the proponent’s activities on any Aboriginal heritage in the area covered by the agreement.”<sup>122</sup> Once an agreement is approved, the Premier “must grant an authorisation to the proponent to excavate the land or to damage, disturb or interfere with any sites, objects or the remains on the condition that the proponent complies with the agreement.”<sup>123</sup> In addition, “[a] proponent may request an authorisation to impact heritage without a local heritage agreement, in which case the request will be processed in accordance with the consultation provisions in the Act and the Premier will decide whether to grant the authorisation.”<sup>124</sup>

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<sup>117</sup> Aboriginal Heritage Act 1988 (SA), [https://www.legislation.sa.gov.au/LZ/C/A/ABORIGINAL HERITAGE ACT 1988/CURRENT/1988.12.AUTH.PDF](https://www.legislation.sa.gov.au/LZ/C/A/ABORIGINAL%20HERITAGE%20ACT%201988/CURRENT/1988.12.AUTH.PDF), archived at <https://perma.cc/9442-LPFK>.

<sup>118</sup> *Aboriginal Heritage*, SA DEPARTMENT OF THE PREMIER AND CABINET, <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/aboriginal-heritage> (last visited Feb. 20, 2019), archived at <https://perma.cc/FPP5-A5ZE>.

<sup>119</sup> *State Aboriginal Heritage Committee*, DEPARTMENT OF THE PREMIER AND CABINET, <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/aboriginal-heritage/state-aboriginal-heritage-committee> (last visited Feb. 20, 2019), archived at <https://perma.cc/3AP7-YJTH>.

<sup>120</sup> *Aboriginal Heritage Registers*, DEPARTMENT OF THE PREMIER AND CABINET, <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/aboriginal-heritage/aboriginal-heritage-registers> (last visited Feb. 20, 2019), archived at <https://perma.cc/4PYK-BF5M>.

<sup>121</sup> *Guidance*, DEPARTMENT OF THE PREMIER AND CABINET, <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/aboriginal-heritage/guidance> (last visited Feb. 20, 2019), archived at <https://perma.cc/CRJ5-TS25>.

<sup>122</sup> Department of the Premier and Cabinet, *Aboriginal Heritage Fact Sheet: Project Planning and Aboriginal Heritage*, [https://www.dpc.sa.gov.au/\\_data/assets/pdf\\_file/0015/34602/FactSheet\\_ProjectPlanning.pdf](https://www.dpc.sa.gov.au/_data/assets/pdf_file/0015/34602/FactSheet_ProjectPlanning.pdf) (last visited Feb. 20, 2019), archived at <https://perma.cc/E8M4-D955>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

The Act requires that where the owner or occupier of private land discovers an Aboriginal object on that land, he/she must report the discovery to the relevant Minister.<sup>125</sup> The Minister may direct the person to “take such immediate action for the protection or preservation of the remains as the Minister considers appropriate.”<sup>126</sup> As noted above, it is an offense to damage, interfere with, or remove any Aboriginal object.<sup>127</sup>

## 2. *Procedures on Discovery of Human Remains*

Guidance produced by the South Australia government states that persons who find skeletal remains must stop any work that may impact them, not disturb them further, and call the police. The police will determine whether the remains are Aboriginal ancestral remains. If so, Aboriginal Affairs and Reconciliation (part of the Department of the Premier and Cabinet) must be contacted.<sup>128</sup> Additional guidance information states as follows:

The *Discovery Protocol for Ancestral Remains* has been developed in consultation with the State Aboriginal Heritage Committee and should be implemented immediately whenever skeletal remains are discovered. The Protocol is based on proponents’ responsibilities under the Coroner’s Act 2003 and Aboriginal peoples’ rights under the Aboriginal Heritage Act 1988.

In summary, in the event of discovery of bones which may be human, all works in the discovery area should immediately stop and the discovery must be reported to the South Australian Police (SAPOL). If SAPOL confirms the discovery as Aboriginal ancestral remains, the proponent and RARB, or where there is no appointed RARB the relevant local Aboriginal parties, may reach agreement to manage the discovery; including recovery, reburial and any associated cultural ceremony.<sup>129</sup>

## F. Tasmania

### 1. *Protection of Indigenous Heritage Sites and Objects*

The Aboriginal Heritage Act 1975 (Tas)<sup>130</sup> enables the relevant government minister to declare an area of land to be a protected site if he or she is satisfied that there is a “relic” on that site.<sup>131</sup> It

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<sup>125</sup> Aboriginal Heritage Act 1988 (SA) s 20(1).

<sup>126</sup> *Id.* s 20(3).

<sup>127</sup> *Id.* s 23.

<sup>128</sup> *Guidance, supra* note 121; Department of the Premier and Cabinet, Aboriginal Heritage Fact Sheet: Discovery of Aboriginal Sites and Objects, [https://www.dpc.sa.gov.au/\\_data/assets/pdf\\_file/0014/34601/Discovery\\_SitesandObjects.pdf](https://www.dpc.sa.gov.au/_data/assets/pdf_file/0014/34601/Discovery_SitesandObjects.pdf) (last visited Feb. 20, 2019), archived at <https://perma.cc/5VEA-Y5H7>.

<sup>129</sup> Aboriginal Heritage Fact Sheet: Project Planning and Aboriginal Heritage, *supra* note 122.

<sup>130</sup> Aboriginal Heritage Act 1975 (Tas), <https://www.legislation.tas.gov.au/view/whole/html/inforce/current/act-1975-081>, archived at <https://perma.cc/U2PT-RZZY>.

<sup>131</sup> *Id.* s 7.

establishes statutory guidelines “which specify the actions required by a person to establish a defence” to offenses under the Act.<sup>132</sup>

Aboriginal Heritage Tasmania, which administers the Act, states that the Act

applies to ‘relics’ created by Aboriginal people that are of significance to the Aboriginal people of Tasmania. This includes Aboriginal traditions, knowledge, observance, custom or beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people. Significance may relate to the Aboriginal tradition, contemporary history of Aboriginal people or the anthropological, archaeological or scientific history of Aboriginal people. The Act states that ‘no person shall destroy, damage, deface, conceal, or otherwise interfere with a relic.’

Two areas of land in Tasmania are declared ‘Protected Archaeological Sites’ under the Act.<sup>133</sup>

Amendments to the Act that commenced in 2017 established a new Aboriginal Heritage Council and introduced “new penalties for unlawful interference or damage to an Aboriginal relic.”<sup>134</sup> The new Council “provides advice and recommendations to the Director of National Parks and Wildlife, the Minister for Aboriginal Affairs and stakeholders on the protection and management of Aboriginal heritage in Tasmania.”<sup>135</sup>

The Aboriginal Heritage Act requires anyone who finds a “relic” to inform an authorized officer of the find.<sup>136</sup> As indicated above, it is an offense to “destroy, damage, deface, conceal, or otherwise interfere with a relic” or to “remove a relic from the place where it is found or abandoned,” among others, other than in accordance with the Act.<sup>137</sup> The relevant Minister can make orders with respect to the land on which a relic is situated and any relic specified in such an order is considered a protected object, with various provisions in the Act then being applicable to such objects.<sup>138</sup>

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<sup>132</sup> *Legislation*, ABORIGINAL HERITAGE TASMANIA, <https://www.aboriginalheritage.tas.gov.au/legislation> (last updated Nov. 14, 2018), archived at <https://perma.cc/KX32-K84C>.

<sup>133</sup> *Aboriginal Historical Places Introduction*, ABORIGINAL HERITAGE TASMANIA, <https://www.aboriginalheritage.tas.gov.au/cultural-heritage/aboriginal-historical-places-introduction> (last updated Aug. 7, 2018), archived at <https://perma.cc/GJQ9-7NW8>.

<sup>134</sup> *Aboriginal Heritage Act 1975*, ABORIGINAL HERITAGE TASMANIA, <https://www.aboriginalheritage.tas.gov.au/items-of-interest/aboriginal-heritage-act-1975> (last updated Aug. 31, 2018), archived at <https://perma.cc/GHW6-2GSK>.

<sup>135</sup> *Aboriginal Heritage Council*, ABORIGINAL HERITAGE TASMANIA, <https://www.aboriginalheritage.tas.gov.au/aboriginal-heritage-council> (last updated Feb. 7, 2019), archived at <https://perma.cc/3QF9-7X7D>.

<sup>136</sup> Aboriginal Heritage Act 1975 (Tas) s 10(3).

<sup>137</sup> *Id.* s 14.

<sup>138</sup> *Id.* s 7.

Ownership of relics found on government land is vested in the government, and the government can also take ownership of other objects.<sup>139</sup>

## 2. Procedures on Discovery of Human Remains

Aboriginal Heritage Tasmania sets out procedures upon the discovery of skeletal material in its “Unexpected Discovery Plan,” as follows:

### Step 1:

Call the Police immediately. Under no circumstances should the suspected skeletal material be touched or disturbed. The area should be managed as a crime scene. It is a criminal offence to interfere with a crime scene.

### Step 2:

Any person who believes they have uncovered skeletal material should notify all employees or contractors working in the immediate area that all earth disturbance works cease immediately.

### Step 3:

A temporary ‘no-go’ or buffer zone of at least 50m x 50m should be implemented to protect the suspected skeletal material, where practicable. No unauthorised entry or works will be allowed within this ‘no-go’ zone until the suspected skeletal remains have been assessed by the Police and/or Coroner.

### Step 4:

If it is suspected that the skeletal material is Aboriginal, Aboriginal Heritage Tasmania should be notified.

### Step 5:

Should the skeletal material be determined to be Aboriginal, the Coroner will contact the Aboriginal organisation approved by the Attorney-General, as per the Coroners Act 1995.<sup>140</sup>

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<sup>139</sup> *Id.* ss 11 & 12.

<sup>140</sup> Aboriginal Heritage Tasmania, Unanticipated Discovery Plan, <https://www.aboriginalheritage.tas.gov.au/Documents/UDP.pdf> (last visited Feb. 20, 2019), archived at <https://perma.cc/9DP2-WD2N>. See also Coroners Act 1995 (Tas) s 23, <https://www.legislation.tas.gov.au/view/whole/html/inforce/current/act-1995-073>, archived at <https://perma.cc/6MMP-6DFC>.

## G. Victoria

### 1. Protection of Indigenous Heritage Sites and Objects

The Aboriginal Heritage Act 2006 (Vic),<sup>141</sup> along with the Aboriginal Heritage Regulations 2018 (Vic),<sup>142</sup>

- establishes the Victorian Aboriginal Heritage Council;
- provides for the management of a system of Registered Aboriginal Parties, which is intended to allow for “Aboriginal groups with connections to country to be involved in decision making processes around cultural heritage”;
- establishes the Aboriginal Cultural Heritage Register;
- establishes processes related to Cultural Heritage Management Plans and the issuance of permits in order to manage activities that may impact Aboriginal cultural heritage;
- creates a system of Cultural Heritage Agreements that involve partnerships for the protection and management of Aboriginal cultural heritage; and
- contains offenses and penalties to prevent harm to Aboriginal cultural heritage.<sup>143</sup>

The Act “provides protection for all Aboriginal places, objects and human remains in Victoria regardless of their inclusion in the Victorian Aboriginal Heritage Register or land tenure.”<sup>144</sup> The Victorian Aboriginal Heritage Council makes decisions on the appointment of Registered Aboriginal Parties and oversees their operations, has roles related to the protection of ancestral remains, and promotes obligations with respect to secret or sacred objects, as well as providing advice to the relevant minister on the protection and management of Aboriginal cultural heritage in Victoria.<sup>145</sup>

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<sup>141</sup> Aboriginal Heritage Act 2006 (Vic), [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/Pub\\_Statbook.nsf/f932b66241ecf1b7ca256e92000e23be/481F4F0770858034CA257169001D1F4A/\\$FILE/06-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/Pub_Statbook.nsf/f932b66241ecf1b7ca256e92000e23be/481F4F0770858034CA257169001D1F4A/$FILE/06-016a.pdf), archived at <https://perma.cc/XL2F-SK2Q>.

<sup>142</sup> Aboriginal Heritage Regulations 2018 (Vic), [http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/LTObject\\_Store/ltobjst10.nsf/DDE300B846EED9C7CA257616000A3571/97D468DD228ACC40CA2582960004F71A/\\$FILE/18-59sra001%20authorised.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst10.nsf/DDE300B846EED9C7CA257616000A3571/97D468DD228ACC40CA2582960004F71A/$FILE/18-59sra001%20authorised.pdf), archived at <https://perma.cc/D8HJ-TU74>.

<sup>143</sup> *Aboriginal Heritage Act 2006 and the Aboriginal Heritage Regulations 2018*, ABORIGINAL VICTORIA, <https://www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-heritage-act-2006-and-the-aboriginal-heritage-regulations-2018.html> (last visited Feb. 20, 2019), archived at <https://perma.cc/VFM3-9LMF>.

<sup>144</sup> *Protection of Aboriginal Heritage*, NORTH EAST CATCHMENT MANAGEMENT AUTHORITY, <https://www.necma.vic.gov.au/Solutions/Indigenous-Heritage/Protection-of-Aboriginal-heritage> (last visited Feb. 20, 2019), archived at <https://perma.cc/CLX6-ZJ63>.

<sup>145</sup> *Victorian Aboriginal Heritage Council*, DEPARTMENT OF PREMIER AND CABINET, <https://www.dpc.vic.gov.au/index.php/contact-us/25-aboriginal-affairs> (last visited Feb. 20, 2019), archived at <https://perma.cc/SC4X-Q57L>.

The Aboriginal Heritage Act 2006 (Vic) requires that a person who discovers an Aboriginal object on either public or private land must report the discovery to the relevant agency.<sup>146</sup> As noted above, it is an offense to harm Aboriginal cultural heritage, including objects.<sup>147</sup>

## 2. Procedures on Discovery of Human Remains

The Victorian Aboriginal Heritage Council's guidelines on reporting Aboriginal ancestral remains state as follows:

Recent discoveries of human remains must be reported to the Coroner, Victorian Institute of Forensic Medicine or a police officer in charge of a police station. . . .

The Coroner will send a Forensic Anthropologist to the site to assess the remains, and will:

- report the remains to us if they're Aboriginal Ancestral Remains, or
- notify Victoria Police if they're not Aboriginal Ancestral Remains<sup>148</sup>

The Aboriginal Heritage Act 2006 (Vic) recognizes traditional ownership of ancestral remains.<sup>149</sup> Once the Council has been notified of ancestral remains it must, "after taking reasonable steps to consult with any Aboriginal person or body the Council believes may have an interest in the Aboriginal ancestral remains, determine the appropriate course of action to be taken in relation to the Aboriginal ancestral remains."<sup>150</sup> The Coroner must transfer custody of ancestral remains to the Council, after which the Council must transfer the remains to any relevant traditional owner, to the Museum Board for safekeeping, or otherwise deal with the remains as it thinks appropriate.<sup>151</sup>

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<sup>146</sup> Aboriginal Heritage Act 2006 (Vic) s 24. See also *Aboriginal Places, Objects and Land Management*, ABORIGINAL VICTORIA, <https://www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-cultural-heritage-of-victoria/aboriginal-places-objects-and-land-management.html> (last visited Feb. 20, 2019), archived at <https://perma.cc/H5EZ-MX6W>.

<sup>147</sup> Aboriginal Heritage Act 2006 (Vic) s 27.

<sup>148</sup> *Report Ancestral Remains*, VICTORIAN ABORIGINAL HERITAGE COUNCIL, <https://www.aboriginalheritagecouncil.vic.gov.au/report-ancestral-remains> (last updated Jan. 14, 2019), archived at <https://perma.cc/KPD6-Q2ES>.

<sup>149</sup> Aboriginal Heritage Act 2006 (Vic) s 7(2), 12

<sup>150</sup> *Id.* s 18(2)(b).

<sup>151</sup> *Id.* ss 19A & 20.

## H. Western Australia

### 1. Protection of Indigenous Heritage Sites and Objects

The Aboriginal Heritage Act 1972 (WA),<sup>152</sup> which is administered by the Department of Planning, Lands and Heritage, “protects all Aboriginal heritage sites in Western Australia, whether or not they are registered with the department.”<sup>153</sup> It also provides protection for Aboriginal objects, including ceremonial objects, pre-colonial material, and post-contact items.<sup>154</sup>

The Act provides for the “declaration of Aboriginal sites that are of outstanding importance to be Protected Areas.”<sup>155</sup> It also provides for the maintenance of a register of Aboriginal sites containing all protected areas, all Aboriginal cultural material, and all other places and objects to which the Act applies.<sup>156</sup>

The Act requires that any person who has knowledge of an Aboriginal object of “sacred, ritual or ceremonial significance,” or other things related to Aboriginal cultural heritage, must report its existence to the Registrar of Aboriginal Sites or to a police officer.<sup>157</sup> It is an offense to damage or remove any object on or under an Aboriginal site without authorization.<sup>158</sup>

The Western Australia government is currently conducting a review of the Aboriginal Heritage Act in order to develop new legislation that

- promotes the understanding and celebration of Aboriginal cultural heritage through the recognition of significant places and objects[.]
- provides transparent and easy to understand processes that offer certainty and predictability for stakeholders[, and]
- provides high standards of protection for significant places and objects, while enabling land use.<sup>159</sup>

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<sup>152</sup> Aboriginal Heritage Act 1972 (WA), [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_25428.pdf/\\$FILE/Aboriginal Heritage Act 1972 - \[04-g0-05\].pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_25428.pdf/$FILE/Aboriginal%20Heritage%20Act%201972%20-%20%5B04-g0-05%5D.pdf?OpenElement), archived at <https://perma.cc/AY7E-QEE3>.

<sup>153</sup> *Protection under the Aboriginal Heritage Act 1972*, DEPARTMENT OF PLANNING, LANDS AND HERITAGE (DPLH), <https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/protection-under-the-aboriginal-heritage-act-1972> (last updated Dec. 20, 2018), archived at <https://perma.cc/GL2J-6XUU>.

<sup>154</sup> *See Aboriginal Objects*, DPLH, <https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/protection-under-the-aboriginal-heritage-act-1972/aboriginal-objects> (last updated Dec. 20, 2018), archived at <https://perma.cc/N4TU-84BK>.

<sup>155</sup> *Aboriginal Sites*, DPLH, <https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/protection-under-the-aboriginal-heritage-act-1972/aboriginal-sites> (last updated Dec. 20, 2018), archived at <https://perma.cc/PH9C-59U3>.

<sup>156</sup> *Id.*

<sup>157</sup> Aboriginal Heritage Act 1972 (WA) s 15.

<sup>158</sup> *Id.* s 17(b).

<sup>159</sup> *Review of the Aboriginal Heritage Act 1972*, DPLH, <https://www.dplh.wa.gov.au/aha-review> (last updated Jan. 22, 2019), archived at <https://perma.cc/RZR6-P4PA>. See also Press Release, Ben Wyatt, Aboriginal Heritage

## 2. Procedures on Discovery of Human Remains

The Department of Planning, Lands and Heritage lists the following steps to be taken upon the discovery of an Aboriginal burial site or ancestral remains:

1. Immediately contact the police and the Registrar.
2. If development or other ground disturbing activities are carried out, these activities must cease immediately.
3. The police will investigate the remains as soon as possible. The Registrar will liaise with police to ensure that the minimum amount of disturbance takes place before identification of whether the remains are of Aboriginal origin and not a matter for further police involvement.
4. Upon notification that the remains are of Aboriginal origin and not a matter for further police involvement, the Registrar will seek the immediate involvement of relevant Aboriginal people.
5. The landowner will develop an appropriate action plan for the management of the remains, in consultation with relevant Aboriginal people and the Registrar.
6. The Registrar will ensure that the burial place is recorded and placed on the Register of Aboriginal Sites.
7. The Registrar will ensure that the burial place is reported to the Commonwealth Minister for Indigenous Affairs, in accordance with the legal requirements under the Aboriginal and Torres Strait Islander Protection Act 1984.
8. If the landowner wishes to carry out further development activities on the location the Registrar will provide advice on how to lodge an application to use the land.<sup>160</sup>

The Department further states that the options for dealing with the remains depends on the views of the relevant Aboriginal people, the circumstances of each place, and the nature of any development which is occurring. Options include leaving the remains *in situ*, reburial in the same place, reburial in a registered cemetery or keeping place, or reburial as close as possible to the original location.<sup>161</sup>

## IV. Relationships between Australian Governments and Indigenous Peoples

### A. History

The history of the relationship between Australian state and federal governments and Australia's indigenous peoples (including Aboriginal people and Torres Strait Islanders) has involved policies of "protection," assimilation, self-determination, and reconciliation.

In the context of "protection," in the early 1900s state governments began enacting legislation that allowed the forcible removal of indigenous children from their families. These children later came

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Legislation to be Reviewed (Mar. 9, 2018), <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/03/Aboriginal-heritage-legislation-to-be-reviewed.aspx>, archived at <https://perma.cc/JX4G-QUEU>.

<sup>160</sup> *Aboriginal Remains*, DPLH, <https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/protection-under-the-aboriginal-heritage-act-1972/ancestral-remains> (last updated Jan. 2, 2019), archived at <https://perma.cc/6AGK-77N9>.

<sup>161</sup> *Id.*

to be referred to as the “stolen generations.”<sup>162</sup> The removal laws existed in some states and territories until the late 1960s.<sup>163</sup> Other “protection” policies that had previously been introduced by colonial governments involved making indigenous Australians “wards of the state” and the establishment of government reserves where indigenous people were forced to live.<sup>164</sup>

In the 1930s, Australian governments adopted a national policy of assimilation, and this was again affirmed in 1951.<sup>165</sup> The states retained exclusive power over Aboriginal affairs under the Australian Constitution until a referendum in 1967 resulted in amendments that conferred power on the Commonwealth to make laws for Aboriginal people and also saw them counted in the national census for the first time.<sup>166</sup>

The struggle for land rights saw various developments in the 1970s, including the establishment by the Commonwealth government of the Aboriginal Land Rights Commission in 1973, leading to the passage of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Later, a landmark court decision in 1992 and the subsequent passage of the Native Title Act 1993 (Cth) saw indigenous people having a greater, albeit still limited, ability to claim rights in relation to certain land.<sup>167</sup>

The 1970s also saw the federal government move to a policy of self-determination for indigenous Australians, replacing the previous policy of assimilation. The government’s approach included the establishment of the Department of Aboriginal Affairs and the Aboriginal and Torres Strait Islander Commission, which was “composed of Indigenous peoples whose role was to maximise Indigenous participation in the development and implementation of policies that affected them.”<sup>168</sup> The Commission was formally abolished in 2005 and replaced with an advisory board.<sup>169</sup>

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<sup>162</sup> *Historical Context –The Stolen Generations*, BRINGING THEM HOME, <https://bth.humanrights.gov.au/significance/historical-context-the-stolen-generations> (last visited Feb. 21, 2019), archived at <https://perma.cc/6Z7H-CP38>.

<sup>163</sup> *Id.*

<sup>164</sup> *In the Name of Protection*, AUSTRALIANS TOGETHER, <https://australianstogether.org.au/discover/australian-history/protection/> (last visited Feb. 21, 2019), archived at <https://perma.cc/7XAW-R8UP>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Anna Kelsey-Sugg & Annabelle Quince, *Watershed Moments in Indigenous Australia’s Struggle to be Heard*, ABC NEWS (updated July 3, 2018), <https://www.abc.net.au/news/2018-07-04/complex-history-of-indigenous-and-non-indigenous-australia/9930944>, archived at <https://perma.cc/NWK5-A95P>.

<sup>168</sup> *The Indigenous Civil Rights Movement in Australia*, AUSTRALIANS TOGETHER, <https://australianstogether.org.au/discover/australian-history/civil-rights-movement/> (last visited Feb. 21, 2019), archived at <https://perma.cc/R2YR-YFGA>.

<sup>169</sup> See Angela Pratt & Scott Bennett, *The End of ATSIC and the Future Administration of Indigenous Affairs* (Australian Parliamentary Library Current Issues Brief No. 4 2004-05, Aug. 9, 2004), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/Current\\_Issues\\_Briefs\\_2004\\_-\\_2005/05cib04](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/Current_Issues_Briefs_2004_-_2005/05cib04), archived at <https://perma.cc/8ABR-XSF3>.

The 1990s saw the emergence of a policy of reconciliation on the part of different governments, including at the federal level. The Commonwealth government provided funding for the Council for Aboriginal Reconciliation in 1991, which was subsequently disbanded in 2000. In 2001, Reconciliation Australia, a nonprofit entity, was established and continues to receive federal government funding. Its activities include working with various organizations, including governments or individual government departments, to create Reconciliation Action Plans.<sup>170</sup>

In 1997, the Australian Human Rights Commission published a report on the findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, and several state and territory parliaments and governments issued statements apologizing to the stolen generations. Later, in February 2008, the Prime Minister of Australia delivered a national apology to the stolen generations. Some state governments have recently launched reparation programs for the stolen generations.<sup>171</sup>

There is currently a continued focus on reconciliation and self-determination, as well as an overarching framework related to “closing the gap” in various outcomes between indigenous and non-indigenous Australians.<sup>172</sup> There is also an ongoing discussion related to constitutional recognition of indigenous peoples, a policy to which the current government remains committed. A parliamentary joint committee tasked with recommending options for constitutional change was established in March 2018.<sup>173</sup>

## B. Indigenous Heritage Legislation and Policies

The Commonwealth, state, and territory cultural heritage legislation of the 1970s and 1980s can be viewed in the context of policies related to land rights and the emerging focus on self-determination. Legislative and policy developments in some jurisdictions since the 1990s, including recent reform proposals, reflect an increased focus on partnership, consultation, and greater involvement of indigenous people in decision-making and management of their own heritage.<sup>174</sup>

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<sup>170</sup> See *Reconciliation Australia*, DEPARTMENT OF THE PRIME MINISTER AND CABINET, <https://www.pmc.gov.au/indigenous-affairs/culture-and-capability/reconciliation-australia> (last visited Feb. 21, 2019), archived at <https://perma.cc/5HTM-RGZS>.

<sup>171</sup> See *Historical Context –The Stolen Generations*, *supra* note 162.

<sup>172</sup> *Closing the Gap*, DEPARTMENT OF THE PRIME MINISTER AND CABINET, <https://www.pmc.gov.au/indigenous-affairs/closing-gap> (last visited Feb. 21, 2019), archived at <https://perma.cc/CB77-25FT>.

<sup>173</sup> See *Constitutional Recognition*, DEPARTMENT OF THE PRIME MINISTER AND CABINET, <https://www.pmc.gov.au/indigenous-affairs/constitutional-recognition> (last visited Feb. 21, 2019), archived at <https://perma.cc/HT9L-VJ5J>.

<sup>174</sup> For discussion of historical developments regarding the regulation of Aboriginal cultural heritage matters see NATIONAL NATIVE TITLE TRIBUNAL, *INDIGENOUS CULTURAL HERITAGE SCHEMES IN VICTORIA, QUEENSLAND AND NORTHERN TERRITORY: AN OVERVIEW* 4–6 (May 2009), <http://www.nntt.gov.au/Information%20Publications/Vic-Qld-and-NT-heritage-overview.pdf>, archived at <https://perma.cc/RF76-UQDB>; NATIONAL NATIVE TITLE TRIBUNAL, *COMMONWEALTH, STATE AND TERRITORY HERITAGE REGIMES: SUMMARY OF PROVISIONS FOR ABORIGINAL CONSULTATION* (Dec. 2010), <http://www.nntt.gov.au/Information%20Publications/Heritage-regimes-Aboriginal-consultation.pdf>, archived at <https://perma.cc/NA8K-8ULY>.

State and territory governments have published information about policies and approaches to working directly with indigenous people, including in the areas of environmental and heritage protection. For example, the South Australia Department for Environment and Water states: “We acknowledge and respect Aboriginal people as the traditional custodians of South Australia, and work with them to care for Country. Caring for Country means working together to manage our state, and in particular places of environmental, historical, social, cultural and spiritual significance.”<sup>175</sup>

The Victorian government emphasizes self-determination as a central feature of its approach to working with indigenous peoples, stating that “[t]he devastating impact of failed policies can only begin to be turned around when Aboriginal people are supported to make their own decisions on matters such as governance, natural resource management, economic development, health care and social service provision.”<sup>176</sup>

The New South Wales government also includes self-determination and involvement in decision-making in its discussion of reforms to heritage legislation, stating “Aboriginal people must play a significant role in the management of their cultural heritage, and in the planning of their land.”<sup>177</sup> The current guidance regarding the implementation of the NPW Act with respect to Aboriginal heritage refers to enhancing communication and developing partnerships with Aboriginal people.<sup>178</sup>

However, commentators have stated that

[i]n recent years, the advocacy work of Indigenous traditional owners, community groups and academics has led to greater public awareness of the importance of Indigenous cultural heritage, as well as some positive legal reforms. However, legal protection of cultural heritage has often been, and continues to be, ineffective. One of the key reasons for this ineffectiveness is a piecemeal approach to protection of Indigenous cultural heritage.<sup>179</sup>

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<sup>175</sup> *Aboriginal Partnerships*, SA DEPARTMENT FOR ENVIRONMENT AND WATER, <https://www.environment.sa.gov.au/about-us/aboriginal-partnerships> (last visited Feb. 21, 2019), archived at <https://perma.cc/PQ6U-VZ8P>.

<sup>176</sup> *Self-Determination*, ABORIGINAL VICTORIA, <https://www.vic.gov.au/aboriginalvictoria/policy/self-determination.html> (last visited Feb. 21, 2019), archived at <https://perma.cc/A93A-ALJ7>.

<sup>177</sup> See *Planning and Heritage*, NSW ABORIGINAL AFFAIRS, <https://www.aboriginalaffairs.nsw.gov.au/policy-reform/planning-and-heritage> (last visited Feb. 21, 2019), archived at <https://perma.cc/VFH9-XFCK>.

<sup>178</sup> OPERATIONAL POLICY: PROTECTING ABORIGINAL CULTURAL HERITAGE, *supra* note 60, at 7.

<sup>179</sup> Lauren Butterly & Hon Justice Rachel Pepper, *Are Courts Colourblind to Country? Indigenous Cultural Heritage, Environmental Law and the Australian Judicial System*, 40(4) UNSW L.J. (Advance) (2017), at 1, [http://www.unsw.lawjournal.unsw.edu.au/wp-content/uploads/2017/11/404\\_7.pdf](http://www.unsw.lawjournal.unsw.edu.au/wp-content/uploads/2017/11/404_7.pdf), archived at <https://perma.cc/X3PD-39R4>.

# Brazil

Eduardo Soares  
Senior Foreign Law Specialist

**SUMMARY** In Brazil constitutional principles protect archeological and prehistoric sites, and determines that all such sites, including Indian ones, belong to the Union. A Decree-Law from 1937 protects and defines national historical and artistic heritage because of its archaeological and ethnographic value, and such heritage must be registered with the National Historical and Artistic Heritage Service to be considered as an integral part of the national historical or artistic heritage of the country.

A federal law from 1961 determines that archaeological or prehistoric monuments of any nature existing in the national territory and all the elements that are in them are under the guard and protection of the government. This includes sites identified as cemeteries and other types of sites in which human remains of archaeological or paleo-ethnographic interest are found.

The Penal Code and an environmental law are used to punish whoever destroys, renders unusable, or damages registered material of archaeological or historical value.

Federal agencies are in charge of the preservation of the country's cultural heritage and the protection and promotion of the rights of indigenous peoples.

## I. Constitutional Principles

The Brazilian Constitution provides that archeological and prehistoric sites are the property of the Union,<sup>1</sup> including lands traditionally occupied by Indians.<sup>2</sup>

Article 215 determines that the National Government must guarantee to all the full exercise of cultural rights and access to sources of national culture, and must support and grant incentives for the appreciation and diffusion of cultural expression.<sup>3</sup>

The Constitution further determines that the Brazilian cultural heritage includes both material and immaterial goods, taken either individually or as a whole, that refer to the identity, action, and memory of the various groups that form Brazilian society,<sup>4</sup> including, *inter alia*, urban complexes and sites with historical, landscape, artistic, archaeological, paleontological,

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<sup>1</sup> CONSTITUIÇÃO FEDERAL [C.F.], art. 20(X), [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), archived at <https://perma.cc/LA6D-Y4V4>.

<sup>2</sup> *Id.* art. 20(XI).

<sup>3</sup> *Id.* art. 215.

<sup>4</sup> *Id.* art. 216.

ecological, and scientific value.<sup>5</sup> The government, with the collaboration of the community, must promote and protect Brazilian cultural heritage by inventories, registries, surveillance, monument protection decrees, expropriation, and other forms of precaution and preservation.<sup>6</sup> Damages and threats to cultural heritage must be punished, as provided by law.<sup>7</sup>

The social organization, customs, languages, creeds, and traditions of Indians are recognized, as well as their original rights to the lands they traditionally occupy. The Union has the responsibility to delineate these lands and to protect and ensure respect for their property and culture.<sup>8</sup>

Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable for the preservation of environmental resources necessary for their well-being, and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.<sup>9</sup>

The removal of indigenous groups from their lands is prohibited except when the National Congress determines there has been a catastrophe or epidemic that places the population at risk or that removal is in the interest of national sovereignty; such groups' immediate return as soon as the risk ceases must be guaranteed under all circumstances.<sup>10</sup>

## II. Legal Framework

### A. Decree-Law No. 25 of November 30, 1937

#### 1. *Protection of National Historical and Artistic Heritage*

Decree-Law No. 25 of November 30, 1937, provides for the protection of the national historical and artistic heritage of Brazil. Article 1 defines “national historical and artistic heritage” as the set of movable and immovable goods (*bens*) existing in the country and whose conservation is of public interest, either because of its connection with memorable events in the history of Brazil or because of its exceptional archaeological, ethnographic, bibliographic, or artistic value.<sup>11</sup>

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<sup>5</sup> *Id.* art. 216(V).

<sup>6</sup> *Id.* art. 216(§ 1).

<sup>7</sup> *Id.* art. 216(§ 4).

<sup>8</sup> *Id.* art. 231.

<sup>9</sup> *Id.* art. 231(§ 1).

<sup>10</sup> *Id.* art. 231(§ 5).

<sup>11</sup> Decreto-Lei No. 25, de 30 de Novembro de 1937, art. 1, [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/Del0025.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/Del0025.htm), archived at <https://perma.cc/Q8CH-QRSQ>.

## 2. Registration

The goods referred to in article 1 of Decree-Law No. 25 will only be considered as an integral part of the national historical or artistic heritage after being registered separately or grouped in one of the four Register Books (*Livros do Tombo*) referred to in article 4 of the Decree-Law.<sup>12</sup> Natural monuments, as well as the site of and landscapes surrounding those monuments that are important to conserve and protect by the remarkable nature with which they have been endowed by nature or organized by the human industry, are among the goods referred to in article 1.<sup>13</sup>

Article 4 of Decree-Law No. 25 determines that the National Historical and Artistic Heritage Service (Serviço do Patrimônio Histórico e Artístico Nacional) is to have four Register Books, in which the goods referred to in article 1 must be registered:

- 1) in the Archaeological, Ethnographic and Landscape Book, the items belonging to the categories of archaeological, ethnographic, Amerindian and popular art, as well as monuments, sites and landscapes;
- 2) in the Historical Book, things of historical interest and works of historical art;
- 3) in the Fine Arts Book, the things of erudite art, national or foreign;
- 4) in the Applied Arts Book, works included in the category of applied arts, national or foreign.<sup>14</sup>

Voluntary recording will be carried out whenever the owner asks for it and the goods under consideration have the necessary requirements to constitute an integral part of the national historical and artistic patrimony, in the judgment of the Advisory Council of the Service of National Historical and Artistic Patrimony, or whenever the same owner agrees in writing to the registration of the good in any of the Register Books.<sup>15</sup> Compulsory registration must be carried out when the owner refuses to accept registration.<sup>16</sup>

## 3. Effects of Registration

Goods registered cannot be destroyed, demolished or mutilated, or, without prior special authorization from the National Historical and Artistic Patrimony Service, repaired, painted, or restored, under penalty of a fine of 50% of the damage done.<sup>17</sup> Construction in the vicinity of a registered property that would prevent or reduce its visibility is not possible without prior authorization from the National Historical and Artistic Patrimony Service.<sup>18</sup>

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<sup>12</sup> *Id.* art. 1(§ 1).

<sup>13</sup> *Id.* art. 1(§ 2).

<sup>14</sup> *Id.* art. 4.

<sup>15</sup> *Id.* art. 7.

<sup>16</sup> *Id.* art. 8.

<sup>17</sup> *Id.* art. 17.

<sup>18</sup> *Id.* art. 18.

Registered items are subject to the permanent supervision of the National Historical and Artistic Patrimony Service, which may inspect them whenever deemed appropriate, and the respective owners or responsible persons may not obstruct the inspection, under penalty of a fine, which may be doubled in the case of recidivism.<sup>19</sup>

## B. Law No. 3,924 of July 26, 1961

### 1. *Protection of Archaeological and Prehistoric Monuments*

Law No. 3,924 of July 26, 1961, provides for the protection of archaeological and prehistoric monuments. Article 1 determines that archaeological or prehistoric monuments of any nature existing in the national territory and all the elements that are in them are under the guard and protection of the public power.<sup>20</sup> Surface property does not include archaeological or prehistoric deposits, nor the objects incorporated into them.<sup>21</sup>

### 2. *Definition of Archaeological and Prehistoric Monuments*

Article 2 defines “archaeological or prehistoric monuments” as:

- a) deposits of any nature, origin or purpose, representing cultural evidence of the first inhabitants of Brazil (*paleoamerindios*), such as shell mounds (*sambaquis*), artificial hills (*montes artificiais ou tesos*), sepulchral wells, deposits (*jazigos*), landfills (*aterrados*), vestiges (*estearias*) and any others not specified in this article, but of identical meaning, subject to the judgment of the competent authority;
- b) the sites in which there are positive traces of occupation by the first inhabitants such as grottos (*grutas*), caves (*lapas*), and shelters (*abrigos*) under rock;
- c) sites identified as cemeteries, burials or places of prolonged landing or settlement, “stations” and “ceremonies,” in which human remains of archaeological or paleo-ethnographic interest are found;
- d) rock or local inscriptions such as polishing grooves of utensils and other vestiges of activity of the first inhabitants.<sup>22</sup>

### 3. *Prohibitions*

The economic exploitation, destruction, or mutilation, for any purpose, of archaeological or prehistoric deposits (known as *sambaquis*, *casqueiros*, *concheiros*, *birbigueiras*, or *sernambis*) are prohibited, as well as of the sites, inscriptions, and objects enumerated in items b, c and d of article 2 (quoted above), before being properly researched. Previous valid concessions for such exploitation must be respected.<sup>23</sup>

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<sup>19</sup> *Id.* art. 20.

<sup>20</sup> Lei No. 3.924, de 26 de Julho de 1961, art. 1, [http://www.planalto.gov.br/ccivil\\_03/leis/1950-1969/L3924.htm](http://www.planalto.gov.br/ccivil_03/leis/1950-1969/L3924.htm), archived at <https://perma.cc/F3SX-AYTB>.

<sup>21</sup> *Id.* art. 1(sole para.).

<sup>22</sup> *Id.* art. 2.

<sup>23</sup> *Id.* art. 3.

#### 4. Registration and Inspection

According to article 4 of Law No. 3,924, any person, natural or legal, who is undertaking, for economic or other purposes, the exploration of archaeological or prehistoric deposits, must communicate this activity to the Directorate of National Historical Heritage (Diretoria do Patrimônio Histórico Nacional) for the purpose of examination, registration, inspection, and safeguarding the interests of science.<sup>24</sup> Archaeological or prehistoric deposits of any nature that are not communicated to the Directorate and registered in the form of articles 4 and 6 of Law No. 3,924, are considered, for all purposes, assets of the Union.<sup>25</sup>

#### 5. Crime Against the National Patrimony

Any act that destroys or mutilates monuments referred to in article 2 must be considered a crime against the national patrimony and, as such, are punishable in accordance with the provisions of criminal laws.<sup>26</sup>

#### 6. Archaeological Excavations Carried Out by Private Individuals

The right to carry out excavations for archaeological purposes on public or private lands is established by permission of the federal government, through the Directorate of National Historical and Artistic Heritage, and the owner or holder of the land.<sup>27</sup>

The application for permission must be addressed to the Directorate of National Historical and Artistic Patrimony, accompanied by an exact indication of the location, size, and approximate duration of the works to be performed, proof of the technical and scientific suitability of the applicant, and the name of the person responsible for carrying out the work.<sup>28</sup>

The permit must be issued by the Minister of Education and Culture in the form of an administrative act (*portaria*) establishing the conditions to be observed for the development of excavations and studies, which must be transcribed in the proper book of the Directorate of National Historical and Artistic Heritage.<sup>29</sup> As long as excavations and studies are to be carried out on land that does not belong to the applicant, the written consent of the owner of the land or its user must be attached to the permission request.<sup>30</sup>

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<sup>24</sup> *Id.* art. 4.

<sup>25</sup> *Id.* art. 7. Article 6 of Law No. 3, 924 determines, *inter alia*, that sambaquis must take precedence for study and eventual exploitation, in accordance with the Mining Code.

<sup>26</sup> *Id.* art. 5.

<sup>27</sup> *Id.* art. 8. Articles 13–16 of Law No. 3,924 address archeological excavations carried out by specialized scientific institutions of the Union, states, and municipalities.

<sup>28</sup> *Id.* art. 9.

<sup>29</sup> *Id.* art. 10.

<sup>30</sup> *Id.* art. 11.

Excavations must be carried out under the direction of the permission holder, who is liable, under civil, criminal, and administrative law, for the damages caused to the National Patrimony or to third parties.<sup>31</sup> Excavations must be carried out in accordance with the conditions stipulated in the permit, and the person responsible may not, under any circumstances, prevent the inspection of the works by an agent (*delegado*) specially designated by the Directorate of National Historical and Artistic Heritage, when deemed appropriate.<sup>32</sup>

Paragraph 3 of article 11 of Law No. 3,924 further determines that the permission holder is obliged to report to the Directorate of National Historic and Artistic Patrimony on a quarterly basis on the progress of the excavations, except for the occurrence of an exceptional event, which must immediately be reported and appropriate measures taken.<sup>33</sup>

The permission may be revoked if

- a) the provisions of Law No. 3,924 and the administrative act granting the permission are not met;
- b) the field work is suspended for a period exceeding twelve months, unless there is a major cause, which must be duly proven;
- c) in case of noncompliance with article 11, paragraph 3 [discussed above].<sup>34</sup>

In any of the cases listed above, the permission holder will not be entitled to compensation for expenses incurred.<sup>35</sup>

## 7. *Fortuitous Discoveries*

The possession and safeguarding of assets of an archaeological or prehistoric nature constitute, in principle, an inherent right of the state.<sup>36</sup> The fortuitous discovery of any elements of archaeological or prehistoric, historical, artistic, or numismatic interest must immediately be communicated to the Directorate of National Historical and Artistic Patrimony or to the authorized official bodies, by the author of the find or by the owner of the property where the discovery occurred.<sup>37</sup> The owner or occupant of the property where the finding was verified is responsible for the temporary conservation of the thing discovered, until pronouncement and deliberation of the National Historic and Artistic Patrimony Board.<sup>38</sup> Breach of this obligation will give cause for apprehension

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<sup>31</sup> *Id.* art. 11(§ 1).

<sup>32</sup> *Id.* art. 11(§ 2).

<sup>33</sup> *Id.* art. 11(§ 3).

<sup>34</sup> *Id.* art. 12.

<sup>35</sup> *Id.* art. 12(sole para.).

<sup>36</sup> *Id.* art. 17.

<sup>37</sup> *Id.* art. 18.

<sup>38</sup> *Id.* art. 18(sole para.).

of the finding, without prejudice to the responsibility of the finder for the damages that he or she may cause to the national patrimony as a result of the omission.<sup>39</sup>

#### 8. *Shipment Abroad*

No object of archaeological, prehistoric, numismatic, or artistic interest may be transferred abroad without an express license from the Directorate of National Historical and Artistic Heritage, contained in a release document in which the objects to be transferred are duly specified.<sup>40</sup> Failure to comply with this provision will entail the summary apprehension of the object to be transferred, without prejudice to other legal sanctions to which the offender may be subject.<sup>41</sup> The object seized must be delivered to the National Historical and Artistic Patrimony Board.<sup>42</sup>

#### 9. *Sanctions*

The carrying out of archaeological or prehistoric excavations in violation of any of the provisions of Law No. 3,924 is punishable by a fine without prejudice to summary apprehension and consequent loss for the national patrimony of all the material and equipment existing in the place.<sup>43</sup> The offenders of Law No. 3,924 are subject to the penalties of articles 163 to 167 of the Penal Code (see discussion below), without prejudice to other applicable penalties.<sup>44</sup>

### C. Penal Code

Article 163 of the Penal Code determines that destroying, rendering unusable, or damaging something that belongs to another is punishable with detention from one to six months or a fine.<sup>45</sup> The crime is punishable with detention of six months to three years and a fine, in addition to the penalty corresponding to the violence, if committed

- with violence to the person or a serious threat;
- using a flammable or explosive substance, if that fact does not constitute a more serious crime;
- against the patrimony of the Union, a state, the Federal District, a municipality, an agency, a public foundation or public company, a mixed-economy society, or a utility company; or
- for selfish reasons or with considerable damage to the victim.<sup>46</sup>

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<sup>39</sup> *Id.* art. 19.

<sup>40</sup> *Id.* art. 20.

<sup>41</sup> *Id.* art. 21.

<sup>42</sup> *Id.* art. 21(sole para.).

<sup>43</sup> *Id.* art. 25.

<sup>44</sup> *Id.* art. 29.

<sup>45</sup> CÓDIGO PENAL, Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, art. 163, [http://www.planalto.gov.br/ccivil\\_03/Decreto-Lei/Del2848compilado.htm](http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848compilado.htm), archived at <https://perma.cc/V8NX-ZFL5>.

<sup>46</sup> *Id.* art. 163(sole para.).

Destroying, rendering unusable, or damaging something that is registered by the competent authority due to its artistic, archaeological, or historical value is punishable with detention from six months to two years and a fine.<sup>47</sup> To change the aspect of a place specially protected by law without the license of the competent authority is punishable with detention from one month to one year or a fine.<sup>48</sup>

In the cases provided for in articles 163(IV) and 164 of the Penal Code, a criminal complaint (*queixa*) is required.<sup>49</sup>

#### **D. Environmental Law**

Law No. 9,605 of February 12, 1998, provides for criminal and administrative sanctions derived from conduct and activities harmful to the environment. Article 62 states that destroying, rendering useless or damaging an asset especially protected by law, administrative act, or judicial decision, or an archive, registry, museum, library, gallery, scientific installation, or similar place protected by law, administrative act, or judicial decision, is punishable with imprisonment from one to three years and a fine.<sup>50</sup>

Article 63 determines that to change the aspect or structure of a building or place specially protected by law, administrative act, or judicial decision, due to its landscape, ecological, tourist, artistic, historical, cultural, religious, archaeological, ethnographic, or monumental value, without authorization of the competent authority or in disagreement with a granted permit subjects the offender to imprisonment from one to three years and a fine.<sup>51</sup>

In addition, to promote construction on nonbuildable land or its surroundings, considered as such because of its landscape, ecological, artistic, tourist, historical, cultural, religious, archaeological, ethnographic, or monumental value, without the authorization of the competent authority or in disagreement with a granted permit is punishable with detention from six months to one year and a fine.<sup>52</sup>

### **III. National Historic and Artistic Heritage Institute**

The National Historic and Artistic Heritage Institute (Instituto do Patrimônio Histórico e Artístico Nacional, IPHAN) is a federal agency subordinated to the Ministry of Culture that is responsible for the preservation of the Brazilian cultural heritage.<sup>53</sup> IPHAN is in charge of

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<sup>47</sup> *Id.* art. 165.

<sup>48</sup> *Id.* art. 166.

<sup>49</sup> *Id.* art. 167.

<sup>50</sup> Lei No. 9.605, de 12 de Fevereiro de 1998, art. 62, [http://www.planalto.gov.br/ccivil\\_03/LEIS/L9605.htm](http://www.planalto.gov.br/ccivil_03/LEIS/L9605.htm), archived at <https://perma.cc/VU29-9M8K>.

<sup>51</sup> *Id.* art. 63.

<sup>52</sup> *Id.* art. 64.

<sup>53</sup> O *Iphan*, INSTITUTO DO PATRIMÔNIO HISTÓRICO E ARTÍSTICO NACIONAL, <http://portal.iphan.gov.br/pagina/detalhes/872> (last visited Feb. 25, 2019), archived at <https://perma.cc/JUP8-MHDV>.

protecting and promoting the country's cultural assets, ensuring its permanence and enjoyment for present and future generations.<sup>54</sup>

#### IV. Indian National Foundation

The Indian National Foundation (Fundação Nacional do Índio, FUNAI) is the official indigenist organ of the country. FUNAI was created by Law No. 5,371 of December 5, 1967,<sup>55</sup> is subordinated to the Ministry of Justice, and is the coordinator and main executor of the federal government's indigenous policy. Its institutional mission is to protect and promote the rights of indigenous peoples in Brazil.<sup>56</sup>

Indigenous policies,<sup>57</sup> the initiatives prepared by the different agencies of the Brazilian government regarding the indigenous populations, are guided by indigenism (*indigenismo*), a set of principles established from the contact of indigenous peoples with the national society.<sup>58</sup>

#### V. Conclusions

##### A. Protection of Sacred Places of Indigenous People

The Brazilian legal framework discussed above does not include legislation specifically protecting sacred places of indigenous people, their graves, and artifacts belonging to native people found in the course of land use or excavations. Instead, the legislation covers the protection of national historical and artistic heritage of the country and its archeological and prehistoric monuments as a whole.<sup>59</sup> Apparently, protection of indigenous art and materials discovered in archeological excavations, including bodies, places of worship, and arts of native people would fall under the same broad concept of protection.

##### B. Management of Discoveries

In regard to the management of discoveries made in the course of land development and use, as stated in articles 1 and 2(c) of Law No. 3,924, archaeological or prehistoric monuments of any

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<sup>54</sup> *Id.*

<sup>55</sup> Lei No. 5.371, de 5 de Dezembro de 1967, [http://www.planalto.gov.br/ccivil\\_03/LEIS/1950-1969/L5371.htm](http://www.planalto.gov.br/ccivil_03/LEIS/1950-1969/L5371.htm), archived at <https://perma.cc/99TJ-ZV29>.

<sup>56</sup> *Quem Somos*, FUNDAÇÃO NACIONAL DO ÍNDIO, <http://www.funai.gov.br/index.php/quem-somos> (last visited Feb. 25, 2019), archived at <https://perma.cc/8PKG-25QF>.

<sup>57</sup> *Política Indigenista*, FUNDAÇÃO NACIONAL DO ÍNDIO, <http://www.funai.gov.br/index.php/nossas-acoas-politica-indigenista> (last visited Feb. 25, 2019), archived at <https://perma.cc/NJQ7-ADQG>.

<sup>58</sup> *Política Indigenista*, MUSEU DO ÍNDIO, <http://www.museudoindio.gov.br/educativo/pesquisa-escolar/241-politica-indigenista> (last visited Feb. 25, 2019), archived at <https://perma.cc/Q854-6BW3>.

<sup>59</sup> See discussion above (Part II(B)) of Decree-Law No. 25 of November 30, 1937 (Part II(A)) and Law No. 3,924 of July 26, 1961.

nature existing in the national territory and all the elements that are in them are under the guard and protection of the public power.<sup>60</sup>

1. *Preservation Measures*

The fortuitous discovery of any elements of archaeological or prehistoric, historical, artistic, or numismatic interest must immediately be communicated to the Directorate of National Historical and Artistic Patrimony or to the authorized official bodies, by the author of the find or by the owner of the property where the discovery occurred.<sup>61</sup> The owner or occupant of the property where the finding was verified is responsible for the temporary conservation of the thing discovered, until deliberation of and a pronouncement by the National Historic and Artistic Patrimony Board.<sup>62</sup>

2. *Recognition as Cultural Patrimony*

It appears that the definition of “archaeological or prehistoric monuments” contained in article 2 of Law No. 3,924 (see discussion, Part II(B), above) could be used to recognize such discoveries as objects of cultural patrimony of indigenous people.<sup>63</sup>

3. *Finding of Native People’s Remains*

The researched legislation does not specifically define or determine any specific protocol to be followed in connection with the finding of native people’s human remains and/or cultural items. The mentioned provision, which determine that findings must be communicated to the appropriate authorities and preserved, would most likely be applicable to this situation.<sup>64</sup>

4. *Relocation of Cemetery of Native People or Ruins of Their Temple*

According to article 3 of Law No. 3,924, the economic exploitation, destruction, or mutilation, for any purpose, of archaeological or prehistoric deposits are prohibited, as well as of the sites, inscriptions, and objects enumerated in items (a), (c), and (d) of article 2 of Law No. 3,924 (see discussion, Part II(B)(2), and (3), above), before being properly researched. Previous unexpired concessions for such exploitation must be respected.<sup>65</sup>

Article 3 of Law No. 3,924 implies that before a decision is made about destruction or preservation of archeological sites, research must first be undertaken. However, the legislation is silent in regard to how to preserve such a site.

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<sup>60</sup> Law No. 3,924, *supra* note 21, arts. 1, 2(c).

<sup>61</sup> *Id.* art. 18.

<sup>62</sup> *Id.* art. 18(sole para.).

<sup>63</sup> *Id.* art. 2.

<sup>64</sup> *Id.* art. 18.

<sup>65</sup> *Id.* art. 3.

### 5. *Legal Treatment of Sites*

The legislation does not make any distinction regarding the ownership of the land where graves and artifacts are found. The Constitution determines that archeological and prehistoric sites<sup>66</sup> and lands traditionally occupied by Indians<sup>67</sup> are the property of the Union. Furthermore, Law No. 3,924 establishes that ownership of the site does not include archaeological or prehistoric deposits, nor the objects incorporated into them.<sup>68</sup>

### 6. *Unauthorized Disturbance*

It appears that the disturbance of the protected, sacred places of indigenous people would fall within the scope of article 17 of Law No. 3,924, which determines that any act that destroys or mutilates the archeological or prehistoric monuments referred to in article 2 of Law No. 3,924 (see Part II(B)(2), above) must be considered a crime against the national patrimony and, as such, is punishable in accordance with the provisions of criminal laws<sup>69</sup> (see Parts II(C) and (D), above).

### 7. *National Policy*

FUNAI is the coordinator and main executor of the federal government's indigenous policy.<sup>70</sup> The Constitution of 1988, recognized Indians' rights to their social organization, customs, languages, beliefs, and traditions, and their original rights over the lands they traditionally occupy.<sup>71</sup> Indians also expanded their citizenship rights and now are legitimate parties to defend their rights and interests in court.<sup>72</sup> Thus, the main objective of indigenous policy today is the preservation of indigenous cultures, through the guarantee of their lands and the development of educational and sanitary activities.<sup>73</sup>

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<sup>66</sup> C.F. art. 20(X).

<sup>67</sup> *Id.* art. 20(XI).

<sup>68</sup> Law No. 3,924, *supra* note 20, art. 1(sole para.).

<sup>69</sup> *Id.* art. 5.

<sup>70</sup> *Quem Somos*, FUNDAÇÃO NACIONAL DO INDIO, *supra* note 56.

<sup>71</sup> *Política Indigenista*, MUSEU DO INDIO, *supra* note 58.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

# Canada

*Tariq Ahmad*  
*Foreign Law Specialist*

**SUMMARY** Canada does not have federal legislation similar to the Native American Graves Protection and Repatriation Act in the US. There is little legislation at the federal level for the protection and preservation of heritage sites and objects including burial sites. Rather, most heritage protection and preservation legislation has been enacted by provincial and territorial governments. Each province and territory has developed heritage legislation and policies that address issues of protecting and preserving cultural heritage. In British Columbia, for example, heritage and archaeological conservation and protection is regulated mainly by the Heritage Conservation Act (HCA).

## I. Introduction

Though Canada has a “similar indigenous prevalence of archaeological sites” as the US and “concern for ancient burials,” the country does not have comparable federal legislation to the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>1</sup> Indeed, Canada is the only “G8-nations member lacking comprehensive federal cultural heritage resource management legislation.”<sup>2</sup> The federal government provides “little legislative protection for heritage structures or sites.”<sup>3</sup> Instead, Canada has taken a multifaceted approach to the protection of indigenous heritage that involves federal, provincial, and territorial initiatives, with the provinces being the key legislators in the area.

Sections 91 & 92 of the Constitution Act, 1867<sup>4</sup> articulate the jurisdictional division of responsibilities between the federal and provincial governments, stipulating that “Indians, and Lands reserved for the Indians” fall exclusively under the federal domain,<sup>5</sup> while matters related to “The Management and Sale of the Public Lands belonging to the Province,” “Local Works and

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<sup>1</sup> Jerome S. Cybulski, *Canada*, in THE ROUTLEDGE HANDBOOK OF ARCHAEOLOGICAL HUMAN REMAINS AND LEGISLATION 526-27 (Nicholas Marquez-Grant & Linda Fibiger eds., 2011).

<sup>2</sup> D. Pokotylo & A.R. Mason, *Canada: Cultural Heritage Management*, in ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY 1104 (Smith C., ed., Springer, New York, NY, 2014), [https://link.springer.com/content/pdf/10.1007/978-1-4419-0465-2\\_1147.pdf](https://link.springer.com/content/pdf/10.1007/978-1-4419-0465-2_1147.pdf), archived at <https://perma.cc/7ZMN-2KD4>.

<sup>3</sup> *Heritage Legislation: An Overview*, VANCOUVER HERITAGE FOUNDATION, <https://www.vancouverheritagefoundation.org/learn-with-us/policies-by-laws/heritage-legislation-an-overview/> (lasted visited Feb. 28, 2019), archived at <https://perma.cc/D2P5-TGF8>.

<sup>4</sup> Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), <https://laws-lois.justice.gc.ca/eng/Const/FullText.html>, archived at <https://perma.cc/EU7S-N58M>.

<sup>5</sup> *Id.* § 91(24).

Undertakings,” and “Generally all Matters of a merely local or private Nature in the Province” all fall within the jurisdiction of the provinces.<sup>6</sup>

Section 35 of the Constitution Act, 1982 provides constitutional protection to treaty and aboriginal rights:

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

**Land claims agreements**

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

**Aboriginal and treaty rights are guaranteed equally to both sexes**

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.<sup>7</sup>

The Canadian Charter of Rights and Freedoms,<sup>8</sup> the Canadian version of the US Bill of Rights, states as follows:

**25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.<sup>9</sup>

Finally, section 27 of the Constitution Act, 1982 stipulates that “[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>10</sup>

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<sup>6</sup> *Id.* § 92.

<sup>7</sup> Constitution Act, 1982, § 35, <https://laws-lois.justice.gc.ca/eng/Const/page-16.html#docCont> (footnote in original omitted), archived at <https://perma.cc/AFZ6-XP9J>.

<sup>8</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.), <https://laws-lois.justice.gc.ca/eng/const/page-15.html>, archived at <https://perma.cc/YC4X-26PK>.

<sup>9</sup> *Id.* § 25 (footnote in original omitted).

<sup>10</sup> Constitution Act, 1982, § 27.

In terms of international obligations, Canada is a party to the Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) and acceded to the Convention on July 23, 1976.<sup>11</sup> Canada is also a party to the Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>12</sup> and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>13</sup>

While comprehensive legislation is lacking at the federal level, the federal government has been active in a federal/provincial/territorial collaboration to establish standards and guidelines for heritage preservation, as the discussion below illustrates.

## II. Standards and Guidelines for Conservation of Historic Places

The Standards and Guidelines for the Conservation of Historic Places in Canada<sup>14</sup> is a federal, provincial, and territorial collaboration “to regulate and guide heritage conservation and its related processes as a standard for policymakers, planners, and jurisdictions to follow in order to recognize, manage, and conserve historic places in Canada.”<sup>15</sup> It directs the actions of Parks Canada to “ensure the sustainable conservation of cultural resources at the protected heritage places it administers.”<sup>16</sup>

According to the Standards and Guidelines,

[c]ulturally sensitive places are defined here as officially recognized places that have been given special meaning by a group or a community. Those places can include burial grounds, above-ground burials, abandoned cemeteries and other sites that may have cultural or spiritual value to a community. Each province or territory has its own

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<sup>11</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, Dec. 17, 1975, 15511 U.N.T.S. 1037, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800fece0&clang=_en), archived at <https://perma.cc/3DDS-TFE4>; *States Parties Ratification Status*, WORLD HERITAGE CONVENTION, <https://whc.unesco.org/en/statesparties/>, archived at <https://perma.cc/Z6A5-BBJL>.

<sup>12</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, Aug. 7, 1956, 3511 U.N.T.S. 249, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280145bac&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280145bac&clang=_en), archived at <https://perma.cc/FEY4-XL92>.

<sup>13</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, April 24, 1972, 3511 U.N.T.S. 249, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801170ec&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801170ec&clang=_en), archived at <https://perma.cc/RB3P-M23A>.

<sup>14</sup> STANDARDS AND GUIDELINES FOR THE CONSERVATION OF HISTORIC PLACES IN CANADA (2d ed. 2010), <https://www.historicplaces.ca/media/18072/81468-parks-s+g-eng-web2.pdf>, archived at <https://perma.cc/X54P-GD9L>.

<sup>15</sup> Julia Catherine Marie Stevens, *Indigenous Intangible Cultural Heritage: Towards an Indigenous Approach to Canadian Heritage Management and Planning* 21 (M.A. Thesis, University of Waterloo, 2017), <https://core.ac.uk/download/pdf/144150410.pdf>, archived at <https://perma.cc/7QAQ-TRFH>.

<sup>16</sup> HOUSE OF COMMONS, REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, PRESERVING CANADA’S HERITAGE: THE FOUNDATION FOR TOMORROW 9 (42nd Parl. 1st Sess., Dec. 2017), <http://www.ourcommons.ca/Content/Committee/421/ENVI/Reports/RP9295003/envirp10/envirp10-e.pdf>, archived at <https://perma.cc/5MA5-LF9E>.

heritage/archaeology/cemetery statutes that relate to burial sites and human remains. In addition, some settled land claims agreements set out obligations related to burial sites and human remains. It is best practice to inform, and in some cases mandatory to consult, the local and/or culturally affiliated Aboriginal and non-Aboriginal communities before visiting or intervening on a culturally sensitive place, or before removing human remains and funerary objects considered archaeological.<sup>17</sup>

Section 4.2.8 (“Culturally-Sensitive Places”) of the Guidelines “provide direction when an archaeological site is considered to be, or is located in, a culturally-sensitive place.”<sup>18</sup> The Guidelines define “culturally-sensitive places” as “formally recognized places that have been given special meaning by a group or a community. These places include burial grounds, above-ground burials, and abandoned cemeteries, Aboriginal spiritual places, such as medicine wheels and effigies, and other sites that may have spiritual value for a community.”<sup>19</sup> According to the Guidelines

[c]ulturally-sensitive places deserve a separate section in these guidelines because their heritage value most often resides in their cultural, social and spiritual significance. The heritage value of culturally sensitive places is not always proportional to the extent or state of their physical remains. Therefore, great sensitivity is required so that conservation strategies preserve the associated values of these places, even when there is little tangible evidence on or in the ground. These types of archaeological sites can be found in many contexts, in urban as well as natural environments. If human remains are discovered, all activities must stop, and the proper authorities must be contacted. Any action on human remains should only be performed according to provincial and territorial legislation and be supported by the affiliated community.<sup>20</sup>

The following are the general guidelines for preservation and rehabilitation in culturally sensitive places as set forth in section 4.2.8 of the Guidelines:

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<sup>17</sup> STANDARDS AND GUIDELINES FOR THE CONSERVATION OF HISTORIC PLACES IN CANADA, *supra* note 14, at 99.

<sup>18</sup> *Id.* § 4.2.8, at 122.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**General Guidelines for Preservation and Rehabilitation**

	Recommended	Not recommended
1	<b>Understanding</b> the potentially sensitive nature of an archaeological site and its environment, for a group or community, before any intervention is undertaken.	
2	<b>Protecting</b> and preserving the landscape and its natural features that directly contribute to the site’s heritage value.	
3	<b>Recording</b> without disturbance the elements that contribute to the heritage value in consultation with the affiliated community.	Recording the elements that contribute to the heritage value, using methods that disregard the sensitive nature of the sites.
4	<b>Stabilizing</b> the character-defining elements, using methods that do not affect the site’s heritage value.	
5	<b>Working</b> with interested parties, particularly the affiliated community, to define acceptable activities at a culturally sensitive place.	Allowing activities in culturally sensitive places, without notifying interested parties, resulting in negative impacts on the heritage value.
6	<b>Preserving</b> the heritage value of a site by enabling a continued relationship between cultural groups and culturally-sensitive places, when this relationship contributes to the heritage value of the site. This includes access and use for rituals, ceremonies and traditional gatherings, while ensuring measures to protect heritage value are in place. The need to preserve the community’s relationship with the place should be balanced with the need to preserve the character-defining elements.	
7	<b>Protecting</b> the archaeological context of burials to preserve associated information.	
8	<b>Removing</b> , when appropriate, human remains with associated funerary objects and surrounding soil, with the support of the affiliated community and after documenting their position.	Removing human remains without the support of the affiliated community, and without including information about context and location, such as soil, position, funerary objects, etc.

*Source:* STANDARDS AND GUIDELINES FOR THE CONSERVATION OF HISTORIC PLACES IN CANADA § 4.2.8 at 123 (2d ed. 2010).

The Standards define a heritage or historic place as “a structure, building, group of buildings, district, landscape, archaeological site or other place in Canada that has been formally recognized for its heritage value.”<sup>21</sup> According to a 2017 report this designation has been granted to about 13,000 sites across the country by various levels of government.<sup>22</sup>

### III. Federal Law

A variety of federal laws may come into play with regard to the protection of indigenous heritage protection:

- The Historic Sites and Monuments Act<sup>23</sup> grants the Historic Sites and Monuments Board of Canada, a federal agency, with the power to “receive and consider recommendations respecting the marking or commemoration of historic places, the establishment of historic museums and the administration, preservation and maintenance of historic places and historic museums, and shall advise the Minister in carrying out his powers under this Act.”<sup>24</sup> The Board has the “mandate to advise the Minister of Environment on the designation of national historic sites, heritage railway stations and heritage lighthouses.”<sup>25</sup> The Board “evaluates applications for designating national historic places, heritage railway stations and heritage lighthouses. Archaeological sites of potential national significance will be referred to the Historic Sites and Monuments Board of Canada for consideration.”<sup>26</sup>
- The Parks Canada Agency Act<sup>27</sup> stipulates that the Parks Canada Agency (or Parks Canada) is the federal agency responsible for the implementation “of policies of the Government of Canada that relate to national parks, national historic sites, national marine conservation areas, other protected heritage areas and heritage protection programs.”<sup>28</sup> Parks Canada has the

largest share of federal responsibilities related to heritage site conservation. It has direct stewardship of 171 national historic sites, 505 national heritage buildings, 10 heritage lighthouses, 6 Canadian heritage rivers and 12 world heritage sites. Around 20 other federal departments and agencies administer a total of 767 federal heritage buildings.<sup>29</sup>

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<sup>21</sup> STANDARDS AND GUIDELINES FOR THE CONSERVATION OF HISTORIC PLACES IN CANADA, *supra* note 14, at 5; see also *Definitions and Heritage FAQs*, HERITAGE BC, <https://heritagebc.ca/resources/definitions-heritage-faqs/> (last visited Feb. 28, 2019), archived at <https://perma.cc/6GL7-3ZTE>.

<sup>22</sup> REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, *supra* note 16, at 12.

<sup>23</sup> Historic Sites and Monuments Act, R.S.C., 1985, c. H-4, <https://laws-lois.justice.gc.ca/eng/acts/H-4/FullText.html>, archived at <https://perma.cc/TN6U-WSYL>.

<sup>24</sup> *Id.* § 7.

<sup>25</sup> REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, *supra* note 16, at 13.

<sup>26</sup> *Id.* at 16.

<sup>27</sup> Parks Canada Agency Act, S.C. 1998, c. 31, <https://laws-lois.justice.gc.ca/eng/acts/p-0.4/FullText.html>, archived at <https://perma.cc/Y9HU-FVAU>.

<sup>28</sup> *Id.* § 6(1).

<sup>29</sup> REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, *supra* note 16, at 15.

Parks Canada manages cultural resources using its Cultural Resource Management Policy.<sup>30</sup> The purpose of this policy is “to ensure that its requirements are effectively applied at our protected heritage places so that cultural resources are conserved and their heritage value is shared for the understanding, appreciation and enjoyment of present and future generations.”<sup>31</sup>

- The Canada National Marine Conservation Areas Act<sup>32</sup> provides that the Governor in Council “may make regulations ‘for the protection of cultural, historical and archaeological resources’ in marine conservation areas.”<sup>33</sup>
- The Department of Canadian Heritage “plays an important role in identifying, recognizing, protecting and presenting Canadian historic and natural sites, notably national parks, national historic sites, historic canals, heritage railway stations and federal heritage buildings.”<sup>34</sup> The Department also “administers other heritage resource instruments, such as a policy framework for the protection of archaeological resources,” called the Archaeological Heritage Policy Framework.<sup>35</sup>
- Canada’s federal Criminal Code also plays a role in cultural heritage protection. Improper interference with human remains is an indictable offense under section 182 of the Code.<sup>36</sup>

## IV. Provincial Laws

### A. Overview

As noted above, most Canadian heritage protection and preservation legislation has been enacted by provincial and territorial governments. Each province and territory has “developed legislative and policy frameworks to address issues of cultural heritage and Indigenous relations amongst other responsibilities.”<sup>37</sup> In Ontario, for example, heritage protection is regulated by the Ontario

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<sup>30</sup> Parks Canada, Cultural Resource Management Policy (effective Jan. 1, 2013), <https://www.pc.gc.ca/en/docs/pc/poli/grc-crm>, archived at <https://perma.cc/Z8L8-859U>.

<sup>31</sup> REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, *supra* note 16, at 15.

<sup>32</sup> Canada National Marine Conservation Areas Act, S.C. 2002, c. 18, <https://laws-lois.justice.gc.ca/eng/acts/c-7.3/FullText.html>, archived at <https://perma.cc/D7PS-HXVY>.

<sup>33</sup> REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, *supra* note 16, at 15.

<sup>34</sup> CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, REFERENCE GUIDE ON PHYSICAL AND CULTURAL HERITAGE RESOURCES (1996), <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/reference-guide-physical-cultural-heritage-resources.html>, archived at <https://perma.cc/QK35-IV2S>.

<sup>35</sup> *Archaeological Heritage Policy Framework*– 1990, PARKS CANADA, <https://www.pc.gc.ca/en/docs/pc/poli/arch> (last updated Mar. 30, 2017), archived at <https://perma.cc/WYC6-4HWQ>.

<sup>36</sup> *Human Remains*, PARKS CANADA, [https://www.pc.gc.ca/en/docs/r/pfa-fap/sec7/decouv\\_discov3](https://www.pc.gc.ca/en/docs/r/pfa-fap/sec7/decouv_discov3) (last modified Mar. 30, 2017), archived at <https://perma.cc/P8D7-WXFS>.

<sup>37</sup> Stevens, *supra* note 15, at 54.

Heritage Act,<sup>38</sup> while British Columbia it is protected under the Heritage Conservation Act. According to one article on cultural heritage in Canada,

[a]ll provinces have enacted heritage conservation laws that control excavations affecting historical resources through a permit system, provide for the reporting, designation and protection of historical resources, and vest ownership of archaeological and other historical resources and sites discovered in or on provincial public (and in some instances private) lands in the provincial Crown.<sup>39</sup>

Another article provides the following summary of the provincial legal frameworks for heritage management in Canada:

Each province and territory in Canada has cultural heritage protection legislation, and an administrative unit to implement and manage activities resulting from it. The administrative units charged with regulating work under these acts are situated in a variety of ministries or departments that often have a broader scope beyond cultural heritage. The basic principle of most of this legislation is to provide blanket protection for all cultural heritage remains and sites, on private or public property, recorded or not, and the use of permits or licenses to control any alterations to those sites. Although these laws vary, they share many common elements regarding the nature and kind of heritage resources protected, special protection provisions, control over the conduct of work, ownership and stewardship, management of impacts, and civil remedies for contravention. Penalties, which may include fines and/or incarceration, vary across the country with differentiation between individual and corporate violators.<sup>40</sup>

In regard to indigenous burial grounds and human remains a complex set of laws can apply, including heritage protection legislation, coroners legislation, and cemeteries legislation.<sup>41</sup> However, provincial cemeteries legislation in Canada is “designed only for modern (i.e., non-ancient) designated burial grounds” and “therefore it is of no value in the preservation of most aboriginal burial grounds,” according to one source.<sup>42</sup> Ontario and Prince Edward Island appear to be an exception where burial heritage protection is provided by their respective cemeteries legislation.<sup>43</sup>

In Canada, municipalities fall under the jurisdiction of provincial governments, and “[h]eritage management has increasingly fallen under the responsibility of municipalities in recent years as

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<sup>38</sup> Ontario Heritage Act, R.S.O. 1990, c. O.18, <https://www.ontario.ca/laws/statute/90o18>, archived at <https://perma.cc/AAA6-UN6D>.

<sup>39</sup> Catherine Bell, *Ownership and Trade of Aboriginal Cultural Heritage in Canada*, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 379 (Christoph Beat Graber & Karolina Kuprecht eds., 2012).

<sup>40</sup> Pokotylo & Mason, *supra* note 2, at 1104.

<sup>41</sup> *Human Remains*, PARKS CANADA, *supra* note 36.

<sup>42</sup> Bruce Ziff & Melodie Hope, *Unsightly: The Eclectic Regimes that Protect Aboriginal Cultural Places in Canada*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 189 (Catherine Bell & Robert Paterson eds., 2009).

<sup>43</sup> Bell, *supra* note 39, at 379.

provinces transfer responsibilities due to budgetary constraints and lack of political interest.”<sup>44</sup> Municipalities have the power to pass “bylaws that pertain to the heritage management of heritage buildings, districts, and even cultural landscapes.”<sup>45</sup>

## B. The British Columbia Example

In British Columbia, heritage and archaeological conservation and protection is regulated mainly by the Heritage Conservation Act (HCA).<sup>46</sup> The HCA provides “for the protection of British Columbia’s archaeological resources, covering sites dated before 1846” and “apply whether sites are located on public or private land.”<sup>47</sup> The Archaeology Branch of the British Columbia Ministry of Forests, Lands and Natural Resource Operations “encourages and facilitates the protection, conservation and public appreciation of British Columbia’s unique archaeological resources under the Heritage Conservation Act.”<sup>48</sup>

Archaeological or heritage sites or objects are protected through designation as “Provincial heritage sites” or “Provincial heritage objects (section 9), or “through automatic protection by virtue of being of particular historic or archaeological value (section 13).”<sup>49</sup>

- “Heritage object” under the Act means “whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people.”
- “Heritage site” means “whether designated or not, land, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people.”
- “Heritage value” means “the historical, cultural, aesthetic, scientific or educational worth or usefulness of a site or object.”<sup>50</sup>

One exception to this designation regime is Ontario’s Cemeteries Act, which “governs the management of land containing human remains, including those that have not been approved or consented to as a cemetery.”<sup>51</sup>

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<sup>44</sup> Stevens, *supra* note 15, at 60.

<sup>45</sup> *Id.* at 64.

<sup>46</sup> Heritage Conservation Act [RSBC 1996] Ch. 187, [http://www.bclaws.ca/civix/document/id/complete/statreg/96187\\_01#part1](http://www.bclaws.ca/civix/document/id/complete/statreg/96187_01#part1), archived at <https://perma.cc/ZM8D-WN8Y>.

<sup>47</sup> *Permits and Permitting*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, [https://www.for.gov.bc.ca/archaeology/archaeology\\_professionals/permits.htm](https://www.for.gov.bc.ca/archaeology/archaeology_professionals/permits.htm) (last visited Feb. 28, 2019), archived at.

<sup>48</sup> *About the Branch*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, <https://www.for.gov.bc.ca/archaeology/about.htm> (last visited Feb. 28, 2019), archived at <https://perma.cc/7E52-B88K>.

<sup>49</sup> *Permits and Permitting*, *supra* note 47.

<sup>50</sup> Heritage Conservation Act, § 1.

<sup>51</sup> Ziff & Hope, *supra* 42, at 189.

Staff of the Archeology Branch “authorize archaeological work throughout the province by means of a permit system.”<sup>52</sup> According to BC’s Ministry of Forests, Lands, Natural Resource Operations and Rural Development website,

[p]rotected archaeological sites may not be altered, i.e. changed in any manner, without a permit issued by the Minister or designate. The HCA affords considerable discretionary authority in determining if, and under what conditions, such permits are to be granted (sections 12 and 14).<sup>53</sup>

The Archeology Branch also “maintains a provincial heritage registry of all known archaeological sites, heritage sites and objects, heritage wrecks and other types of sites.”<sup>54</sup>

Section 4 of the Act allows the Province to “enter into a formal agreement with a first nation with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by that first nation.”<sup>55</sup> The Archeology Branch has entered into various agreements<sup>56</sup> with First Nations and other provincial agencies. According to BC’s Ministry of Forests, Lands, Natural Resource Operations and Rural Development website:

[t]hese agreements are used to clarify responsibilities of each group and, in the case of First Nations, to provide a more formal role in archaeological resource management. The Heritage Conservation MOU highlights the importance of heritage protection and conservation during development projects and resource extraction. It establishes processes to effectively share information between the Province and Treaty 8 First Nations and enables the participation of Treaty 8 First Nations in heritage conservation.<sup>57</sup>

In 1994, the Heritage Conservation Statute Amendment Act “enabled municipal powers to protect local heritage from alteration or destruction. The Vancouver Charter was amended to improve regulations for heritage structures and sites.”<sup>58</sup>

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<sup>52</sup> *About the Branch*, *supra* note 48.

<sup>53</sup> *Permits and Permitting*, *supra* note 47.

<sup>54</sup> *About the Branch*, *supra* note 48.

<sup>55</sup> Heritage Conservation Act, § 4(1).

<sup>56</sup> *Agreements*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, [https://www.for.gov.bc.ca/archaeology/legislation\\_agreements\\_policies\\_guidelines\\_bulletins/agreements.htm](https://www.for.gov.bc.ca/archaeology/legislation_agreements_policies_guidelines_bulletins/agreements.htm), (lasted visited Feb. 28, 2019), *archived at* <https://perma.cc/S4LH-A7E8>.

<sup>57</sup> *Id.*

<sup>58</sup> *Heritage Legislation: An Overview*, VANCOUVER HERITAGE FOUNDATION, <https://www.vancouverheritagefoundation.org/learn-with-us/policies-by-laws/heritage-legislation-an-overview/> (lasted visited Feb. 28, 2019), *archived at* <https://perma.cc/ZJB5-TGFS>.

### 1. *Heritage Designation*

Heritage designation of sites and objects by the Lieutenant Governor are done under section 9 of the Act according to the procedure stipulated under section 10. Before a designation can be made, the minister must serve a notice of proposed designation to the following persons:

- (a) in the case of land,
  - (i) all persons who, according to the records of the land title office, have a registered interest in the land to be designated,
  - (ii) the local government or local governments having jurisdiction over the land to be designated, and
  - (iii) the first nation or first nations within whose traditional territory the land to be designated lies;
- (b) in the case of objects,
  - (i) the person who has possession of the object,
  - (ii) all parties who, according to the records of the personal property registry established under the *Personal Property Security Act*, have a registered interest in the object, and
  - (iii) any other person or party who, in the opinion of the minister, is or may be the owner of the object or has or may have a proprietary interest in the object;
- (c) any other prescribed person.<sup>59</sup>

A person or party served with notice may “serve the minister with a notice of objection to the proposed designation within 30 days after receiving the notice of the proposed designation.”<sup>60</sup>

On receiving a notice of objection, “the minister must review the objection and may then amend or cancel the proposed designation as the minister considers appropriate.”<sup>61</sup> Before a designation is made, the minister must

advise the Lieutenant Governor in Council if any notice of objection to the proposed designation has been received and, if so received, provide the Lieutenant Governor in Council with a copy of each notice of objection received, the results of the review of the notice or notices of objection and the terms and conditions of any amendment to the proposed designation.<sup>62</sup>

Subsequently the Act stipulates that,

- (5) Within 30 days after
  - (a) the minister cancels a proposed designation,
  - (b) the Lieutenant Governor in Council makes a designation, or
  - (c) the Lieutenant Governor in Council decides not to make a designation,

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<sup>59</sup> Heritage Conservation Act, § 10(1).

<sup>60</sup> *Id.* § 10(2).

<sup>61</sup> *Id.* § 10(3).

<sup>62</sup> *Id.* § 10(4).

the minister must serve notice on the persons entitled to notice under subsection (1) that a designation has or has not been made.<sup>63</sup>

If a designation made under section 9 “causes, or will cause at the time of designation, a reduction in the market value of the designated property,” the government must compensate an owner of the designated property who makes an application, and “the compensation must be in an amount or in a form the minister and the owner agree on or, failing an agreement, in an amount or in a form determined by binding arbitration.”<sup>64</sup>

Section 23(1) of the Act grants the Lieutenant Governor in Council to pursuant to an order “designate a heritage site on Crown land as a Provincial heritage property and the Provincial heritage property includes the collection of accessioned artifacts associated with that heritage site.”<sup>65</sup>

## 2. Permits

The Director of the Archaeology Branch and the Manager, Permitting and Assessment Section, “have been authorized to exercise the powers of the Minister to issue permits under sections 12(2) and 14(2), as well as ministerial orders under section 14(4) where necessary for emergency conservation purposes.”<sup>66</sup>

### a. Heritage Inspection and Heritage Investigation Permits

Heritage Inspection and Heritage Investigation Permits are issued pursuant to section 14 of the HCA “subsequent to Branch review.” Section 14(1) of the Act stipulates that “[a] person must not excavate or otherwise alter land for the purpose of archaeological research or searching for artifacts of aboriginal origin except under a permit or order issued under this section.”<sup>67</sup> The objective of a heritage inspection is to “assess the archaeological significance of land or other property. In this regard, the inspection determines the presence of archaeological sites which warrant protection, or are already protected, under the HCA.”<sup>68</sup>

Archaeological impact assessment studies are required where potential conflicts have been identified between archaeological resources and a proposed development.

Sites are located and recorded, and site significance is evaluated to assess the nature and extent of expected impacts. The assessment includes recommendations to manage the expected impact of property development on the site.

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<sup>63</sup> *Id.* § 10(5).

<sup>64</sup> *Id.* § 11(1).

<sup>65</sup> *Id.* § 23(1).

<sup>66</sup> *Found Human Remains*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, <https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/archaeology/guidance-policy-tools/policy> (lasted visited Feb. 28, 2019), archived at <https://perma.cc/EE2M-TZ5G>.

<sup>67</sup> Heritage Conservation Act, § 14(1).

<sup>68</sup> *Permits and Permitting*, *supra* note 47.

These recommendations may include:

- Avoiding the site.
- Recovering archaeological site information prior to land altering activities.
- Monitoring for additional archaeological site information during land altering activities.

Assessments require a heritage inspection permit issued by the branch. Permitted archaeological impact assessments are used to identify site locations, evaluate site significance and determine the magnitude of development related impact when sites cannot be avoided.<sup>69</sup>

A heritage investigation is “undertaken in order to recover information which might otherwise be lost as a result of site alteration or destruction.”<sup>70</sup>

#### b. Alteration Permits

Alteration permits are issued under section 12 of the Act. The site alteration permit “authorizes the removal of residual archaeological deposits once the inspection and/or investigation are completed.”<sup>71</sup> If a permit is issued, it

- (3) . . . may include requirements, specifications and conditions that the minister considers appropriate and, without limiting the generality of this, the permit may
- (a) be limited to a specified period of time or to a specified location,
  - (b) require the holder of the permit to consult with or obtain the consent of one or more parties whose heritage the property represents or may represent,
  - (c) require the holder of the permit to provide the minister with reports satisfactory to the minister, and
  - (d) specify a repository for heritage objects that are removed from the heritage property.<sup>72</sup>

The branch requires fifteen days to review permit applications where no further information or clarification is needed.<sup>73</sup> In addition, between fifteen and thirty days is also required in order to provide an “opportunity for those who may be affected by a permitting decision (e.g., First Nations) to have their comments considered.”<sup>74</sup>

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<sup>69</sup> *What an Archaeological Impact Assessment Entails*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, [https://www.for.gov.bc.ca/archaeology/preservation/process/archaeological\\_impact\\_assessment.htm](https://www.for.gov.bc.ca/archaeology/preservation/process/archaeological_impact_assessment.htm) (lasted visited Feb. 28, 2019), archived at <https://perma.cc/CS6H-7MKV>.

<sup>70</sup> *Permits and Permitting*, *supra* note 47.

<sup>71</sup> *Id.*

<sup>72</sup> Heritage Conservation Act, § 12(3).

<sup>73</sup> *Permits and Permitting*, *supra* note 47.

<sup>74</sup> *Id.*

c. Consultation and Balancing Interests

Catherine Bell, professor of Aboriginal law at the University of Alberta, notes that “absent from the HCA and other provincial statutes,” but contained in some agreements with First Nations, “is an express and mandatory duty for the provinces to consult and accommodate [the] interest of First Nations before issuing heritage inspection, investigation or site alteration permits for protected sites.”<sup>75</sup> However, “some consultation before issuing permits occurs as a matter of provincial policy”:<sup>76</sup>

An important decision in B.C. was the *Nanoose* case in which the Nanoose First National opposed development of a condominium complex and a sewage facility on land where a burial ground and village site were located. Applying principles of procedural fairness, the court held the Minister was required to give notice of impending issuance of permits and that affected First Nations had a right to be heard. Following this litigation, in the late 1990s the B.C. Archaeological Branch adopted a policy to notify and consider comments from First Nations ‘known to assert a traditional interest in the area of the proposed activities.’<sup>77</sup>

...

If a permit under the HCA authorizes damage or alteration and is the only permit that can do this, the duty to consult is clearly triggered. The example given by the BCCA in *Lax Kw’alaams* is a First Nation claiming Aboriginal title to a burial site on privately owned land, an owner wishing to build a house on that land, and no other statute or ministry is involved. At the very least in these circumstances consultation and accommodation are required. However, this obligation is not mandated or clear under B.C. and other provincial heritage legislation for heritage sites located on private land, nor is the process mandated or clear when other permits may be required for private or public land and specific agreements with First Nations have not been entered.<sup>78</sup>

It should be noted that the Supreme Court of Canada (SCC) has issued several decisions that Canadian governments have a constitutional duty to consult and, “if appropriate depending on the depth of consultation required, accommodate if actions taken adversely impact or have the potential to adversely impact heritage sites where Aboriginal rights or title are established or can be credibly asserted.”<sup>79</sup> However, the constitutional duty to consult developed by SCC decisions are “concerned with treaty rights or Aboriginal title claims against Crown land, not private lands held by individuals or corporations.”<sup>80</sup>

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<sup>75</sup> Catherine Bell, *First National Control over Archeological Sites: Contemporary Issues in Heritage Law, Policy and Practice*, in *COMPARATIVE LAW AND ANTHROPOLOGY* 65 (James A.R. Nafziger, 2017).

<sup>76</sup> *Id.* at 66.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 70.

<sup>79</sup> *Id.* at 64.

<sup>80</sup> *Id.* at 71.

Authorities balance interests in their decision-making process concerning permits:

Balancing interests is also inherent in the process for issuing permits under provincial heritage conservation legislation that enables a provincial Minister or delegate to permit otherwise prohibited actions of alteration or destruction of a protected heritage site, such as those listed under B.C.'s description of heritage sites under the HCA, if the balance of interests weighs in favour of development. . . . However the challenge of reconciling Aboriginal land rights with private property interests has often resulted in balancing process weighing against preservation and the assumption in implementation of government heritage policy that site alteration permits will rarely be denied or development stopped.<sup>81</sup>

### 3. *Heritage Protection*

The Act prohibits the destruction, excavation or alteration of archaeological sites without a permit. Pursuant to section 13(2)(b) of the HCA, a permit is required under section 12 or 14 before a person can undertake any actions affecting a burial place of historical or archaeological value, human remains or associated heritage objects:

- 13** (1) Except as authorized by a permit issued under section 12 or 14, a person must not remove, or attempt to remove, from British Columbia a heritage object that is protected under subsection (2) or which has been removed from a site protected under subsection (2).
- (2) Except as authorized by a permit issued under section 12 or 14, or an order issued under section 14, a person must not do any of the following:
- (a) damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;
  - (b) damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;
  - (c) damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;
  - (d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846;
  - (e) damage or alter a heritage wreck or remove any heritage object from a heritage wreck;
  - (f) damage, excavate, dig in or alter, or remove any heritage object from, an archaeological site not otherwise protected under this section for which identification standards have been established by regulation;
  - (g) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of unknown origin if the site may be protected under paragraphs (b) to (f);
  - (h) damage, desecrate or alter a site or object that is identified in a schedule under section 4 (4) (a);

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<sup>81</sup> *Id.* at 74.

- (i) damage, excavate or alter, or remove any heritage object from, a property that is subject to an order under section 14 (4) or 16.<sup>82</sup>

#### 4. Other Measures

Section 16 of the Act provides for temporary protection orders “[i]f the minister considers that property has or may have heritage value and is likely to be altered for any reason, the minister may issue, to a person or class of persons, a stop work order that prohibits any alteration of the property for a period of up to 120 days, subject to any requirements and conditions the minister considers appropriate.”<sup>83</sup>

The minister also has other powers, including the power to purchase or acquire property:

- 20** (1) To further the objects of this Act, the minister may do one or more of the following:
  - (a) acquire, manage and conserve property or acquire an interest in property;
  - (b) enter into agreements with a person, organization, local government, first nation or the government of Canada or of a province;
  - (c) conduct and arrange exhibits or activities to inform and stimulate the interest of the public in any matter related to the purposes of this Act;
  - (d) subject to a trust or agreement under which a property was obtained, dispose of the property and execute instruments required to effect the disposal;
  - (e) receive, by donation, public subscription, devise, bequest or otherwise, money or property;
  - (f) assist in or undertake research, study or publication respecting heritage conservation;
  - (g) provide grants, advice and services to other parties having aims and objectives consistent with the purposes of this Act;
  - (h) establish and maintain one or more inventories of heritage sites and heritage objects, including a list of heritage buildings for which the Alternate Compliance Methods of the British Columbia Building Code may apply.
- (2) Property acquired by the minister under this Act is the property of the government and title to the property may vest in the name of the government.
- (3) Despite the *Land Act*, property acquired by the minister under this Act may be dealt with by the minister under this Act.<sup>84</sup>

The minister can also intervene for purposes of preservation under section 21 of the Act:

- 21** (1) If the minister considers that property protected under section 13 (2) is subject to damage or deterioration, the minister may order the owner, on terms and conditions that the minister considers appropriate, to preserve the property at the expenses of the government.

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<sup>82</sup> Heritage Conservation Act, § 13.

<sup>83</sup> *Id.* § 16.

<sup>84</sup> *Id.* § 20.

- (2) If the minister considers that property protected under section 13 (2) is subject to damage or deterioration and is being unreasonable neglected by the owner, the minister may order the owner, on terms and conditions and to specifications that the minister considers appropriate, to preserve the property at the expense of the owner or at the expense of the owner and the government on a cost sharing basis.<sup>85</sup>

Civil remedies, including injunctions to restrain persons from committing contraventions of the Act; government applications for restoration; or compliance orders are provided for under section 34 of the Act, while offenses and penalties for persons and corporations are provided by section 36 of the Act:

- 36** (1) A person who does any of the following commits an offence:
- (a) contravenes section 13 (6), 14 (1) or (8) or a provision of the *Park Act* referred to in section 23 (2) as it applies to a Provincial heritage property;
  - (b) fails to comply with or contravenes a requirement or condition of an order or permit under section 12 (2) (a), 14 (2) or (4), 16, 19 (2), 23 (2) or 34 (3);
  - (c) contravenes a regulation made under section 23 (2) or 37 (2) (e);
  - (d) contravenes section 13 (1) or (2).
- (2) A person convicted of an offence under subsection (1) (a) to (c) is liable to a fine of not more than \$2 000 or to imprisonment for a term of not more than 6 months or to both.
- (3) A person convicted of an offence under subsection (1) (d) is liable,
- (a) if the person is an individual, to a fine of not more than \$50 000 or to imprisonment for a term of not more than 2 years or to both, or
  - (b) if the person is a corporation, to a fine of not more than \$1 000 000.
- (4) If a corporation commits an offence under this Act, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence also commits the offence and is liable,
- (a) if it is an offence under subsection (1) (a) to (c), to the penalty set out in subsection (2), or
  - (b) if it is an offence under subsection (1) (d), to the penalty set out in subsection (3) (a).<sup>86</sup>

### 5. Procedures Regarding Human Remains

The following procedures will normally apply in cases where human remains are discovered “fortuitously through various land altering activities such as house renovations, road construction or natural erosion,” or “during archaeological studies conducted under an HCA permit”:

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<sup>85</sup> *Id.* § 21.

<sup>86</sup> *Id.* § 36.

## 1. Fortuitous Discoveries

In cases where the branch has been notified that human remains have been discovered by chance, the following procedures should normally apply:

- the Coroner's Office and local policing authority should be notified as soon as possible.
- the Coroner's Office should determine whether the matter is of contemporary forensic concern. The branch may provide information and advice that may assist in this determination.
- if the Coroner's Office determines the reported remains are not of forensic concern, the branch will attempt to facilitate disposition of the remains.
- if a cultural affiliation for the remains can be reasonably determined, the branch will attempt to contact an organization representing that cultural group.
- if remains are determined to be of aboriginal ancestry, the branch will attempt to contact the relevant First Nation(s).
- generally, if remains are still interred and are under no immediate threat of further disturbance, they will not be excavated or removed.
- if the remains have been partially or completely removed, the branch will facilitate disposition.
- if removal of the remains is determined to be appropriate, they will be removed under authority of a permit issued pursuant to section 12 or 14, or an order under section 14 of the *HCA*, respecting the expressed wishes of the cultural group(s) represented to the extent this may be known or feasible.
- if circumstances warrant, the branch may arrange for a qualified physical anthropologist or an archaeologist with training in human osteology to provide an assessment of the reported remains in order to implement appropriate conservation measures.
- analysis should be limited to basic recording and in-field observations until consultation between the branch and appropriate cultural group(s) has been concluded.

## 2. Permitted Archaeological Projects

In cases where human remains are encountered in the course of a permitted project, the Archaeology Branch should be contacted as soon as possible.

- the remains are to be handled in accordance with the methods specified in the permit, respecting the expressed wishes of the cultural group(s) represented, to the extent that these may be known or feasible.
- if the permit does not specify how remains are to be handled and if the cultural affiliation of the remains can be reasonably determined, the field director or permit-holder should attempt to contact an organization representing that group. The permit-holder or field director should advise the branch of the organization contacted, and any wishes expressed by that organization.
- the branch, in consultation with the appropriate cultural group(s), will determine disposition of the remains.

- analysis should be limited to basic recording and in-field observations, until consultation between the branch and appropriate cultural group(s) has been concluded.<sup>87</sup>

## 6. Development Projects

As noted earlier, the law requires a person to obtain a site alteration permit in order to develop within a protected archaeological site. To receive a site alteration permit, the Archaeology Branch “will need to know exactly where the archaeological site is located, the site significance, and how development will affect the site.” The Ministry provides an FAQ for property owners and developers that explains the archaeological impact assessment:

This task, called an archaeological impact assessment, includes field work and is completed by a professional consulting archaeologist under Provincial authority. The archaeologist will work with you to develop options on how to manage impacts to the archaeological site.

If development related damage to significant archaeological deposits cannot be avoided, it may be necessary to complete an archaeological excavation to recover the information that will be destroyed as a result of development. This work is completed under a separate permit by a professional consulting archaeologist.

If the impact assessment results show that you are able to develop without affecting the archaeological site, you will not require a site alteration permit to proceed with development.<sup>88</sup>

The Provincial government has published a handbook, the *British Columbia Archaeological Resource Management Handbook*, which provides a summary of the Archaeological Impact Assessment and review process in British Columbia.<sup>89</sup> This process applies “principally to development projects which, by virtue of their scale, location, extent of impact, administrative or jurisdictional complexity, or other factors, are subject to British Columbia’s environmental impact assessment and review processes.”<sup>90</sup> The Ministry’s Archaeology website provides an overview of the investigative process:

Archaeological impact assessment and review in British Columbia applies mainly to development projects that are subject to British Columbia’s environmental impact

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<sup>87</sup> *Found Human Remains*, *supra* note 66.

<sup>88</sup> *Property Owners and Developers Frequently Asked Question*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, [https://www.for.gov.bc.ca/archaeology/property\\_owners\\_and\\_developers/frequently\\_asked\\_questions.htm](https://www.for.gov.bc.ca/archaeology/property_owners_and_developers/frequently_asked_questions.htm) (lasted visited Feb. 28, 2019), *archived at* <https://perma.cc/LB44-Q43Y>.

<sup>89</sup> MINISTRY OF SMALL BUSINESS, TOURISM AND CULTURE, BRITISH COLUMBIA ARCHAEOLOGICAL RESOURCE MANAGEMENT HANDBOOK (1990), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/archaeological\\_resource\\_management\\_handbook.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/archaeology/forms-publications/archaeological_resource_management_handbook.pdf), *archived at* <https://perma.cc/62RS-G3VX>.

<sup>90</sup> *Id.*

assessment and review processes. However, the same principles can also apply, with minor modification, to other developments.

A particularly important characteristic of the process used in British Columbia is its flexibility. It is not intended as a “cookbook” approach to all development projects. Although certain categories of information are needed for decision making, each archaeological study must be tailored to meet specific project characteristics and needs.

Representatives of the Archaeology Branch are available to meet with project proponents to provide project-specific clarification and interpretation of the process. Depending on the project, flexibility can be expected in the staging of impact assessment and management studies, the level of detail at which these studies are undertaken, and the reporting requirements.

The role of the branch is not to prohibit or impede land use and development, but rather to assist the development industry, the province, regional authorities, and municipalities in making decisions leading to rational land use and development.

When the benefits of a project outweigh the benefits of archaeological preservation, the branch will work with the proponent to determine how the project can go ahead with minimal archaeological resource loss. Where the loss of significant archaeological values cannot be avoided, the branch ensures that appropriate compensatory measures are implemented.<sup>91</sup>

## V. Implementation and Effectiveness

Some commentators have criticized the lack of strong federal legislation in this area and differential treatment of modern cemeteries and aboriginal burial sites. According to Professor Bell,

Canadian heritage property law and practice seeks to balance constitutional obligations to Aboriginal peoples and various dimensions of heritage value with benefits derived from land and resource development; but heritage, scientific and Aboriginal rights and interests are frequently outweighed by economic and private property rationale. This situation can be contrasted to the treatment of burials situated in lands set aside and recognized as modern cemeteries and governed by legislation which appreciates their centrality to the culture and religious traditions of living people and anticipates ongoing access, care and preservation of burial places. Cemeteries may also be negatively impacted by development, but the legal and political process required to expropriate the land for a public benefit and disturb cemeteries is often more difficult and complex. In Canada this has resulted in Aboriginal people asserting rights of ownership and control to protect burial places and other significant heritage sites, engage in associated ceremonies and legal traditions, attract public support and draw particular attention to the ongoing connection of ancestral burial grounds to the human rights, culture and wellbeing of descendant communities. Heritage policy, practice and law reform more reflective of Indigenous laws

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<sup>91</sup> *Investigative Process – Overview*, BRITISH COLUMBIA MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND RURAL DEVELOPMENT, [https://www.for.gov.bc.ca/archaeology/preservation/process/investigative\\_process.htm](https://www.for.gov.bc.ca/archaeology/preservation/process/investigative_process.htm) (last visited Feb. 28, 2019), archived at <https://perma.cc/8PZB-RSLS>.

and values are also at the forefront in modern treaty, land claim and self-government negotiations.<sup>92</sup>

As noted, Canada lacks specific federal legislative framework recognizing and affirming broad-based indigenous cultural and intellectual property protection. Furthermore, provincial legislation in this area has proven to be deficient in recognizing and affirming indigenous culture and heritage, according to one commentator.<sup>93</sup>

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<sup>92</sup> Bell, *supra* note 75, at 56.

<sup>93</sup> John Borrows, *Policy Paper: Implementing Indigenous Self-determination through Legislation in Canada* (Apr. 20, 2017), <http://www.afn.ca/wp-content/uploads/2018/09/2017-04-20-Implementing-Indigenous-self-determination-through-policy-legislation.pdf>, archived at <https://perma.cc/MR9M-3AVM>.

# Mexico

*Gustavo Guerra*  
*Senior Foreign Law Specialist*

## I. Federal Law on Monuments and Archeological, Historic and Artistic Zones

Mexican experts on archeology have indicated that in Mexico, there is no law comparable to the US NAGPRA.<sup>1</sup> Instead, Mexico's Federal Law on Monuments and Archeological, Historic and Artistic Zones (FLMAHAZ) provides that historic artifacts and human remains are to be managed exclusively by the Mexican State.<sup>2</sup>

Specifically, this Law states that human remains of individuals that belonged to civilizations that existed prior to the establishment of the Spanish civilization in national territory are the property of the Nation.<sup>3</sup> Movable and immovable goods produced by those civilizations, as well as fossil remains of paleontological interest of native species, are subject to the same legal regime.<sup>4</sup>

Movable archeological goods may not be transported or exhibited without authorization from Mexican authorities.<sup>5</sup> Civil authorities must be notified of findings of archeological goods.<sup>6</sup>

All projects aimed at discovering or researching archeological monuments must be either conducted directly by Mexico's National Institute of Anthropology and History (INAH) or by scientific institutions duly authorized by INAH.<sup>7</sup> Such authorizations determine the terms and conditions that apply to the aforementioned projects.<sup>8</sup>

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<sup>1</sup> ELISA VILLALPANDO, LA APERTURA PARA VISITA PUBLICA DE CERRO DE TRINCHERAS, SONORA, reproduced in 48-II ANALES DE ANTROPOLOGÍA 111, 117 (July 2014), <http://www.revistas.unam.mx/index.php/antropologia/article/view/46455>, archived at <https://perma.cc/B39Z-YYGW>. See also LOURDES MARQUEZ ET AL., COLECCIONES ESQUELÉTICAS HUMANAS EN MÉXICO: EXCAVACIÓN, CATALOGACIÓN Y ASPECTOS NORMATIVOS 73-75 (2011).

<sup>2</sup> *Id.* See also Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas e Históricas [Federal Law on Monuments and Archeological, Historic and Artistic Zones], arts. 27, 28, DIARIO OFICIAL DE LA FEDERACIÓN [D.O.F], May 6, 1972, available as amended through 2018 on the website of Mexico's House of Representatives, at [http://www.diputados.gob.mx/LeyesBiblio/pdf/131\\_160218.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/131_160218.pdf), archived at <https://perma.cc/WG72-U9XX>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* arts. 27, 28, 28 BIS.

<sup>5</sup> *Id.* art. 29.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* arts. 30, 31.

<sup>8</sup> *Id.* art. 31.

INAH has the authority to suspend projects that do not have proper authorization and those in which archeological materials are taken.<sup>9</sup> In these instances, INAH may occupy the site where unauthorized operations have taken place and impose pertinent penalties.<sup>10</sup>

## II. Penalties

The FLMAHAZ provides that imprisonment from three to ten years and a fine may be imposed on those who undertake archeological projects (be they through excavation, removal, or by any other means) without proper authorization from INAH.<sup>11</sup> The same penalties may be imposed on those who transport or exhibit a movable archeological good without proper authorization,<sup>12</sup> as well as to those who damage, alter, or destroy such types of goods.<sup>13</sup>

## III. Public Policies

A source specifically addressing whether the FLMAHAZ advances policies supporting the interests of native people could not be located. However, according to Mexico's anti-discrimination government agency CONAPRED (Consejo Nacional para Prevenir la Discriminación), indigenous communities are affected by "structural discrimination," as they have been historically relegated in a wide variety of aspects, including with regard to justice, education, health, and employment, despite public policies aimed at preventing precisely these issues.<sup>14</sup> CONAPRED has indicated that government agencies do not have enough resources to properly serve these communities and that decision makers occasionally ignore their interests.<sup>15</sup>

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<sup>9</sup> *Id.* art. 32.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* art. 47.

<sup>12</sup> *Id.* art. 49.

<sup>13</sup> *Id.* art. 52.

<sup>14</sup> CONAPRED, DISCRIMINACIÓN PUEBLOS Y COMUNIDADES INDÍGENAS, [https://www.conapred.org.mx/index.php?contenido=pagina&id=109&id\\_opcion=42&op=42](https://www.conapred.org.mx/index.php?contenido=pagina&id=109&id_opcion=42&op=42) (last visited Feb. 25, 2019), archived at <https://perma.cc/9F9B-K942>.

<sup>15</sup> *Id.*

# New Zealand

*Kelly Buchanan*  
*Foreign Law Specialist*

**SUMMARY** Several New Zealand statutes contains specific references to, and protections for, Māori sacred areas and cultural artifacts. Two of the key statutes for the protection of areas of interest to Māori, the Heritage New Zealand Pouhere Taonga Act 2014 and the Resource Management Act 1991, refer to the Treaty of Waitangi of 1840 and provide for processes to involve Māori in decision making related to developments that could impact such areas. In addition, the Protected Objects Act 1975 regulates the handling of Māori artifacts and provides a process for determining ownership of such items, including collective ownership. These statutes can be seen in the context of legal developments regarding land and resource rights and a shift to a government policy of biculturalism that started in the 1970s and 1980s, with current Māori-government relations policies involving principles of partnership and a duty to act in good faith, as well as redress for past breaches of the Treaty.

Heritage New Zealand Pouhere Taonga (HNZPT) guidance on the discovery of human remains states that anyone who discovers what appear to be Māori ancestral remains should contact the police, local public health units, HNZPT, and local Māori people with a connection to the relevant place. Different statutes could apply in this context, including those regulating archeological sites and burials.

## I. Legal Framework

Various New Zealand laws and government entities are relevant in the protection and preservation of Māori sacred areas, cultural artifacts, and human remains. In practice, these laws and entities interact and there are certain protocols and guidelines in place for ensuring that appropriate measures are taken and that Māori are involved in decision-making processes.

### A. Heritage New Zealand Pouhere Taonga Act 2014

The Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act),<sup>1</sup> which replaced the Historic Places Act 1993, sets out the functions and powers of Heritage New Zealand Pouhere Taonga (HNZPT), continues the role of the Māori Heritage Council, and defines certain terms and processes with respect to the protection of Māori sacred and historic sites.<sup>2</sup>

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<sup>1</sup> Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act), <http://www.legislation.govt.nz/act/public/2014/0026/latest/whole.html>, archived at <https://perma.cc/QR8X-3UK3>.

<sup>2</sup> See *Heritage New Zealand Pouhere Taonga Act - What's New?*, HERITAGE NEW ZEALAND POUHERE TAONGA (HNZPT), <http://www.heritage.org.nz/about-us/heritage-new-zealand-pouhere-taonga-act> (last visited Jan. 24, 2019), archived at <https://perma.cc/E9HW-KLUG>.

Under the Act, HNZPT is required to recognize certain principles in performing its functions:

- (a) the principle that historic places have lasting value in their own right and provide evidence of the origins of New Zealand's distinct society; and
- (b) the principle that the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage should –
  - (i) take account of all relevant cultural values, knowledge, and disciplines; and
  - (ii) take account of material of cultural heritage value and involve the least possible alteration or loss of it; and
  - (iii) safeguard the options of present and future generations; and
  - (iv) be fully researched, documented, and recorded, where culturally appropriate; and
- (c) the principle that there is value in central government agencies, local authorities, corporations, societies, tangata whenua, and individuals working collaboratively in respect of New Zealand's historical and cultural heritage; and
- (d) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.<sup>3</sup>

The interpretation section of the Act defines several of the terms used above with respect to Māori culture and heritage, which are also relevant to this report:

**tangata whenua** means, in relation to a particular place or area, the iwi [tribe] or hapū [subtribe] that holds, or at any time has held, mana whenua [customary authority over a place or area] in relation to that place or area

...

**wāhi tapu** means a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense

**wāhi tapu area** means land that contains 1 or more wāhi tapu

**wāhi tūpuna** means a place important to Māori for its ancestral significance and associated cultural and traditional values, and a reference to wāhi tūpuna includes a reference, as the context requires, to –

- (a) wāhi tūpuna:
- (b) wāhi tūpuna:
- (c) wāhi tūpuna

The word “taonga” can be defined as “treasure” or “anything prized”<sup>4</sup> and is used in various New Zealand statutes in relation to items or features of significance to Māori.

The HNZPT Act also includes a provision related to the Treaty of Waitangi, which was signed in 1840 by representatives of the British Crown and Maori chiefs (see below, Part II). The HNZPT Act's Treaty provision lists various sections of the Act that are intended to “recognise and respect the Crown's responsibility to give effect” to the Treaty.<sup>5</sup> This includes the appointment of at least three members of the board of HNZPT “who are qualified for appointment having regard to their knowledge of te ao Māori [the Māori world] and tikanga Māori [Māori customs or behavioral

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<sup>3</sup> HNZPT Act s 4.

<sup>4</sup> See *Taonga*, MĀORI DICTIONARY, <https://maoridictionary.co.nz/search?keywords=taonga> (last visited Jan. 24, 2019), archived at <https://perma.cc/ZP64-JE9A>.

<sup>5</sup> HNZPT Act s 7.

guidelines]”<sup>6</sup> the power of HNZPT to delegate functions and powers to the Māori Heritage Council, as well as the functions and powers of that Council with respect to the protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, historic places, and historic areas of interest to Māori;<sup>7</sup> and sections that provide for “the measures that are appropriate to support processes and decisions relating to sites that are of interest to Māori or to places on Māori land.”<sup>8</sup>

One of the core functions of HNZPT is to “identify, record, investigate, assess, list, protect, and conserve historic places, historic areas, wāhi tūpuna, wāhi tapu, and wāhi tapu areas or enter such places and areas on the New Zealand Heritage List/Rārangi Kōrero.”<sup>9</sup> It may also enter into a “heritage covenant” with the owner of a particular place or area for the protection, conservation, and maintenance of that place or area.<sup>10</sup> In addition, certain historic places may be owned or controlled by HNZPT, or vested in it to ensure their protection, preservation, and conservation.<sup>11</sup> The HNZPT Act contains offenses with respect to modifying or destroying property or land that is vested in HNZPT or subject to a covenant.<sup>12</sup>

Various provisions and criteria apply with respect to considering entries for the New Zealand Heritage List/Rārangi Kōrero, including provisions that specifically relate to wāhi tapu areas.<sup>13</sup> Information about places and areas on the list, and any covenants that have been entered into, is provided to the appropriate local authorities.<sup>14</sup>

The Māori Heritage Council is assigned the task of considering and determining applications to enter wāhi tūpuna, wāhi tapu, and wāhi tapu areas on the New Zealand Heritage List/Rārangi Kōrero, and can also propose “historic places and historic areas of interest to Māori” for entry on the list.<sup>15</sup> More generally, among several other functions, the Council seeks to “ensure that, in the protection of wāhi tūpuna, wāhi tapu, wāhi tapu areas, and other historic places and historic areas of interest to Māori, Heritage New Zealand Pouhere Taonga meets the needs of Māori in a culturally sensitive manner.”<sup>16</sup>

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<sup>6</sup> *Id.* ss 7(a) & 10. See *Tikanga Maori*, TE TAURA WHIRI I TE REO MĀORI, <http://www.tetaurawhiri.govt.nz/maori-language/tikanga-maori/> (last visited Jan. 24, 2019), archived at <https://perma.cc/LP36-K77Z>.

<sup>7</sup> HNZPT Act ss 7(c) & (d), 27 & 28.

<sup>8</sup> *Id.* s 7(f).

<sup>9</sup> *Id.* s 13(1)(a).

<sup>10</sup> *Id.* s 39.

<sup>11</sup> See *id.* s 13(1)(f).

<sup>12</sup> *Id.* ss 85 & 86.

<sup>13</sup> *Id.* pt 4 subpt 1.

<sup>14</sup> *Id.* s 76.

<sup>15</sup> *Id.* ss 68 & 27(1)(f) & (g).

<sup>16</sup> *Id.* s 27(1)(a).

## B. Protected Objects Act 1975

The Protected Objects Act 1975 regulates the export of protected New Zealand objects, establishes and records ownership of “ngā taonga tūturu,” and controls the sale of ngā taonga tūturu within New Zealand, among other matters.<sup>17</sup> “Taonga tūturu” (“ngā” denotes the plural form of this term) means an object that

- (a) relates to Māori culture, history, or society; and
- (b) was, or appears to have been,—
  - (i) manufactured or modified in New Zealand by Māori; or
  - (ii) brought into New Zealand by Māori; or
  - (iii) used by Māori; and
- (c) is more than 50 years old[.]<sup>18</sup>

Ngā taonga tūturu is one of the categories of “protected New Zealand object,” which broadly means an object forming part of the movable cultural heritage of New Zealand that . . . is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional reasons.”<sup>19</sup>

The Act is administered by the Ministry for Culture and Heritage.<sup>20</sup>

## C. Laws Related to Human Remains and Burial

### 1. Coroners Act 2006

The Coroners Act 2006 establishes the coronial system in New Zealand, including the functions and powers of a coroner, requirements with respect to reporting certain deaths to a coroner, and death investigation procedures. It requires, for example, that “[a] person who finds a body in New Zealand must report the finding to a Police employee as soon as practicable unless the person believes that the finding is already known to the New Zealand Police, or will be reported to a Police employee by another person.”<sup>21</sup>

### 2. Burial and Cremation Act 1964

The Burial and Cremation Act 1964 contains various provisions related to cemeteries and burial grounds and cremation and burial requirements. It states, for example, that “[i]t shall not be lawful to remove from its burial place any body, or the remains of any body, buried in any

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<sup>17</sup> Protected Objects Act 1975 s 1A, <http://www.legislation.govt.nz/act/public/1975/0041/latest/whole.html>, archived at <https://perma.cc/V3BA-R66D>.

<sup>18</sup> *Id.* s 2.

<sup>19</sup> *Id.* s 2 & sch 4.

<sup>20</sup> See *Protected Objects*, MINISTRY FOR CULTURE AND HERITAGE, <https://mch.govt.nz/nz-identity-heritage/protected-objects> (last updated Sept. 11, 2018), archived at <https://perma.cc/CH8M-SD5S>.

<sup>21</sup> Coroners Act 2006 s 13(1), <http://www.legislation.govt.nz/act/public/2006/0038/latest/whole.html>, archived at <https://perma.cc/FA2X-RBJM>.

cemetery, Maori burial ground, or other burial ground or place of burial, without licence under the hand of the Minister, and except in accordance with such conditions as he may prescribe.”<sup>22</sup>

#### D. Land Use and Conservation Laws

##### 1. Resource Management Act 1991

The Resource Management Act 1991 (RMA) is New Zealand’s core environmental legislation and regulates the use, development, and protection of natural and physical resources, including historic heritage. It includes the following matters as being of national importance, which must be recognized and provided for by anyone exercising functions under the Act:

- (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;
- (f) the protection of historic heritage from inappropriate subdivision, use, and development;
- (g) the protection of protected customary rights:<sup>23</sup>

It also requires that those exercising functions under the RMA must take into account the principles of the Treaty of Waitangi.<sup>24</sup>

Under the RMA, planning documents are developed by local authorities, with the process involving consultation with affected communities.<sup>25</sup> Persons who wish to develop or use land or resources must apply for “resource consents,” unless the activity is permitted by the relevant plan.<sup>26</sup> The RMA contains provisions that enable local authorities to make heritage orders in their planning documents to give effect to a requirement made by a heritage protection authority (including HNZPT).<sup>27</sup> Such orders, which “protect the heritage qualities of a particular place or structure,” affect how a place can be used.<sup>28</sup>

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<sup>22</sup> Burial and Cremation Act 1964 s 51(1), <http://www.legislation.govt.nz/act/public/1964/0075/latest/whole.html>, archived at <https://perma.cc/9ZUA-HFRJ>.

<sup>23</sup> Resource Management Act 1991 (RMA) s 6, <http://www.legislation.govt.nz/act/public/1991/0069/latest/whole.html>, archived at <https://perma.cc/76S7-75CS>.

<sup>24</sup> *Id.* s 8.

<sup>25</sup> See generally *Plan Making*, MINISTRY FOR THE ENVIRONMENT, <http://www.mfe.govt.nz/rma/processes-and-how-get-involved/plan-making> (last visited Jan. 31, 2019), archived at <https://perma.cc/D6XH-2MJ2>.

<sup>26</sup> See generally *Resource Consents*, MINISTRY FOR THE ENVIRONMENT, <http://www.mfe.govt.nz/rma/processes-and-how-get-involved/resource-consents> (last visited Jan. 31, 2019), archived at <https://perma.cc/U68X-YRD6>.

<sup>27</sup> RMA ss 187–189.

<sup>28</sup> *Heritage Orders in District Plans*, MINISTRY FOR THE ENVIRONMENT, <http://www.mfe.govt.nz/rma/rma-processes-and-how-get-involved/heritage-orders-district-plans> (last updated Oct. 26, 2018), archived at <https://perma.cc/L7ZT-KZGE>.

## 2. *Conservation Act 1987*

Under the Conservation Act 1987, the functions of the Department of Conservation include managing “for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act” and “to advocate the conservation of natural and historic resources generally.”<sup>29</sup> “Historic resources” refers to any historic place within the meaning of the HNZPT Act.<sup>30</sup>

## 3. *Reserves Act 1977*

The Department of Conservation administers the Reserves Act 1977 for the purpose of, among others, “providing, for the preservation and management for the benefit and enjoyment of the public, areas of New Zealand possessing . . . natural, scenic, historic, cultural, archaeological, biological, geological, scientific, educational, community, or other special features or value.”<sup>31</sup>

## 4. *Te Ture Whenua Maori Act 1993*

The Te Ture Whenua Maori Act 1993 (alternatively, the Maori Land Act 1993), “provides the rules around land dealings that change the ownership status of Māori land.”<sup>32</sup> Among the principles of the Act, set out in its preamble, is that it is

desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau [family], and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu.<sup>33</sup>

The Act provides for any urupā (Māori burial ground) and wāhi tapu on Māori freehold or general land to be set apart as a Māori reservation through a notice in the government gazette.<sup>34</sup>

## 5. *Marine and Coastal Area (Takutai Moana) Act 2011*

The Marine and Coastal Area (Takutai Moana) Act 2011 is intended to, among other purposes, “recognise the mana tuku iho [inherited status] exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua” and “provide for the exercise of customary interests in

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<sup>29</sup> Conservation Act 1987 s 6(a) and (b), <http://www.legislation.govt.nz/act/public/1987/0065/latest/whole.html>, archived at <https://perma.cc/Q9PM-MUSS>.

<sup>30</sup> *Id.* s 2.

<sup>31</sup> Reserves Act 1977 s 3(1)(v), <http://www.legislation.govt.nz/act/public/1977/0066/latest/whole.html>, archived at <https://perma.cc/29HD-WBZQ>.

<sup>32</sup> Māori Land FAQs, LAND INFORMATION NEW ZEALAND, <https://www.linz.govt.nz/kb/849> (last updated Dec. 3, 2018), archived at <https://perma.cc/M2TQ-LZYH>.

<sup>33</sup> Te Ture Whenua Maori Act 1993, preamble, <http://www.legislation.govt.nz/act/public/1993/0004/latest/whole.html>, archived at <https://perma.cc/ETH6-XRPJ>.

<sup>34</sup> *Id.* s 338.

the common marine and coastal area,” as well as to acknowledge the Treaty.<sup>35</sup> It includes provisions related to the inclusion, either in an agreement or customary marine title order, of recognition of a wāhi tapu or a wāhi tapu area.<sup>36</sup> It also modifies the application of the Protected Objects Act 1975 with respect to any taonga tūturu found in a customary marine title area.<sup>37</sup>

## II. Māori-Government Relations and Policy

The Treaty of Waitangi is considered New Zealand’s founding document and in modern times is described as a “broad statement of principles on which the British and Māori made a political compact to found a nation state and build a government in New Zealand.”<sup>38</sup> Waitangi Day, the date on which the Treaty was signed, is New Zealand’s national day.<sup>39</sup>

The history of the relationship between Māori and the New Zealand government since the signing of the Treaty is complex,<sup>40</sup> involving land wars in the 1860s,<sup>41</sup> various government and settler actions that resulted in widespread land alienation,<sup>42</sup> a policy of assimilating Māori into colonial society,<sup>43</sup> and later a shift to a policy of biculturalism, beginning in around the 1980s.<sup>44</sup>

The 1970s through the 1980s is considered a period of “renaissance” in terms of Māori culture, language, and political awareness,<sup>45</sup> as well as continuing the protest movement that started in

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<sup>35</sup> Marine and Coastal Area (Takutai Moana) Act 2011 s 4, <http://www.legislation.govt.nz/act/public/2011/0003/latest/whole.html>, archived at <https://perma.cc/NG5V-V4EL>.

<sup>36</sup> *Id.* s 78–81.

<sup>37</sup> *Id.* s 82.

<sup>38</sup> *The Treaty in Brief*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief> (last updated May 17, 2017), archived at <https://perma.cc/U3LF-NAMD>.

<sup>39</sup> See Kelly Buchanan, *New Zealand’s National Day – Controversy and Celebration*, IN CUSTODIA LEGIS (Feb. 7, 2011), <https://blogs.loc.gov/law/2011/02/new-zealands-national-day/>.

<sup>40</sup> See Kelly Buchanan, *Indigenous Rights in New Zealand: Legislation, Litigation, and Protest*, IN CUSTODIA LEGIS (Nov. 18, 2016), <http://blogs.loc.gov/law/2016/11/indigenous-rights-in-new-zealand-legislation-litigation-and-protest/>.

<sup>41</sup> See *The Treaty in Practice: Slide To War*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/slide-to-war> (last updated July 7, 2014), archived at <https://perma.cc/2EVM-ZFFJ>.

<sup>42</sup> See *The Treaty in Practice: Obtaining Land*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/obtaining-land> (last updated Jan. 13, 2016), archived at <https://perma.cc/Y7AP-2A82>.

<sup>43</sup> See *The Treaty in Practice: Introduction*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-practice/early-crown-policy> (last updated Apr. 15, 2016), archived at <https://perma.cc/7JLL-H8TK>.

<sup>44</sup> See Janine Hayward, *Story: Biculturalism*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), <https://teara.govt.nz/en/biculturalism>, archived at <https://perma.cc/P84X-MH23>.

<sup>45</sup> See Mark Derby, *Story: Māori–Pākehā Relations, Page 6. Maori Renaissance*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND (May 5, 2011), <https://teara.govt.nz/en/maori-pakeha-relations/page-6>, archived at <https://perma.cc/68HF-Y42N>; RICHARD S. HILL, MAORI AND THE STATE: CROWN-MAORI RELATIONS IN NEW ZEALAND/AOTEAROA, 1950-2000, at 149–53 (2009), available at <http://nzetc.victoria.ac.nz/tm/scholarly/tei-HilMaor-t1-body-d7-d1.html>, archived at <https://perma.cc/Q7ZJ-ALE5>.

the 1960s in relation to land rights and broader calls to “honour the Treaty.”<sup>46</sup> This period saw multiple legal developments with respect to Maori rights to land, resources, and the protection of cultural heritage. For example, Te Reo Māori (the Māori language) was made an official language of the country in 1987.<sup>47</sup> Other developments during this time, and subsequently, included making Waitangi Day a public holiday in 1974,<sup>48</sup> the establishment of the Waitangi Tribunal in 1975,<sup>49</sup> and the creation of Māori-language immersion preschools and elementary schools during the 1980s.<sup>50</sup>

In late 2018, the current government established a new office within the Ministry of Justice, the Office for Māori Crown Relations: Te Arawhiti. This agency is responsible for negotiating Treaty settlements on behalf of the government and ensuring the implementation of the government’s settlement commitments, among other functions.<sup>51</sup>

There are currently twenty-nine Members of Parliament, out of 120, who are of Māori descent.<sup>52</sup> This includes MPs elected to serve seven Māori electoral districts. Such seats have been a feature of the political system since 1867, and Maori can choose whether to be on the general electoral roll or the Maori electoral roll (allowing them to vote for representatives in the Māori electorates).<sup>53</sup>

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<sup>46</sup> See Basil Keane, *Story: Ngā Rōpū Tautohetohe – Māori Protest Movements, Page 1. Historic Māori Protest*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), <https://teara.govt.nz/en/nga-ropu-tautohetohe-maori-protest-movements/page-1>, archived at <https://perma.cc/B65A-C8WM>. Information about Māori protest movements and the increasing recognition of tikanga Māori in New Zealand law is contained in KELLY BUCHANAN, LEGAL RESEARCH GUIDE: MĀORI CUSTOMARY LAW (Law Library of Congress, July 2013), <https://www.loc.gov/law/help/maori-customary-law.php>.

<sup>47</sup> Māori Language Act 1987, <http://www.legislation.govt.nz/act/public/1987/0176/latest/whole.html>, archived at <https://perma.cc/GA2G-J45S>; *Te Wiki o Te Reo Māori – Māori Language Week, Page 2 – History of the Māori Language*, NEW ZEALAND HISTORY, <https://nzhistory.govt.nz/culture/maori-language-week/history-of-the-maori-language> (last updated Oct. 10, 2017), archived at <https://perma.cc/8YQS-UC2Q>.

<sup>48</sup> See Waitangi Day Act 1976, <http://www.legislation.govt.nz/act/public/1976/0033/latest/whole.html>, archived at <https://perma.cc/P3P2-W4DJ>.

<sup>49</sup> Waitangi Day Act 1975, <http://www.legislation.govt.nz/act/public/1975/0114/latest/whole.html>, archived at <https://perma.cc/H8ZZ-DBN5>; *Homepage*, WAITANGI TRIBUNAL, <https://www.waitangitribunal.govt.nz/> (last updated Dec. 4, 2018), archived at <https://perma.cc/YUR4-A4PF>.

<sup>50</sup> *History*, TE KŌHANGA REO NATIONAL TRUST, <https://www.kohanga.ac.nz/history/> (last visited Feb. 5, 2019), archived at <https://perma.cc/TZ4N-TPDP>.

<sup>51</sup> *About Us*, TE ARAWHITI, <https://tearawhiti.govt.nz/about-us/> (last visited Feb. 5, 2019), archived at <https://perma.cc/Q43M-MRGM>.

<sup>52</sup> *Tepara Koti, Who Are Our Māori Members of Parliament Now*, MĀORI TELEVISION (Sept. 24, 2017), <https://www.maoritelevision.com/news/politics/who-are-our-maori-members-parliament-now>, archived at <https://perma.cc/C6Y2-8M3Q>.

<sup>53</sup> *Māori Representation*, ELECTORAL COMMISSION, <https://www.elections.org.nz/voting-system/maori-representation> (last updated Aug. 14, 2018), archived at <https://perma.cc/UCV2-U7TJ>.

The relationship between Māori and the government today involves multiple elements, including continuing the negotiation of redress actions to settle breaches of the Treaty of Waitangi,<sup>54</sup> recognition at both the national and local levels of various Māori rights with respect to resources, different approaches to involving Māori in decision making, and a commitment to reflecting the principles of the Treaty in various policy areas. Although there is no complete and final list of principles, one is considered to be a partnership while others include a duty to act in good faith and actively protect Māori interests.<sup>55</sup> Such notions of partnership, consultation, and self-determination or self-management can be seen in the various laws and processes related to Māori heritage protections, although these are also the subject of criticism, as discussed below.

### III. Protection of Wāhi Tapu and Other Sites of Interest to Māori

In January 2017, the Māori Heritage Council of HNZPT published a bilingual document titled *Tapuwae* (meaning “sacred footprint”), which contains the Council’s statement and vision with respect to Māori heritage.<sup>56</sup> The document states, for example, that

[a]n awareness of Māori heritage places amongst land owners, land developers and those who exercise authority over and make decisions about land development is vital for the prevention of damage to and destruction of heritage places. This need underpins Heritage New Zealand activities such as entering Māori heritage places on the New Zealand Heritage List/Rārangi Kōrero, engagement in statutory advocacy processes for the protection of cultural sites, and the preservation and conservation of significant Māori heritage buildings and structures.<sup>57</sup>

In addition to protecting Māori heritage places through entering them on the New Zealand Heritage List/Rārangi Kōrero or taking other protective measures, HNZPT and the Council have various functions and powers in relation to archeological sites and contributing to decision making under the RMA.

#### A. Archeological Sites

With regard to archeology and Māori heritage places, *Tapuwae* provides a detailed explanation of the statutory framework and how HNZPT regulates archeological sites in practice. For example:

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<sup>54</sup> See *Settling Historical Treaty of Waitangi Claims*, NEW ZEALAND GOVERNMENT, <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims/> (last visited Feb. 5, 2019), archived at <https://perma.cc/8ADM-QDZA>.

<sup>55</sup> See Janine Hayward, *Principles of the Treaty of Waitangi – Ngā Mātāpono o te Tiriti*, TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND (June 20, 2012), <https://teara.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matapono-o-te-tiriti/print>, archived at <https://perma.cc/L3MC-JUEQ>; *Principles of the Treaty*, WAITANGI TRIBUNAL, <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/> (last updated Sept. 19, 2016), archived at <https://perma.cc/8L9Q-MNBY>.

<sup>56</sup> HNZPT, TAPUWAE: NĀ TE KAUNIHERA MĀORI MŌ TE POUHERE TAONGA MĀORI; THE MĀORI HERITAGE COUNCIL STATEMENT ON MĀORI HERITAGE (Jan. 2017), <http://www.heritage.org.nz/resources/-/media/bfa29419db7f42beaaeabc831193de67.ashx>, archived at <https://perma.cc/W9LA-FGRT>.

<sup>57</sup> *Id.* at 10.

Archaeological sites, whether or not they are identified or recorded, have, in the first instance, protection under the Heritage New Zealand Pouhere Taonga Act 2014. Heritage New Zealand is empowered by the Act to exercise regulatory authority (kāwanatanga) regarding archaeological sites. It is a crime to modify or destroy an archaeological site without authority from Heritage New Zealand to do so. The archaeological authority process administered by Heritage New Zealand regulates the extent to which land development or any activity may be permitted to have an impact on archaeological sites.<sup>58</sup>

As indicated in this paragraph, the protection of archeological sites applies whether or not the site is entered on the New Zealand Heritage List/Rārangi Kōrero.<sup>59</sup> The HNZPT Act defines “archeological site” as being any place associated with human activity that occurred before 1900.<sup>60</sup> HNZPT may also, by a notice in the government gazette, declare a place to be an archeological site if it was associated with human activity in or after 1900 and “provides, or may be able to provide, through investigation by archaeological methods, significant evidence relating to the historical and cultural heritage of New Zealand.”<sup>61</sup>

HNZPT has published a “statement of general policy” on the administration of the archeological provisions in the HNZPT Act.<sup>62</sup> The document contains various references to archeological sites of interest to Māori and approaches to working with Māori with respect to such sites. For example, it includes the following policies under the objective that “Māori cultural values are respected and taken into account”:

- 2.1 HNZPT will ensure Māori cultural values associated with archaeological sites of interest to Māori are considered alongside archaeological and other relevant values when archaeological authority decisions are being made, where information about those values has been provided with the application.
- 2.2 HNZPT encourages iwi and hapū to engage in the archaeological authority process so that their cultural values can be considered in the determination.
- 2.3 In advance of an authority application, HNZPT encourages applicants and iwi and hapū to formalise protocols on agreed cultural processes for archaeological authorities which relate to sites of interest to Māori, so long as the legal requirements of the HNZPTA are met.<sup>63</sup>

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<sup>58</sup> *Id.* at 16. The role and powers of HNZPT with respect to archeological sites are contained in sections 42–59 of the HNZPT Act. See generally *Archaeology*, HNZPT, <http://www.heritage.org.nz/protecting-heritage/archaeology> (last visited Jan. 31, 2019), archived at <https://perma.cc/WP25-N3NA>.

<sup>59</sup> HNZPT Act s 42.

<sup>60</sup> *Id.* s 6.

<sup>61</sup> *Id.* s 43.

<sup>62</sup> HNZPT, STATEMENT OF GENERAL POLICY: THE ADMINISTRATION OF THE ARCHEOLOGICAL PROVISIONS UNDER THE HERITAGE NEW ZEALAND POUHERE TAONGA ACT 2014 (Oct. 29, 2015), <http://www.heritage.org.nz/resources/-/media/7b4f5a79a0be40d697e8bbfe4409bab8.ashx>, archived at <https://perma.cc/38C8-1MHH>.

<sup>63</sup> *Id.* at 7.

The document also lists principles and policies related to consultation with iwi and hapū; HNZPT's maintenance of relationships with iwi, hapū and whānau, as appropriate; and encouraging collaboration between Māori and archeologists.<sup>64</sup>

## B. Land Use and Development

With regard to land use, development, and the utilization of natural resources, HNZPT has roles, under both the HNZPT Act and the RMA, related to “[s]tatutory advocacy in support of whānau, hapū and iwi on RMA-related matters.”<sup>65</sup> For example, the HNZPT Act states that, “[i]n respect of a wāhi tapu area entered on the New Zealand Heritage List/Rārangi Kōrero, the Council may make recommendations to the local authorities that have jurisdiction in the relevant area as to the appropriate measures that those local authorities should take to assist in the conservation and protection of the wāhi tapu area.”<sup>66</sup> The Council must recognize the interests of the owner of the area, and local authorities must have “particular regard” to the Council’s recommendation.<sup>67</sup> Local authorities notify HNZPT when they receive resource consent applications in respect of wāhi tapu areas. HNZPT must then refer the matter to the Council and consult with relevant parties before it takes any action in respect of such an application.<sup>68</sup>

HNZPT staff therefore become involved in RMA processes when these “potentially or actually impact on Māori heritage places or areas on the New Zealand Heritage List/Rārangi Kōrero.”<sup>69</sup> *Tapuwae* notes that

Heritage New Zealand staff are experts in various fields relevant to heritage and the RMA, and are regularly called upon to give evidence at hearings or before the Environment Court. Often the evidence provided directly supports a hapū or iwi position on a matter and is prepared in close conjunction with hapū or iwi.<sup>70</sup>

## C. Criticism of Current Approach

The current system for the protection of Maori heritage sites was recently criticized in a January 2019 article published in the *New Zealand Listener*. The article stated, for example, that while the HNZPT Act protects sites where there is evidence of pre-1900 human activity, this “does not cover more-intangible historic landscapes, wāhi tapu (places sacred to Māori) and wāhi tupuna (places with ancestral significance).”<sup>71</sup> Furthermore, the listing of such heritage places on the New

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<sup>64</sup> *Id.* at 7-8.

<sup>65</sup> TAPUWAE, *supra* note 56, at 19.

<sup>66</sup> HNZPT Act s 74(2).

<sup>67</sup> *Id.* s 74(3) & (4).

<sup>68</sup> *Id.* s 75.

<sup>69</sup> TAPUWAE, *supra* note 56, at 19.

<sup>70</sup> *Id.* at 20.

<sup>71</sup> Sally Blundell, *What Ihumātao Reveals About NZ's Protection of Māori Heritage Sites*, NEW ZEALAND LISTENER (Jan. 26, 2019), available at <https://www.noted.co.nz/currently/social-issues/ihumatao-maori-heritage-sites-nz-protection/>, archived at <https://perma.cc/U773-6RQ5>.

Zealand Heritage List/Rārangī Kōrero “does not afford automatic protection – rather it serves as an acknowledgement the site is worth protecting and can trigger opportunities to discuss options with the landowner.”<sup>72</sup> The article goes on to state that,

[w]hereas in many countries a permit is required before any work on an archaeologically significant site can be undertaken, the onus in New Zealand is on the landowner to request authority to undertake earthworks that could modify or destroy an archaeological site. Even then, under the 2014 legislation, HNZPT is expected to consider the interests of property owners, as well as heritage and cultural values.

Applications are rarely refused. On average, 496 out of every 500 applications are successful. HNZPT senior legal adviser Geraldine Baumann says this number doesn't tell the whole story. In the process of application, she says, the agency will discuss options with the iwi and the owner or developer in a bid to reduce the scope of any modification.

...

Ultimately, protection of historic places, in particular those “big picture” landscapes and wāhi tapu and wāhi tupuna areas, depends on the provisions of each district plan. Local authorities are expected to include a schedule of heritage buildings, archaeological sites and heritage precincts in their district plans, with appropriate rules for their protection, but here again there are limitations. Although the Resource Management Act recognises the importance of ancestral lands and the need to protect heritage from inappropriate use, these considerations do not give automatic right of veto when weighing up sustainably managed developments.

...

Even when historic sites are listed on district plans, there is the risk, says University of Otago archaeologist Richard Walter, that local authorities will look at the plan, see isolated sites, “then let people go ahead with their development activities”.<sup>73</sup>

#### IV. Processes and Protocols on Discovery of Kōiwi Tangata/Human Remains

In 2014, HNZPT published guidance related to kōiwi tangata/human remains.<sup>74</sup> This document sets out the legislative framework, key agencies and responsibilities, the significance of kōiwi tangata/human remains in the New Zealand context, and guidelines for how to proceed in different circumstances, including guidelines for the general public, police, developers, consultant archeologists, the Department of Conservation, and tangata whenua. It also provides information regarding reinternment of remains of Māori origin, as well as setting out cultural considerations and other information. The guidelines

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> HNZPT, ARCHEOLOGICAL GUIDELINES SERIES: KOIWI TANGATA/HUMAN REMAINS (Aug. 25 2014), <https://www.heritage.org.nz/~/-/media/a483bc2fdcf14f1aa67dd84e3e16b80d.ashx>, archived at <https://perma.cc/9Z3C-KUSR>.

provide advice for a culturally responsible mechanism for the management of koiwi tangata/human remains that have been either uncovered through accidental discovery or deliberately excavated/exhumed in emergency response situations, or as a result of natural processes e.g. coastal erosion. In the majority of cases it will be found that these koiwi tangata/human remains are Maori in origin, so these Guidelines have a deliberate focus in that direction, and recognise the kaitiaki [guardian] role that Maori play in determining what happens in the management of the discovery of koiwi tangata/human remains.<sup>75</sup>

The guidelines state that “[m]ore than one Act may apply in discovery of koiwi tangata/human remains.”<sup>76</sup> As noted above, any person who finds a body, in whatever circumstances, is required to report the find to the police under the Coroners Act 2006. The police are then responsible for determining whether or not the site is a crime scene. The Burial and Cremation Act 1964 makes it an offense to remove any body without a license issued by the relevant Minister. This legislation is administered by the Ministry of Health, and Public Health Units will determine if a disinternment license is required.<sup>77</sup> The HNZPT guidelines state that, even when a disinternment license is not required, “it is good practice to contact the local Public Health Unit so that they are aware of the situation.”<sup>78</sup>

As also noted above, HNZPT has regulatory powers with respect to archeological sites, and unless authority is granted, “no person may modify or destroy, or cause to be modified or destroyed, the whole or any part of that site if the person knows, or ought reasonably to have suspected, that the site is an archaeological site.”<sup>79</sup> HNZPT therefore advises that “in all circumstances involving the care and management of koiwi tangata/human remains, that the police, Heritage New Zealand, local public health unit, and tangata whenua are notified in the first instance.”<sup>80</sup> It emphasizes that

[t]he majority of cases of discovery of koiwi tangata/human remains are of tangata whenua derivation. It is essential, therefore, that hapu/iwi are contacted immediately following discoveries to ensure cultural protocol is adhered to and decisions for exhumation and reinterment are culturally appropriate.<sup>81</sup>

The HNZPT policy statement related to the administration of the archeological provisions in the HNZPT Act also contains a section specifically on kōiwi tangata that provides as follows:

Kōiwi tangata (human skeletal remains of any race) may be unexpectedly uncovered during earthworks, as a result of natural processes such as coastal erosion or as part of the archaeological authority process.

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<sup>75</sup> *Id.* at 4.

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.* at 6.

<sup>79</sup> HNZPT Act s 42; KOIWI TANGATA/HUMAN REMAINS, *supra* note 74, at 7.

<sup>80</sup> KOIWI TANGATA/HUMAN REMAINS, *supra* note 74, at 8.

<sup>81</sup> *Id.* at 9.

Unexpected finds of kōiwi tangata are most often of Māori origin (kōiwi tangata Māori). Kōiwi tangata are of special significance to all descendant groups and HNZPT will work closely with them to ensure appropriate processes are followed. The place of interment may also be significant and should be respected.

Other legislation which must also be considered when kōiwi tangata are uncovered includes the Coroners Act 2006, the Burial and Cremation Act 1964, the Protected Objects Act 1975 and Te Ture Whenua Māori Act 1993.<sup>82</sup>

The policies listed under the objective that “[k]ōiwi tangata are treated in a sensitive and culturally respectful manner” are as follows:

- 6.1 HNZPT recognises the need for urgency when kōiwi tangata are discovered.
- 6.2 HNZPT notifies iwi and hapū when discovery of kōiwi tangata Māori are reported.
- 6.3 HNZPT recognises the role iwi and hapū must have in decisions relating to the treatment of kōiwi tangata Māori.
- 6.4 HNZPT encourages iwi and hapū to consider protocols for when more than one burial or a urupā is identified.
- 6.5 HNZPT supports tikanga Māori protocols advised by iwi and hapū in all cases when kōiwi tangata Māori are identified.
- 6.6 Kōiwi tangata will not be held at any HNZPT office or property.
- 6.7 HNZPT will engage in processes relating to kōiwi tangata in accordance with the requirements of other relevant legislation.
- 6.8 HNZPT encourages dialogue with the Ministry for Culture and Heritage and iwi and hapū, prior to undertaking archaeological work to develop processes for the management of taonga tūturu when located with kōiwi tangata Māori.
- 6.9 HNZPT will work closely with applicants, landowners, iwi and hapū, to develop appropriate management processes when archaeological work may affect known kōiwi tangata as part of the archaeological authority process.<sup>83</sup>

## V. Protection of Taonga Tūturu/Cultural Artifacts

Under the Protected Objects Act 1975, “all taonga tūturu found are in the first instance (prima facie) Crown owned to allow claims for ownership to be heard by the Māori Land Court.”<sup>84</sup> The Act requires that

[e]very person who, after the commencement of this Act, finds any taonga tūturu anywhere in New Zealand or within the territorial waters of New Zealand shall, within 28 days of finding the taonga tūturu, notify either the chief executive [of the Ministry for Culture and Heritage] or the nearest public museum, which shall notify the chief executive, of the finding of the taonga tūturu:

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<sup>82</sup> STATEMENT OF GENERAL POLICY: THE ADMINISTRATION OF THE ARCHEOLOGICAL PROVISIONS UNDER THE HERITAGE NEW ZEALAND POUHERE TAONGA ACT 2014, *supra* note 62, at 12.

<sup>83</sup> *Id.*

<sup>84</sup> *Taonga Tūturu*, MINISTRY FOR CULTURE AND HERITAGE, <https://mch.govt.nz/nz-identity-heritage/protected-objects/taongatuturu> (last updated Feb. 21, 2018), archived at <https://perma.cc/QWL2-4TUM>. See also Protected Objects Act 1975, s 11(1).

provided that in the case of any taonga tūturu found during the course of any archaeological investigation authorised by Heritage New Zealand Pouhere Taonga under section 48 of the Heritage New Zealand Pouhere Taonga Act 2014, the notification shall be made within 28 days of the completion of the field work undertaken in connection with the investigation.<sup>85</sup>

Once notified, the chief executive must take appropriate action to provide for the examination, care, recording and custody of the item; notify any interested parties; and publish a public notice calling for claims of ownership to be lodged with the chief executive.<sup>86</sup> If only one claim is registered, and if the chief executive is satisfied that the claim is valid, the chief executive applies to the Registrar of the Maori Land Court for an order confirming ownership of the item.<sup>87</sup> If two or more claims are lodged, the chief executive must consult the claimants. If the competing claims are resolved, the chief executive can seek an order from the Court, but if they are unresolved the chief executive may, if requested by a claimant, “facilitate the applications of any or all of the claimants to the Maori Land Court.”<sup>88</sup> The legislation states that “ownership” includes collective or joint ownership.<sup>89</sup>

The Māori Land Court’s jurisdiction with respect to determining ownership of taonga tūturu is established in the Protected Objects Act 1975. It is able to make various orders with respect to an item, including vesting in any person as trustee any taonga tūturu for safekeeping and preservation, prohibiting any person from dealing with the item, and prohibiting any offering for sale or parting with possession of the item.<sup>90</sup> Other provisions in the Act related to taonga tūturu govern the sale and trade of such items.<sup>91</sup>

In addition to the provisions in the Act, taonga tūturu protocols may be entered into between the Crown and individual iwi as part of Treaty settlement redress. These relationship agreements may cover, for example, the administration of the Act, iwi engagement in policy and legislation reviews, registration of iwi as expert examiners and collectors of taonga tūturu, and the provision of cultural practices and professional services by iwi.<sup>92</sup>

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<sup>85</sup> Protected Objects Act 1975, s 11(3).

<sup>86</sup> *Id.* s 11(4).

<sup>87</sup> *Id.* s 11(5).

<sup>88</sup> *Id.* s 11(6) & (7).

<sup>89</sup> *Id.* s 11(8).

<sup>90</sup> *Id.* s 12.

<sup>91</sup> *Id.* ss 13–16.

<sup>92</sup> *Taonga Tūturu Protocols*, MINISTRY FOR CULTURE AND HERITAGE, <https://mch.govt.nz/nz-identity-heritage/taonga-tuturu-protocols> (last updated Nov. 20, 2018), archived at <https://perma.cc/Z3T6-AVAJ>.

The Ministry for Culture and Heritage has published detailed guidance on taonga tūturu, including the process for “newly found” items.<sup>93</sup> The Ministry also states that

[k]nown and suspected archaeological sites are protected by the Heritage New Zealand Pouhere Taonga Act and must not be deliberately disturbed in order to find taonga tūturu. If taonga tūturu are partially exposed and not in any immediate danger, Heritage New Zealand Pouhere Taonga should be contacted right away and the taonga tūturu left in the site.

If the taonga tūturu is in danger of being lost or destroyed, carefully remove it from the site and notify the Ministry of the find and Heritage New Zealand Pouhere Taonga of the potential damage to the archaeological site.<sup>94</sup>

HNZPT’s policy statement regarding the administration of the HNZPT Act provisions on archeological sites includes policies regarding the recovery of archeological material and taonga tūturu. This includes that “HNZPT encourages archaeologists to work with the Ministry for Culture and Heritage, iwi and hapū, applicants, and landowners to develop appropriate processes, prior to and during analysis, for the storage of material uncovered as part of an archaeological authority.”<sup>95</sup> It also states that HNZPT works with the Ministry “to support the processes of the Protected Objects Act 1975.”<sup>96</sup>

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<sup>93</sup> MINISTRY FOR CULTURE AND HERITAGE, PROTECTED OBJECTS ACT 1975: GUIDELINES FOR TAONGA TŪTURU (last updated Dec. 20, 2010), [https://mch.govt.nz/sites/default/files/Taonga Tuturu Guidelines Feb 2018 \(D-0760408\).PDE](https://mch.govt.nz/sites/default/files/Taonga_Tuturu_Guidelines_Feb_2018_(D-0760408).PDE), archived at <https://perma.cc/VU32-FPLM>.

<sup>94</sup> *Taonga Tūturu*, *supra* note 84.

<sup>95</sup> STATEMENT OF GENERAL POLICY: THE ADMINISTRATION OF THE ARCHEOLOGICAL PROVISIONS UNDER THE HERITAGE NEW ZEALAND POUHERE TAONGA ACT 2014, *supra* note 62, at 13.

<sup>96</sup> *Id.*

# Norway

*Elin Hofverberg  
Foreign Law Specialist*

**SUMMARY** Norway has recognized its Sami population as indigenous and has special rules for the protection of Sami cultural heritage. All Sami cultural heritage dating from prior to 1917, including gravesites, buildings, and objects, is automatically protected, while cultural heritage dating after that time may or may not be protected, depending on the circumstances.

Under Norwegian law, any cultural objects found must be reported to the police; failure to do so results in a fine or imprisonment. Sites designated as heritage sites may not be altered. Persons causing damage to heritage sites are subject to fines or imprisonment for up to two years for gross violations. Private owners of land may request funding to protect cultural heritage property.

Norwegian land use regulations also impact Sami cultural heritage protection. The indigenous Sami population of Norway, and in certain instances also Swedish Sami groups, have a right to use the land in Finnmark to fish and hunt, and to graze their reindeer. The question of the extent of this right to use natural resources is currently being challenged in Norwegian courts. Land use is typically zoned by the municipality and the Norwegian state. All use of land is subject to a zoning plan, and the Sami Council has a right both to comment on proposals and appeal decisions that affect them. Almost 20% of Norway's landmass is designated as national parks, which in itself may impinge on the freedom of the Sami people.

Norway has ratified both ILO Convention 169 and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Many Sami human remains were taken from Sami graves during the nineteenth and twentieth centuries. Most of these remains are now in the possession of research institutions, including Oslo University. In 1997, Norway became the first Nordic country in which Sami skulls were repatriated. Since then an additional ninety-seven skeletons have been repatriated and reburied in northern Norway.

## I. Introduction

### A. The Sami People

Norway is located on the far northern European peninsula, and includes parts of an area known as Sápmi, which runs through Norway, Sweden, and Finland, into Russia, where the Sami people live.<sup>1</sup> The Sami people are a diverse group speaking three main Sami languages/ dialects and nine

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<sup>1</sup> STATISTISK SENTRALBYRÅ, SAMISK STATISTIKK 2018 at 7 (2018/5), [https://www.ssb.no/befolkning/artikler-og-publikasjoner/\\_attachment/339026?\\_ts=16151cb7dd0.pdf](https://www.ssb.no/befolkning/artikler-og-publikasjoner/_attachment/339026?_ts=16151cb7dd0.pdf), archived at <https://perma.cc/7ZVM-ZNY7>.

subdialects.<sup>2</sup> Norway was christened around the year 1,000 AD and starting in 1700 many Sami remains were buried in Norwegian State Church cemeteries.<sup>3</sup>

There are no official statistics for how many Sami are living throughout the Sápmi area as the local state governments (of Finland, Norway, Russia, and Sweden) do not generate official statistics for these groups.<sup>4</sup> Unofficial surveys claim that there are approximately 80,000 to 100,000 Sami living throughout Sápmi.<sup>5</sup> An estimated 50,000–65,000 of these live in the national state of Norway.<sup>6</sup> Thus, the Norwegian Sami population is the greatest across the area, both in real numbers and measured in per capita population.<sup>7</sup> The Norwegian Sami Council (Sametinget) had 16,958 registered voters in 2017.<sup>8</sup>

## B. International Obligations and Domestic Law

### 1. Recognition of Sami People as Indigenous

Norway is a signatory to the International Labor Organization Convention on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169).<sup>9</sup> Norway was the first country to ratify it in 1990.<sup>10</sup> Neither Sweden, Finland, nor Russia has ratified ILO 169 to recognize Sami as indigenous people.<sup>11</sup> Thus, currently Norway is the only country that recognizes Sami as specifically indigenous. Sweden recognizes that the Sami are a “special people” but has not

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<sup>2</sup> *Language, Dialect or Variety?*, SAMER, <http://www.samer.se/4567> (last visited Mar. 5, 2019), archived at <https://perma.cc/5S6F-H2BK>.

<sup>3</sup> KATHRYN W. SHANLEY & BJØRG EVJEN, MAPPING INDIGENOUS PRESENCE: NORTH SCANDINAVIAN AND NORTH AMERICAN PERSPECTIVES 29 (2015).

<sup>4</sup> *Sami, 2011-2013*, STATISTICS NORWAY (Feb. 6, 2014), <https://www.ssb.no/en/befolkning/statistikker/samisk/hvert-2-aar/2014-02-06>, archived at <https://perma.cc/4LRT-MK8R>.

<sup>5</sup> *Antalet samer i Sápmi*, SAMER, <http://samer.se/samernaisifror> (last visited Mar. 5, 2019), archived at <https://perma.cc/Y663-R9YE>.

<sup>6</sup> *Id.*; STATISTISK SENTRALBYRÅ, *supra* note 1.

<sup>7</sup> STATISTISK SENTRALBYRÅ, *supra* note 1.

<sup>8</sup> *Id.* at 25. For the area of residence of the Sami voters see *id.* at 23.

<sup>9</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO 1989 No. 169, June 27, 1989 (entered into force Sept. 5, 1991), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169), archived at <https://perma.cc/XUG7-EKSD>; ILO -konvensjon nr. 169 om urfolk og stammefolk i selvstendige stater, REGJERINGEN (Dec. 3, 2018), <https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/samepolitikk/midtpalte/ilokonvensjon-nr-169-om-urbefolkninger-o/id451312/>, archived at <https://perma.cc/TCB9-8VML>; Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), ILO, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314), archived at <https://perma.cc/7EXM-D98M>.

<sup>10</sup> *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, ILO, *supra* note 9.

<sup>11</sup> *Id.*

specifically recognized them as indigenous.<sup>12</sup> Norway on the other hand does recognize the Sami people as indigenous, and the Norwegian Constitution requires that the government “creates the conditions [that ensure] the Sami people can secure and develop its language, its culture, and its community.”<sup>13</sup>

## 2. Special Legislation Regarding the Sami People

The Sami Act regulates Sami conditions as well as establishes the Sami Council.<sup>14</sup> The Sami Council is responsible for and represents the Sami people on matters that are of interest to the Sami people.<sup>15</sup> State agencies must also ask the Sami Council to comment on issues that concern them.<sup>16</sup> This includes central, regional, and local agencies.<sup>17</sup>

A special act, the Finnmark Act, also regulates the use of resources in Finnmark (a district in northern Norway that overlaps with the Sápmi area).<sup>18</sup> It specifically provides that the Sami Council can provide guidance on how to use the land.<sup>19</sup> It also provides that the law cannot limit any rights that the Sami have based on custom (*hevd*), or immemorial use (*alders tid*).<sup>20</sup>

## 3. International Obligations

In addition to ratifying the ILO 169 Convention, mentioned above, Norway has also ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

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<sup>12</sup> 1 kap. 2 § REGERINGSFORMEN [INSTRUMENT OF GOVERNMENT] (Svensk författningssamling [SFS] 1794:152), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kungorelse-1974152-om-beslutad-ny-regeringsform\\_sfs-1974-152](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/kungorelse-1974152-om-beslutad-ny-regeringsform_sfs-1974-152), archived at <https://perma.cc/NF4C-LCDQ>.

<sup>13</sup> § 108 GRUNNLOVEN [NORWEGIAN CONSTITUTION] (LOV 1817-05-17), <https://lovdata.no/dokument/NL/lov/1814-05-17>, archived at <https://perma.cc/5HPC-EBJT> (translation by author).

<sup>14</sup> §§ 1-1 and 1-2 LOV OM SAMETINGET OG ANDRE SAMISKE RETTSFORHOLD (SAMELOVEN) [ACT ON THE SAMI COUNCIL AND OTHER SAMI LEGAL RELATIONSHIP (SAMI ACT)] (LOV-1987-06-12-56), <https://lovdata.no/dokument/NL/lov/1987-06-12-56>, archived at <https://perma.cc/3DP6-BYG9>. See also Norges Offentlige Utredninger [Government Report], NOU 1997: 5, Urfolks landrettigheter etter folkerett og utenlandsk rett – Bakgrunnsmateriale for Samerettsutvalge [Indigenous Peoples Rights According to International Law and Foreign Law – Background Material for the Sami Rights Survey] (Jan. 1997), <https://www.regjeringen.no/contentassets/5b44693549934f36af8a901cfbf3f3cd/no/pdfa/nou199719970005000dddpdfa.pdf>, archived at <https://perma.cc/BE7N-87F8>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 2-2.

<sup>17</sup> Odelstings Proposisjon [Ot.prp.] [Government Bill] nr. 33 (1986–1987) Om lov om Sametinget og andre samiske rettsforhold (sameloven) [Regarding Act on the Sami Council and Other Sami Relations (Sami Act)], at 118.

<sup>18</sup> LOV OM RETTSFORHOLD OG FORVALTNING AV GRUNN OG NATURRESSURSER I FINNMARK FYLKE (FINNMARKSLOVEN) [ACT ON THE LEGAL RELATIONSHIP AND ADMINISTRATION OF GROUND AND NATURAL RESOURCES IN FINNMARK (THE FINNMARK ACT)] (LOV 2005-06-17-85), <https://lovdata.no/dokument/NL/lov/2005-06-17-85>, archived at <https://perma.cc/7CAK-7GQE>.

<sup>19</sup> *Id.* § 4.

<sup>20</sup> *Id.* § 5. For further discussions on the land use rights of the Sami reindeer herders see Part V, below.

Transfer of Ownership of Cultural Property.<sup>21</sup> It is thus illegal to import cultural heritage objects from other states, and to export items that are of cultural importance to Norway, as specified in the Cultural Heritage Act.<sup>22</sup> In 1995 Norway ratified the European Convention on the Protection of the Archaeological Heritage (also known as the Valetta or Malta Convention) of 1972, which obliges Norway to protect and preserve the cultural heritage in a sound way. The Convention entered into force in Norway in March 1996.<sup>23</sup> Its obligations are also part of the Cultural Heritage Act.

### C. Prevalence of Sami Historic Items

Several Sami historical items are spread throughout Europe, including skulls, full skeletons, religious drums, clothes, and items for everyday use (such as cooking utensils).<sup>24</sup> A large number of human remains are located at research facilities. For example, Uppsala University has thirteen skulls in its collection.<sup>25</sup> These thirteen skulls have been collected both from Swedish and Norwegian cemeteries.<sup>26</sup> Oslo University has numerous skulls and skeletons that were excavated from Sami graves during the early 1900s; at its height the collection included between five hundred and one thousand Sami skeletons.<sup>27</sup> Some of the Skolt-Sami holdings (*Neidensamlingen*) were returned to the Skolt-Sami ancestors in 2007 and 2011, and resulted in the reburial of more than one hundred skulls.<sup>28</sup>

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<sup>21</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, Nov. 14, 1970, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E>, archived at <https://perma.cc/EQQ8-HZM5>; Forskrift om tilbakelevering av stjålne og ulovlig utførte kulturgjenstande (FOR-2001-10-04-1179), <https://lovdata.no/dokument/SF/forskrift/2001-10-04-1179>, archived at <https://perma.cc/88HL-L578>.

<sup>22</sup> §§ 23 and 23a LOV OM KULTURMINNER [KULTURMINNELOVEN] [ACT ON CULTURAL HERITAGE OBJECTS (CULTURAL HERITAGE ACT)] (LOV 1987-06-09-50), <https://lovdata.no/dokument/NL/lov/1978-06-09-50>, archived at <https://perma.cc/H7UF-3T3F>.

<sup>23</sup> European Convention on the Protection of the Archaeological Heritage, Jan. 16, 1992, ETS No. 143, <https://rm.coe.int/168007bd25>, archived at <https://perma.cc/LLJ4-DFBS>; *Chart of Signatures and Ratifications of Treaty 143, Status as of 13/03/2019*, COUNCIL OF EUROPE, [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143/signatures?p\\_auth=SpOvuuQ4](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143/signatures?p_auth=SpOvuuQ4), archived at <https://perma.cc/P5EP-ABPK>.

<sup>24</sup> Gunnilla Edbom, *Samiskt kulturarv i samlingar - Rapport från ett projekt om återföringsfrågor gällande samiska föremål, Arkeologisk rapport 2005:1, Åjtte, Svenskt Fjäll- och Samemuseum* (2015), [http://www.ajtte.com/wp-content/uploads/2010/10/Samiskt\\_kulturarv\\_i\\_samlingar.pdf](http://www.ajtte.com/wp-content/uploads/2010/10/Samiskt_kulturarv_i_samlingar.pdf), archived at <https://perma.cc/9HKU-LT9T>.

<sup>25</sup> *Id.* at 41.

<sup>26</sup> *Id.*

<sup>27</sup> Yngve Vogt, *UiO har tusenvis av skjeletter i skapet*, APOLLON (June 14, 2018), [https://www.apollon.uio.no/artikler/2018/2\\_skjeletter.html](https://www.apollon.uio.no/artikler/2018/2_skjeletter.html), archived at <https://perma.cc/6ZNA-3GCD>.

<sup>28</sup> Kaspar Fuglesang & Erik Lieungh, *Begravde 94 skoltesamer for andre gang*, NRK (Sept. 26, 2011), <https://www.nrk.no/troms/begravde-94-skoltesamer-1.7809234>, archived at <https://perma.cc/R3GK-ZS6L>; *Verdig og respektfull gjenbegravning i Neiden*, SO-VANGER KOMMUNE (Sept. 25, 2011), <http://www.sor-varanger.kommune.no/verdig-og-respektfull-gjenbegravning-i-neiden-.4964283-17830.html>, archived at <https://perma.cc/MPL5-5QHA>.

## II. Protection of Cultural Objects and Cultural Heritage

### A. Objects Protected under the Cultural Heritage Act

Cultural objects and cultural heritage are protected by the Norwegian Cultural Heritage Act (Kulturminneloven).<sup>29</sup> The enumerated list includes the following examples of protected cultural objects:<sup>30</sup>

- a) settlement sites, caves, natural rock shelters with evidence that people have lived or worked there, sites of dwellings or churches, churches, houses and structures of all kinds, and remains or parts of these, mounds marking ancient farming settlements, farms, homesteads, courtyard sites or any other groups of structures, such as market sites and trading places, town sites and the like or remains of these.
- b) Work or workshop sites of all kinds such as quarries and other mining sites, iron extraction sites, charcoal burning and tar-making sites, and other traces of crafts or industry.
- c) Traces of land cultivation of any kind, such as clearance cairns; ditches and plough furrows; fences and enclosures; and hunting, fishing, and trapping devices.
- d) Roads and tracks of any kind, whether unpaved or paved with stone, wood, or other material; dams, bridges, fords, harbor installations, and crew-change stations; landing places and slipways; ferry berths and portages or their remains; obstructions in fairways, road markers; and navigation markers.
- e) Defense items of any kind such as hill-forts, entrenchments, ramparts, moats, fortifications, and remains of these and beacons, cairns, etc.
- f) Council sites; cult sites; cult deposition sites; and cairns, wells, springs and other places associated with archeological finds, traditions, beliefs, legends, or customs.
- g) Stones, rocks, and mountains with inscriptions or images such as runic inscriptions, rock carvings, and rock paintings, cup-marks, grooves, and other rock art.
- h) Monoliths, crosses, and other similar monuments.
- i) Stone settings, stone pavings, etc.
- j) Gravesites of any kind, single ones or in groups, such as burial mounds, burial cairns, burial chambers, cremation burials, urn burials, coffin burials, cemeteries, and their enclosures, and sepulchral monuments of all kinds.<sup>31</sup>

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<sup>29</sup> § 3 KULTURMINNELOVEN.

<sup>30</sup> *Id.* § 4.

<sup>31</sup> *Id.* § 4. (translation by author).

Whereas “Norwegian” objects listed above must date back to 1537 or earlier to be protected, Sami cultural objects are protected if dating back to prior to 1917.<sup>32</sup> Areas surrounding cultural heritage sites are also protected.<sup>33</sup> As seen from the list above, most of the Sami objects from 1917 or earlier, including sacred places, are protectable. Also, more recent cultural heritage may be protected if it is tied to important historic events.<sup>34</sup>

## B. Preservation of Sami Cultural Heritage

### 1. Automatic Protection of Sami Cultural Heritage and Sami Buildings from 1917 or Earlier

The Norwegian Cultural Heritage Act protects Norwegian cultural heritage, including Sami cultural heritage, and Sami buildings.<sup>35</sup> Following a legislative change in 2018, Norway now automatically protects all Sami cultural heritage that date back to 1917 and earlier.<sup>36</sup> Under the previous rules the Norwegian Cultural Heritage Act automatically protected all Sami cultural heritage (*Samiske kulturminner*) that was more than one hundred years old.<sup>37</sup> The new rules adopted by the Norwegian Parliament in June of 2018 freezes the period of protection, to 1917 and earlier. According to the Norwegian government, the fixed 1917 date, as opposed to a moving one-hundred-year mark, makes conservation easier and more predictable.<sup>38</sup> The seemingly arbitrary selection of 1917 as the historic threshold is a result of the first national assembly of the Sami at Trondheim in 1917.<sup>39</sup> Any Sami cultural heritage that is from 1918 and forward thus must instead seek protection under sections 15, 19, and 20 of the Cultural Heritage Act.<sup>40</sup> Such protections are made available for areas surrounding a protected area, or for new areas that otherwise have a unique cultural value (*særart*) where protecting it would protect the cultural heritage. Examples of Sami cultural heritage other than buildings include Sami offering sites.<sup>41</sup>

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<sup>32</sup> §§ 4 and 12 KULTURMINNELOVEN.

<sup>33</sup> *Id.* § 6.

<sup>34</sup> *Id.* § 15.

<sup>35</sup> §§ 4, 15, 19 and 20 KULTURMINNELOVEN.

<sup>36</sup> *Id.* § 4.

<sup>37</sup> Compare KULTURMINNELOVEN, as in force until 2018.

<sup>38</sup> Proposisjon [Prop.] [Government Bill] 42 L (2017-2018) Endringer i kulturminneloven (fredningsgrensen for samiske kulturminner) [Amendments to the Cultural Heritage Act (Protection of Sami Cultural Heritage)], at 6, <https://www.regjeringen.no/contentassets/5d22847e34e144b49a406a7ba5603256/no/pdfs/prp201720180042000dddpdfs.pdf>, archived at <https://perma.cc/G9L7-P2PU>.

<sup>39</sup> Innstilling [Innst.] [Committee Report] 305 L (2017-2018) Innstilling fra familie- og kulturkomiteen om Endringer i kulturminneloven (fredningsgrensen for samiske kulturminner) Recommendations from the Family and Cultural Committee Regarding Amendments to the Cultural Heritage Act (Protections for the Sami Cultural Heritage)], <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2017-2018/inns-201718-305l.pdf>, archived at <https://perma.cc/JPG5-4LG9>.

<sup>40</sup> §§ 15, 19 and 20 KULTURMINNELOVEN.

<sup>41</sup> *Samiske kulturminne*, RIKSANTIKVAREN, <https://www.riksantikvaren.no/Tema/Urfolk-minoriteter-og-kulturminne/Samiske-kulturminne> (last visited Mar. 5, 2019), archived at <https://perma.cc/2PYA-M6QD>.

The Directorate for Cultural Heritage (Riksantikvaren) has a special program that covers protected Sami cultural buildings.<sup>42</sup> A review and inventory of protected buildings was initiated in 2011<sup>43</sup> and the full registry (*Samiske bygningsregistreringer*) was completed in 2017.<sup>44</sup> The list then included eight hundred to nine hundred buildings.<sup>45</sup> An example of a protected Sami building includes the Buret på Fagerbakken (Cage on the Fager Hill).<sup>46</sup>

The government has provided funds, subject to an application, for the protection and preservation of privately owned cultural heritage sites and Sami buildings.<sup>47</sup> The Directorate for Cultural Heritage processes the application and grants the funding.<sup>48</sup>

## 2. Automatic Protection of Gravesites from Prior to 1917

Similar to other Sami cultural objects, Sami gravesites that date back to 1917 or earlier are automatically protected under the Norwegian Cultural Heritage Act.<sup>49</sup> The Norwegian Institute for Cultural Heritage Research (Norsk institutt for kulturminneforskning, NIKU) has published a report on the protected gravesites of the Sami, which are generally located in the northern parts of the country.<sup>50</sup> During its 2002 survey the NIKU found essentially five different types of Sami graves.<sup>51</sup> The older Sami graves (from the sixteenth and seventeenth centuries) were located just outside the cemetery and were unmarked.<sup>52</sup> The newer graves (after the 1750s) were located in

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<sup>42</sup> *Bevaringsprogrammet for samiske kulturminner*, RIKSANTIKVAREN, <https://www.riksantikvaren.no/Prosjekter/Bevaringsprogramma/Bevaringsprogrammet-for-samiske-kulturminner> (last visited Mar. 5, 2019), archived at <https://perma.cc/4WEC-QK29>.

<sup>43</sup> *Samisk bygningsvern – Viktig kulturhistorie*, SAMETINGET (Sept. 14, 2019), <https://www.samedigge.no/Samedikke-birra/Arkiv-perioden-2016-2017/AAdaasa/Samisk-bygningsvern-Viktig-kulturhistorie>, archived at <https://perma.cc/W3TY-69FJ>; SÅMEDIGGE, VERN OG FORVALTNING AV SAMISKE BYGGVERK (Aug. 2003), <https://www.samedigge.no/content/download/1115/file/Vern+og+forvaltning+av+samiske+byggverk.pdf>, archived at <https://perma.cc/5TKF-WM8X>.

<sup>44</sup> *Samisk bygningsvern – Viktig kulturhistorie*, SAMETINGET, *supra* note 43.

<sup>45</sup> *Id.*

<sup>46</sup> *Buret på Fagerbakken – en ikonisk samisk bygningstype*, RIKSANTIKVAREN, <https://www.riksantikvaren.no/Aktuelt/Maanedens-kulturminne/Buret-paa-Fagerbakken-en-ikonisk-samisk-bygningstype> (last visited Mar. 5, 2019), archived at <https://perma.cc/RXL6-LPLJ>.

<sup>47</sup> *Tilskuddsmidler 2019 - Freda samiske bygninger i privat eie*, SAMETINGET, <https://www.sametinget.no/Tilskudd-og-stipend/Tilskuddsmidler-2019-Freda-samiske-bygninger-i-privat-eie> (last visited Mar. 5, 2019), archived at <https://perma.cc/6C6N-L9JW>.

<sup>48</sup> *RETNINGSLINGER OG VILKÅFOR TILSKUDD FRA STATSBUJETTET KAP. 1429 POST 71-79*, RIKSANTIKVARIEN, <https://www.sametinget.no/content/download/2794/file/Retningslinjer-og-vilkaar-for-stilskudd-fra-statsbudsjettet-kap-1429-post-71-79.pdf>, archived at <https://perma.cc/H4V6-4Y6W>.

<sup>49</sup> *Id.* § 4.

<sup>50</sup> Asgeir Svestad & Stine Barlindhaug, *Norsk institutt for kulturminneforskning, Samiske Kirkegårder Registrering av automatisk freda samiske kirkegårder i Nord Troms og Finnmark (2003)*, <https://brage.bibsys.no/xmlui/bitstream/handle/11250/2561037/NIKURapport4.pdf?sequence=1&isAllowed=y>, archived at <https://perma.cc/4TQM-A89Z>.

<sup>51</sup> *Id.* at 10–11.

<sup>52</sup> *Id.* at 10.

cemeteries and marked with a wooden cross with a name or initials.<sup>53</sup> For these graves, the information provided on Sami graves was typically less than the information included on the graves of non-Sami Norwegians, and many of the graves from prior to the 1900s had wooden crosses that had been destroyed, making the information illegible.<sup>54</sup> NIKU's graveyard group that conducted the survey of the protected gravesites called for additional areas to be registered, including more southern areas where the Sami ancestors no longer identify as Sami.<sup>55</sup> Sami graveyards that are protected by the automatic protection provided by the Norwegian Cultural Heritage Act may not be altered.<sup>56</sup> Sami graveyards from 1918 or later are not automatically protected.<sup>57</sup> However, more recent Sami graveyards may be protected under the provision protecting all graves for forty years from burial.<sup>58</sup>

### C. Limits on Land Use Based on the Cultural Heritage Act

#### 1. Preservation

Persons who use and own land have a duty to examine whether it is subject to cultural heritage protection.<sup>59</sup> If the site is a protected cultural heritage site the person who wants to modify the site must make a request with the Directorate for Cultural Heritage or the police.<sup>60</sup> Although costs to protect and preserve automatically protected heritage sites must generally be borne by the owner or the person who takes the measure affecting the site, the Directorate of Cultural Heritage may decide to reimburse certain costs.<sup>61</sup>

The Norwegian state must provide compensation for moveable property that it expropriates on the basis of the property being of protected cultural value.<sup>62</sup> The state may also excavate human remains including skulls and skeletons.<sup>63</sup>

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<sup>53</sup> *Id.* at 11.

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> § 3 KULTURMINNELOVEN.

<sup>57</sup> *Id.* § 4.

<sup>58</sup> § 8 LOV OM GRAVPLASSER, KREMASJON OG GRAVFERD (GRAVFERDSLOVEN) [ACT ON GRAVE PLOTS, CREMATION, AND FUNERALS (THE FUNERAL ACT)] (LOV 1996-06-07-32), <https://lovdata.no/dokument/NL/lov/1996-06-07-32>, archived at <https://perma.cc/LF6M-GM4T>. See also *Gravplasser mangler lovbeskyttelse etter 40 år*, ØKOKRIM (Apr. 7, 2011), <https://www.okokrim.no/gravplasser-mangler-lovbeskyttelse-etter-40-aar.416163.no.html>, archived at <https://perma.cc/D3DX-UDCB>.

<sup>59</sup> § 9 KULTURMINNELOVEN.

<sup>60</sup> *Id.* § 8.

<sup>61</sup> *Id.* § 10.

<sup>62</sup> *Id.* § 11.

<sup>63</sup> *Id.*

## 2. Prohibition on Alterations, Damage, Etc.

Buildings or cultural heritage sites that are automatically protected may not be altered.<sup>64</sup> The law specifically provides that “[n]o action – unless otherwise permissible under § 8 – may be initiated if it will damage, destroy, excavate, move, change, cover, hide, or in another way unduly hurt automatically protected cultural heritage, or create a risk that this may happen.”<sup>65</sup> Violations of this provision are subject to fines or one year of imprisonment (two years if the violation is especially heinous).<sup>66</sup> A recent example of a violation of a Sami heritage site is the Kallenholmen incident, where an individual, using a metal detector to mark the spots, dug up eighty holes in the Kallenholmen Sami heritage site.<sup>67</sup> The police did not manage to locate the perpetrator.<sup>68</sup> Previous surveys conducted by the police and Oslo University show that local police officers generally express that they lack expertise in how to investigate and prevent violations of heritage protection laws and damage to heritage sites.<sup>69</sup>

Examples of instances where fines were issued for the destruction of a cultural site include an NOK 150,000 (about US\$14,000) fine issued to the Eigursund municipality for allowing one of its contractors to dig up parts of a Norwegian (non-Sami) heritage site.<sup>70</sup> Tønsberg municipality received a larger, NOK 1.5 million (about US\$175,000) fine in 2016 when it dug into a heritage site.<sup>71</sup> Here the circumstances suggested the municipality was culpable and had not notified the county of its intended actions.<sup>72</sup>

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<sup>64</sup> *Id.* § 3.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 27.

<sup>67</sup> PRM: Fredet kulturminne på Kalle i Vågan kommune rasert, SAMETINGET (May 22, 2018), <https://www.sametinget.no/Nyhetsarkiv/PRM-Fredet-kulturminne-paa-Kalle-i-Vaagan-kommune-rasert>, archived at <https://perma.cc/P5A6-UT4H>.

<sup>68</sup> Synne Mauseth, *Henla saken etter at kulturminne ble rasert*, LOFOTPOSTEN (Dec. 29, 2018), <https://www.lofotposten.no/politi/kalle/kabelvag/henla-saken-etter-at-kulturminne-ble-rasert/s/5-29-442743>, archived at <https://perma.cc/VH4D-SB9G>.

<sup>69</sup> *Kulturminnekriminalitet*, ØKOKRIM (May 30, 2011), <https://www.okokrim.no/kulturminnekriminalitet.416143.no.html>, archived at <https://perma.cc/86KA-96FA>.

<sup>70</sup> *150 000 i bot til Eigersund kommune for å grave sjakt i kulturminne*, ØKOKRIM (Dec. 19, 2013), <https://www.okokrim.no/150-000-i-bot-til-eigersund-kommune-for-aa-grave-sjakt-i-kulturminne.416937.no.html>, archived at <https://perma.cc/4VDG-VH3P>.

<sup>71</sup> *Aktuelle førelegg*, ØKOKRIM (May 13, 2015), <https://www.okokrim.no/aktuelle-foerelegg.416363.no.html>, archived at <https://perma.cc/BXH5-2GH9>.

<sup>72</sup> *Id.*

Examples of instances where a prison sentence was delivered include a farmer who, absent prior approval, dug up parts of his land.<sup>73</sup> He was sentenced to a sixty-day jail sentence and an NOK 60,000 (about US\$7,000) fine.<sup>74</sup>

#### D. Finder's Rights and Obligations

By law, the finder of a cultural object (as defined in the Act on Cultural Heritage, see Part III(A), above) must report it to the police.<sup>75</sup> Failure to do so is subject to a fine or imprisonment for up to one year.<sup>76</sup>

A finder of a cultural object may be entitled to a finder's fee. Finder's fees are determined on an ad hoc basis by the sole discretion of the Directorate for Cultural Heritage.<sup>77</sup> If the object found is made of silver or gold then the reimbursement must be based on the value of the item as determined by the weight of the metal.<sup>78</sup>

Persons who violate the Cultural Heritage Act either through their actions or inaction may be fined or imprisoned for up to one year.<sup>79</sup>

### III. Repatriation of Human Remains

In 1997, Norway became the first Nordic country in which Sami human remains were repatriated.<sup>80</sup> Oslo University returned the skull of Mons Somby (one of the beheaded leaders behind the Kautokeino Uprising of 1852) to the Sami Cultural Board (Samisk kulturminneråd) in 1996.<sup>81</sup> He was later reburied together with Aslak Hætta, whose skull was found at the University of Copenhagen, in 1997.<sup>82</sup> Other descendants of Sami individuals have also requested to have

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<sup>73</sup> Gulating lagmannsrett [Gulating Appeals Court] LG-2009-113472 (2010-10-14) (on file with author), also available at LG-2009-113472, <https://lovdata.no/pro/#document/LGSTR/avgjorelse/lg-2009-113472?searchResultContext=1167&rowNumber=47&totalHits=345> (by subscription), archived at <https://perma.cc/2FPD-KK5E>.

<sup>74</sup> *Id.*

<sup>75</sup> § 13 KULTURMINNELOVEN.

<sup>76</sup> *Id.* § 27.

<sup>77</sup> *Id.* § 13.

<sup>78</sup> *Id.* § 13 mom. 4.

<sup>79</sup> *Id.* § 27.

<sup>80</sup> *Hodeskallen levert tilbake*, UNIFORM (Sept. 3, 1996), [https://www.uniform.uio.no/nyheter/1996/uni\\_forum11-96/hode.html](https://www.uniform.uio.no/nyheter/1996/uni_forum11-96/hode.html), archived at <https://perma.cc/6Q5Z-W9YQ>; *Norway Returns Skulls of Lappish Dead*, BBC (Dec. 15, 1997), <http://news.bbc.co.uk/2/hi/39626.stm>, archived at <https://perma.cc/HHL6-H2BT>.

<sup>81</sup> *Hodeskallen levert tilbake*, UNIFORM, *supra* note 80.

<sup>82</sup> *Aslak Hættas hodeskalle i København*, UNIFORM (May 15, 1997), <https://www.uniform.uio.no/nyheter/1997/uniform08-97/a7.html>, archived at <https://perma.cc/K5UT-ZHYC>; Per Lars Tonstand, *Fulgte skallene til graven*, DAGBLADET (Nov. 22, 1997), <https://www.dagbladet.no/nyheter/fulgte-skallene-til-graven/65423245>, archived at <https://perma.cc/HWA6-3WQ7>.

their ancestors' skulls returned and reburied.<sup>83</sup> For instance, Oslo University holds hundreds of skulls that were taken from the Sami.<sup>84</sup> In 2011 a total of ninety-four Skolt-Sami (*skolttesamer*) remains were reburied in a mass grave in Neiden, an area on the Norwegian-Finnish-Russian border.<sup>85</sup> The government has not passed legal requirements or issued ethical guidelines for the conservation and return of Sami skulls and human remains.

#### IV. Excavation of Sami Graves

Excavation and archeological studies of Sami graves may be conducted by (or at the direction of) the Norwegian government, provided that certain rules are followed, including notifying the landowner.<sup>86</sup> The cultural heritage site must also be restored and the objects returned.<sup>87</sup> If the objects cannot be returned they must be preserved by the relevant government agency.<sup>88</sup>

In 2005 an excavation and archeological survey of Sami grave sites in Øyo was conducted to determine whether pre-Christian customs of burial ceremonies (such as being buried with personal items) carried over to post-Christian Sami burial ceremonies.<sup>89</sup>

Newer graves, which do not qualify automatically for heritage protection, are protected in the Funeral Act.<sup>90</sup> The Act specifies when graves may be opened or moved.<sup>91</sup> New graves are typically protected for forty years.<sup>92</sup> Older graves that are considered cultural heritage, compare above, are automatically protected.<sup>93</sup>

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<sup>83</sup> Janne Kjellberg, *Vil ha 21 hodeskaller tilbake*, NRK (Jan. 18, 2008), <https://www.nrk.no/kultur/vil-ha-21-hodeskaller-tilbake-1.4561916>, archived at <https://perma.cc/K56Y-7NMZ>.

<sup>84</sup> *Id.*

<sup>85</sup> Per Lars Tonstand, *Norsk Gravroveri med statens velsignelse*, DAGBLADET (Sept. 24, 2011), <https://www.dagbladet.no/nyheter/norsk-gravroveri-med-statens-velsignelse/63501006>, archived at <https://perma.cc/6997-FSBD>; Erik Lieungh, *Nå skal 94 samiske skjelett gravlegges for godt*, NRK (June 30, 2011), <https://www.nrk.no/troms/gjengraving-av-94-sameskjelett-1.7696109>, archived at <https://perma.cc/U8PJ-UTS6>.

<sup>86</sup> § 11 KULTURMINNELOVEN.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Tor Kjetil, *Samiske graver på Kirkegårdsøya åpnes*, FINNMARK (July 11, 2005), <https://www.ifinnmark.no/kultur/samiske-graver-pa-kirkegardsoya-apnes/s/1-30002-1661649?service=profile&personId=356330>, archived at <https://perma.cc/BEU6-4ZD9>.

<sup>90</sup> LOV OM GRAVPLASSER, KREMASJON OG GRAVFERD (GRAVFERDSLOVEN) [ACT ON GRAVE PLOTS, CREMATION, AND FUNERALS (FUNERAL ACT)] (LOV 1996-06-07-32), <https://lovdata.no/dokument/NL/lov/1996-06-07-32>, archived at <https://perma.cc/LF6M-GM4T>.

<sup>91</sup> *Id.* § 7.

<sup>92</sup> *Id.* § 8.

<sup>93</sup> See Part II(B)(2), above.

## V. Laws Regulating Land Use, Conservation, and Sami Territorial Rights

### A. Land Protection Legislation

The use of land in Norway is subject to several laws, including the Cultural Heritage Act mentioned above. In addition to that Act, the use of land is also subject to limitations found in the Nature Diversity Act and the Planning and Building Act.

#### 1. Nature Diversity Act

The purpose of the Nature Diversity Act is to ensure that “nature with its biological, geographic and geological diversity and ecological processes is taken care of through sustainable use and protection, also in a way that it provides a basis for mankind’s activities, culture, health and well-being, now and in the future, and also a basis for Sami culture.”<sup>94</sup> The law also requires that Sami usage of an area, as well as the impact on Sami culture, be considered before measures are undertaken to change the land.<sup>95</sup> The law specifically requires that the Sami Council be heard or have a chance to comment on issues that affect the Sami people.<sup>96</sup>

Under the Nature Diversity Act, protected areas such as national parks may be established.<sup>97</sup> If established, the use of these spaces is regulated and no activity having a lasting impact on nature or cultural heritage sites and objects may be undertaken.<sup>98</sup> As of 2017, 17% of Norway’s landmass was protected as national parks.<sup>99</sup> National parks may also be established on private land as the result of an amendment to the legislation.<sup>100</sup> In determining whether a protected area should be established, both cultural interests and financial interests must be considered.<sup>101</sup>

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<sup>94</sup> LOV OM FORVALTNING AV NATURENS MANGFOLD (NATURMANGFOLDLOVEN) [NATURE DIVERSITY ACT] § 1 (LOV 2006-06-19), <https://lovdata.no/dokument/NL/lov/2009-06-19-100?searchResultContext=1115&rowNumber=4&totalHits=1246> (translation by author), archived at <https://perma.cc/P6BR-JTQG>.

<sup>95</sup> *Id.* §§ 8, 11.

<sup>96</sup> *Id.* § 43.

<sup>97</sup> *Id.* §§ 35–37.

<sup>98</sup> *Id.* § 35.

<sup>99</sup> Antje Neumann, *Sami Participatory Rights in Area Protection and Management: The Influence of the Related CBD’s Programme in Finland and Norway*, in *INDIGENOUS RIGHTS IN MODERN LANDSCAPES: NORDIC CONSERVATION REGIMES IN GLOBAL CONTEXT* 205 (Lars Elenius et al. eds., 2017).

<sup>100</sup> NOU 2004:28 Lov om bevaring av natur, landskap og biologisk mangfold [Act on Preservation of Nature, Landscapes, and Biological Diversity], at 147, <https://www.regjeringen.no/contentassets/149bde12e1e24fe983663d38ec6d41e0/no/pdfs/nou200420040028000dddpdfs.pdf>, archived at <https://perma.cc/FHV5-8BHF>.

<sup>101</sup> § 14 NATURMANGFOLDLOVEN.

Violations of the Nature Diversity Act are punishable by fine, unless a greater punishment is warranted because of other laws.<sup>102</sup> Thus, in the case of violations of Sami heritage sites in national parks, the Heritage Act and its specified punishments (a fine or imprisonment) would apply.<sup>103</sup>

Sami representatives are members of the National Park Boards in all National Parks where Sami people live or operate.<sup>104</sup>

## 2. *The Planning and Building Act*

The Planning and Building Act is meant to coordinate efforts between the Norwegian state, municipalities, and districts in planning the zoning and use of land in Norway.<sup>105</sup> It is intended to create “sustainable development in the best interest of the individual, the community, and for future generations.”<sup>106</sup> Under the law, any development of Norwegian land must first be preapproved by the Ministry of Local Government and Modernization.<sup>107</sup> Development of an area not correctly zoned is prohibited, and violations of the Planning and Building Act may result in forced restitution as well as administrative fees, fines, or imprisonment.<sup>108</sup> Both the municipality and the Norwegian state must provide updated zoning plans.<sup>109</sup> Consideration must be given to “protection of important geographical and cultural areas,” but the plan should also create an opportunity for value appreciation and the development of industry.<sup>110</sup> The Sami Council has a right and duty to participate in local planning, and also has a right to comment on proposals and appeal decisions that affect them.<sup>111</sup> The state plan is revised every four years by the government.<sup>112</sup> Sami reindeer herders have objected to the urbanization of northern areas.<sup>113</sup>

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<sup>102</sup> *Id.* § 75.

<sup>103</sup> *Id.* § 39; § 27 KULTURMINNELOVEN.

<sup>104</sup> *Lokal forvaltning av nasjonalparker og store verneområder*, SAMETINGET (Feb. 10, 2017), <https://www.sametinget.no/Tjenester/Miljoe-areal-og-kulturvern/Lokal-forvaltning-av-nasjonalparker-og-store-verneomraader>, archived at <https://perma.cc/VL39-AAX4>.

<sup>105</sup> LOV OM PLANLEGGING OG BYGGESAKSBEHANDLING (PLAN- OG BYGNINGSLOVEN) (LOV 2008-06-27-71), <https://lovdata.no/dokument/NL/lov/2008-06-27-71/>, archived at <https://perma.cc/L99N-7QDF>.

<sup>106</sup> *Id.* § 1-1.

<sup>107</sup> *Id.* 20-1.

<sup>108</sup> *Id.* §§ 32-8, 32-9.

<sup>109</sup> *Id.* §§ 2-1, 2-2.

<sup>110</sup> *Id.* § 2-1b.

<sup>111</sup> *Id.* §§ 1-9, 3-2, 5-4.

<sup>112</sup> *Id.* § 6-1.

<sup>113</sup> Rune Andreassen, *Dette er et reinbeitedistrikt. Det kan ikke folk se bort fra*, NRK (Mar. 18, 2019), <https://www.nrk.no/troms/-dette-er-et-reinbeitedistrikt-det-kan-ikke-folk-se-bort-fra-1.14451906>, archived at <https://perma.cc/H3Q2-YS7W>.

## B. The Right to Roam

Generally, the right to roam (*allemansretten*) provides a public right to walk on private land (*utmark*), as well as a duty of care, i.e. persons are not allowed to damage the property.<sup>114</sup> The right to roam has been a foundation of Norwegian society since the 1700s when Norwegian settlers moved to Finnmark, the lands previously utilized primarily by the Sami people.<sup>115</sup> The right to exercise the right to roam and to use natural resources “such as stones, twigs, plants etc., of little or no financial value” is also illustrated by a section in the Penal Code that exempts the taking of these items from the provision on theft.<sup>116</sup> Similarly, property owners may not erect fences or other obstacles that would hinder the public’s use of their right to roam.<sup>117</sup> The right to roam must be exercised with due care for cultural heritage sites and objects.<sup>118</sup>

## C. Reindeer Grazing Rights

### 1. Law and Customary Rights

The Sami people have a special right to use land in Finnmarken, the northern parts of Norway. About 40% of the Norwegian mainland is used for reindeer grazing.<sup>119</sup> The right is based both on custom and black letter law.<sup>120</sup> Specifically, authorized Sami reindeer herders may allow their reindeer to graze in certain areas.<sup>121</sup> Norwegian law differentiates between the grazing rights during summer and winter months.<sup>122</sup> Finnmarken is controlled by the Finnmark Estate Agency (Finnmarkseiendommen, FeFo), a special administrative agency that is made up of both Sami representatives and non-Sami representatives, all of whom must reside in Finnmarken.<sup>123</sup>

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<sup>114</sup> § 2 LOV OM FRILUFTSLIVET (FRILUFTSLOVEN) [ACT ON OUTDOOR ACTIVITIES (OUTDOORS ACT)] (LOV 1957-06-28-16), <https://lovdata.no/dokument/NL/lov/1957-06-28-16>, archived at <https://perma.cc/C2WH-HXYK>.

<sup>115</sup> NOU 2001:34 Samiske sedvaner og rettsoppfatninger – bakgrunnsmateriale for Samerettsutvalget [Sami Custom and Legal Interpretations – Background Material for the Sami Law Survey] at 575, <https://www.regjeringen.no/contentassets/fba82b10cd444d7ab37b550c4ac518f8/no/pdfs/nou200120010034000dddpdfs.pdf>, archived at <https://perma.cc/V6CA-J3S3>.

<sup>116</sup> § 323 STRAFFELOVEN [PENAL CODE], LOV-2005-05-20, [https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL\\_2-12](https://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_2-12) (translation by author), archived at <https://perma.cc/WY6U-VKEM>.

<sup>117</sup> § 13 FRILUFTSLOVEN.

<sup>118</sup> § 27 KULTURMINNELOVEN.

<sup>119</sup> Jan Åge Riseth, *A Space for Sami Valued? Sami Reindeer Herding and Norwegian National Parks*, in INDIGENOUS RIGHTS IN MODERN LANDSCAPES, *supra* note 99, at 148.

<sup>120</sup> § 4 LOV OM REINDRIFT (REINDRIFTSLOVEN) [ACT ON REINDEER (REINDEER ACT)] (LOV 2007-06-15-40), <https://lovdata.no/dokument/NL/lov/2007-06-15-40>, archived at <https://perma.cc/C6C5-QXF2>.

<sup>121</sup> *Id.* §§ 8, 9; see also NOU 2001:34, *supra* note 115.

<sup>122</sup> § 20 REINDRIFTSLOVEN.

<sup>123</sup> *Id.* §§ 6 & 7.

## 2. Recent Case Law on Grazing Rights

Although Norway recognizes the right of immemorial use by Sami reindeer herders, there are limits on the right to use the land for reindeer grazing or other activities. In January of 2019 the Norwegian Court of Appeals found that a Swedish Sami village that enjoys grazing rights during the winter months does not enjoy these same rights during the summer months.<sup>124</sup> This case may be appealed to the Supreme Court.<sup>125</sup> The Norwegian Supreme Court also held in 2018 that a Sami village in Finnmark, while possessing user rights based on immemorial use (*alders tids bruk*), did not have a right to regulate fishing, trapping, and hunting in Finnmark.<sup>126</sup> The right to regulate instead rested with the Finnmark Estate Agency as owner (*grundeier*) of the land.<sup>127</sup>

### D. Current Land-Use Conflicts

The absence of a right for Sami people to administer the land that they use, as well as any determination that their use is based on the season, has consequences with regard to the granting of mining operations, creation of hydroelectric power stations, and other permissible uses of land used by the Sami. Some of the larger conflicts regarding land-use rights are between traditional Sami land use and mining.<sup>128</sup> For example, a copper mine in Kvalsund, which the Sami oppose, will be required to halt its operations during the reindeer calving period.<sup>129</sup> Another example of a land-use conflict is the prohibition on snowmobiles and other motorized traffic in protected areas (such as national parks), technology that the Sami reindeer herders use.<sup>130</sup> These prohibitions are often in place to protect cultural sites and the environment, including Sami

<sup>124</sup> Borgarting Lagmannsrett [Boargarting Court of Appeals] LB-2017-97958-2 (Jan. 6, 2019), on file with author.

<sup>125</sup> *Id.*

<sup>126</sup> Høyesterett [Supreme Court], HR-2018-456-P (Sak nr. 2017/860), <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2018/avgjorelser-mars-2018/saknr-2017-860.pdf>, archived at <https://perma.cc/GG6Q-R2X9>, English summary available at <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-colleective-rights-of-use-to-land-in-nesseby-finnmark/>, archived at <https://perma.cc/BW95-XK3V>; see also Elin Hofverberg, *Norway: Supreme Court: Finnmark Estate Agency Has Right to Regulate Fishery, Hunting and Use of Natural Resources in Finnmark*, GLOBAL LEGAL MONITOR (Mar. 30, 2018), <http://www.loc.gov/law/foreign-news/article/norway-supreme-court-finnmark-estate-agency-has-right-to-regulate-fishery-hunting-and-use-of-natural-resources-in-finnmark/>, archived at <https://perma.cc/AC7S-DQVY>.

<sup>127</sup> Høyesterett, HR-2018-456-P, *supra* note 126.

<sup>128</sup> André Bendixen & Fredrik Solvang, *Gruva i Kvalsund stikker hardt i hjertet*, NRK (Feb. 21, 2019), [https://www.nrk.no/finnmark/\\_gruva-i-kvalsund-stikker-hardt-i-hjertet-1.14441498](https://www.nrk.no/finnmark/_gruva-i-kvalsund-stikker-hardt-i-hjertet-1.14441498), archived at <https://perma.cc/Y5HP-RZM6>; see also U.N. General Assembly, *Report on the Special Rapporteur on the Rights of Indigenous Peoples on the Human Rights Situation of the Sami People in the Sápmi Region of Norway, Sweden, and Finland: Human Rights Council*, U.N. Doc A/HR/33/42/Add.3 (Aug. 9, 2016), <http://unsr.vtaulicorpuz.org/site/images/docs/country/2016-sapmi-a-hrc-33-42-add-3-en.pdf>, archived at <https://perma.cc/4SUV-LVM3>; *Gruvedrift i Finnmark gjennom tidene*, NATURVERNFORBUNDET, <https://naturvernforbundet.no/finnmark/gruvedrift/gruvedrift-i-finnmark-gjennom-tidene-article26009-2023.html?offset5331=8> (last visited Feb. 12, 2019), archived at <https://perma.cc/ZD2K-5PRY>.

<sup>129</sup> NRK, *supra* note 128.

<sup>130</sup> Jan Åge Riseth, *A Space for Sami Valued? Sami Reindeer Herding and Norwegian National Parks*, in *INDIGENOUS RIGHTS IN MODERN LANDSCAPES*, *supra* note 119, at 158, 162.

heritage sites. The tourism industry also creates a potential for conflict, and the creation of national parks may limit the freedom of the Sami.

# Peru

*Graciela Rodriguez-Ferrand*  
*Senior Foreign Law Specialist*

Peru does not have specific legislation on the protection of sacred places of indigenous people. Its cultural property, including graves, human remains, and artifacts, are governed by the general rules applicable to the cultural heritage of Peru.

The Peruvian Constitution provides that archaeological ruins and sites, monuments, bibliographic and archival documents, artistic objects, and documents of historic value, expressly declared to be cultural assets, and provisionally those presumed as such, are the nation's cultural patrimony, regardless of their status as private or public property,<sup>1</sup> and are protected by the state.<sup>2</sup> The protection of cultural property has been extensively structured by the Ley General de Patrimonio Cultural (LGPC) (General Law on Cultural Patrimony) No. 28296<sup>3</sup> and its regulation under Decreto Supremo No. 011-2006-ED.<sup>4</sup>

The LGPC defines cultural property that is part of the cultural patrimony of the nation as any tangible or intangible expression of human work of paleontological, archeological, architectural, historical, artistic, military, social, anthropological, traditional, religious, ethnic, scientific, technological, or intellectual importance, value, and significance, which is specifically declared or legally presumed as such.<sup>5</sup>

Once declared a cultural property asset, property must be registered in the National Registry of Cultural Property Assets, within the Ministry of Culture.<sup>6</sup>

Indigenous art, materials, graves discovered in archeological excavations, and discoveries are governed by the LGPC and its regulation.<sup>7</sup> State protection includes a number of restrictions

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<sup>1</sup> CONSTITUCIÓN POLÍTICA DEL PERÚ [CPP] [POLITICAL CONSTITUTION OF PERU], OCT. 31, 1993, art. 21, [http://spij.minjus.gob.pe/content/publicaciones\\_oficiales/img/Constitucion-Politica-2016.pdf](http://spij.minjus.gob.pe/content/publicaciones_oficiales/img/Constitucion-Politica-2016.pdf), archived at <https://perma.cc/FM5Y-NYJ2>.

<sup>2</sup> *Id.*

<sup>3</sup> Ley 28296 General del Patrimonio Cultural de la Nación [LGPC] [General Law on Cultural Patrimony] art. I, <http://www.leyes.congreso.gob.pe/Documentos/Leyes/28296.pdf>, archived at <https://perma.cc/87FQ-MXTV>.

<sup>4</sup> Decreto Supremo No. 011-2006-ED Aprueba Reglamento de la Ley 28296, Ley General del Patrimonio Cultural [RLGPC] [Regulation of LGPC], <https://www.senace.gob.pe/download/senacenormativa/NAT-3-4-02-DS-011-2006-ED.pdf>, archived at <https://perma.cc/9MTQ-XNRB>.

<sup>5</sup> *Id.* art. II.

<sup>6</sup> RLGPC art. 9.

<sup>7</sup> LGPC art. 1.1.2.

imposed on the private or public owners of those cultural items regarding their sale, transfer, export, etc., in order to secure their adequate preservation.<sup>8</sup>

The transfer of cultural property assets must be reported to the competent authorities.<sup>9</sup> If the transfer is for valuable consideration, the seller must also give the authorities thirty days to opt to purchase the item, which will expire after said term and allow the seller to freely transfer the cultural property.<sup>10</sup>

The protection of the land categorized as cultural property includes the soil and subsoil where the property is located.<sup>11</sup> Any development or change in use of land constituting cultural property must have the prior approval of the National Institute of Culture.<sup>12</sup>

Private participation in the conservation, restoration, exhibition, and diffusion of this patrimony is encouraged, as is its return to Peru when it has been illegally removed from the national territory.<sup>13</sup>

The Penal Code<sup>14</sup> further provides that exploration, excavation, or appropriation of items found in pre-Hispanic archeological areas, without authorization, is a crime sanctioned with imprisonment and a fine in addition to seizure of the assets and civil compensatory reparation.<sup>15</sup> Criminal penalties also apply to whoever finances or organizes illegal extractions or explorations,<sup>16</sup> or destroys or illegally takes items of the cultural patrimony out of the country.<sup>17</sup>

A bill on the Protection and Preservation of the Paleontological Patrimony of the Nation, submitted on April 17, 2017, and pending congressional approval, would complement the LGPC, providing specific rules for the protection and preservation of paleontological assets.<sup>18</sup>

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<sup>8</sup> *Id.* arts. 7, 9 & 10.

<sup>9</sup> *Id.* art. 12.

<sup>10</sup> *Id.* art. 13.

<sup>11</sup> *Id.* art. 27.

<sup>12</sup> *Id.* art. 29.

<sup>13</sup> *Id.* art. V.

<sup>14</sup> Decreto Legislativo 635, Apr. 25, 1991, CÓDIGO PENAL [PENAL CODE] arts. 226-231, at 45, [http://spij.minjus.gob.pe/content/publicaciones\\_oficiales/img/CODIGOPENAL.pdf](http://spij.minjus.gob.pe/content/publicaciones_oficiales/img/CODIGOPENAL.pdf), archived at <https://perma.cc/5VDJ-SKS7>.

<sup>15</sup> *Id.* arts. 226, 231.

<sup>16</sup> *Id.* art. 227.

<sup>17</sup> *Id.* arts. 228, 230.

<sup>18</sup> Proyecto de Ley No. 1240/2016 CR Ley de Protección y Preservación del Patrimonio Paleontológico de la Nación [Bill No. 1240/2016 on the Law on the Protection and Preservation of the Paleontological Patrimony of the Nation], Apr. 17, 2017, [http://www.leyes.congreso.gob.pe/Documentos/2016\\_2021/Proyectos\\_de\\_Ley\\_y\\_de\\_Resoluciones\\_Legislativas/PL0124020170417.pdf](http://www.leyes.congreso.gob.pe/Documentos/2016_2021/Proyectos_de_Ley_y_de_Resoluciones_Legislativas/PL0124020170417.pdf), archived at <https://perma.cc/W4JF-AMVJ>.

# Russia

*Astghik Grigoryan*  
*Legal Research Analyst*

**SUMMARY** The Russian Federation is a multiethnic and multicultural country. Russian legislation does not contain a general definition of indigenous people. The Law on Guarantees of the Rights of Small-Numbered Indigenous Peoples of the Russian Federation only defines “small-numbered” (groups of no more than fifty thousand) indigenous peoples of the North, Far East, and Siberia.

Existing legislation contains several provisions aimed at guaranteeing the protection of objects of cultural and archaeological heritage. The Law on Objects of Cultural and Historic Heritage (Monuments of Culture and History) of the People of the Russian Federation is the primary law governing discoveries of human remains, sacred places, and artifacts of indigenous peoples. The Law governs the process and policies for archaeological excavations, inventories, and the protection of finds. The Law also provides a legal framework for land development in the context of the protection of objects of cultural and archaeological heritage.

Sacred places and places of worship of indigenous peoples are considered a part of their natural habitat. The Federal Law on Territories of Traditional Use of the Natural Habitat of Small-Numbered Indigenous Peoples of the North, Siberia, and Far East provides limited protection for these sites, as parts of specially protected lands of traditional use of the natural habitat.

## I. Introduction

The Russian Federation is a multiethnic and multicultural country, with more than 180 different nationalities and ethnic groups. The Russian Constitution provides for the protection and preservation of the cultural heritage of Russians. According to article 44, paragraph 3 of the Constitution, “everyone shall be obliged to care for the preservation of cultural and historical heritage and protect monuments of history and culture.”<sup>1</sup>

Russian legislation does not contain a general definition of the term “indigenous people.” National legislation only defines “small-numbered indigenous peoples of the Russian North, Far East, and Siberia.” Article 1 of the Law on Guarantees of the Rights of Small-Numbered Indigenous Peoples of the Russian Federation (Law on Guarantees of Rights) states that “indigenous small-numbered peoples” are those who live in the territories of traditional settlement of their ancestors; preserve their traditional lifestyle, economic activities, and crafts; and have a collective population in the Russian Federation of less than fifty thousand.<sup>2</sup> According

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<sup>1</sup> CONSTITUTION OF THE RUSSIAN FEDERATION 1993, art. 44, para. 3, available at <http://www.constitution.ru/en/10003000-04.htm> (in English), archived at <https://perma.cc/9QVU-E6N8>.

<sup>2</sup> Federal’nij Zakon Rossiskoi Federatsii o Garantiakh Prav Korennikh Malochislennikh Narodov Rossiiskoy Federatsii [Federal Law of Russian Federation (RF) on Guarantees of Rights of Indigenous Small-Numbered

to the Governmental Resolution on the Unified Registry of Small-Numbered Indigenous Peoples, of 180 nationalities and ethnic groups living in the Russian Federation more than forty are classified as “small-numbered indigenous peoples” and are thus subject to a special legal status and protection.<sup>3</sup>

The protections accorded to small-numbered indigenous peoples can be found in a variety of legal sources:

- Article 69 of the Constitution provides that “the Russian Federation shall guarantee the rights of the indigenous small-numbered people according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation.”<sup>4</sup>
- Article 72 of the Constitution states that the protection of the natural habitat and traditional way of living of small-numbered ethnic minorities, as well as issues of the possession, use, and disposal of land, subsoil, water, and other natural resources, are under the joint jurisdiction of the Russian Federation and its subjects.<sup>5</sup>
- The Federal Law on Territories of Traditional Use of the Natural Habitat of Indigenous Small-Numbered Peoples of the North, Siberia, and Far East (Law on Territories of Traditional Use) is the main piece of legislation providing protection for traditional habitats, places of worship, and objects of history and culture situated on the specially protected territories of traditional use of the natural habitat.<sup>6</sup>
- Additionally, the Law on Guarantees of Rights states that small-numbered indigenous peoples have the right to their unique culture, to observe their traditions and perform religious ceremonies, and to preserve and protect their places of worship.<sup>7</sup>

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People (Law on Guarantees of Rights)] art. 1 (1999), available in Russian on the legal information portal of the Russian Federation, at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102059473>, archived at <https://perma.cc/BK2M-STVQ>.

<sup>3</sup> Postanovlenie Pravitel'stva RF ot 24 Marta 2000 goda N 255 O Edinnom Perechne Korennikh Malochislennikh Narodov Rossiskoi Federatsii [Resolution of the Government of the RF from March 24, 2000, N 255 on the Unified Registry of Indigenous Small-Numbered Peoples of the RF], available in Russian on the website of the legal information portal Garant, at <http://base.garant.ru/181870/>, archived at <https://perma.cc/2Q9C-5KR9>.

<sup>4</sup> CONSTITUTION OF THE RUSSIAN FEDERATION 1993, art. 69.

<sup>5</sup> *Id.* art. 72.

<sup>6</sup> Rossiiskaya Federatsia, Federal'nii Zakon o Territoriakh Traditsionnogo Prirodopol'zovanoya Korennikh Malochislennikh Narodov Severa, Sibiri, i Dal'nego Vostoka, 4 Aprelya, 2001 goda [Federal Law on Territories of Traditional Use of Natural Habitat of Small-Numbered Indigenous Peoples of the North, Siberia, and Far East (Law on Territories of Traditional Use)], Apr. 4, 2001, <http://pravo.gov.ru/proxy/ips/?docview&page=1&print=1&infostr=xO7q8+zI7flg7vLu4fDg5uD18vH/IO3IIOIg7+7x6+Xk7eXpIPDI5ODq9ujo&nd=102070941&rdk=4&&empire> (in Russian), archived at <https://perma.cc/XWR4-XUHE>.

<sup>7</sup> Law on Guarantees of Rights art. 10.

This report examines the legal framework for the protection of indigenous peoples' graves, human remains, sacred places, and artifacts discovered during archaeological activities. The report outlines the process and protocol applicable to archaeological discoveries, land use and development on the territory where the objects of cultural heritage of indigenous peoples are found, and the protection of their places of worship and sacred places.

## II. Process of and Protocol for Archaeological Excavations

### A. Governing Principles and Definitions

Russian law does not contain specific provisions on conducting archaeological activities on the territory inhabited by indigenous peoples. The general principles for conducting scientific and exploratory activities on the specially protected territories of traditional use of the natural habitat are contained in the Law on Territories of Traditional Use. Article 10 of the Law on Territories of Traditional Use of Natural Habitat stipulates that parts of the specially protected lands allocated (demarcated) for use by small-numbered indigenous peoples may include objects of historical-cultural heritage, such as religious buildings, places of ancient habitation, and sites of ancestral burials.<sup>8</sup> Scientific and exploratory work conducted within the limits of these specially protected lands must be carried out with due consideration to the status of the lands.<sup>9</sup>

All archaeological activities, including the discovery and treatment of artifacts, graves, sacred places, and places of worship, are regulated by the Law on Objects of Cultural Heritage (Monuments of History and Culture) of the People of the Russian Federation (Law on Objects of Cultural Heritage).<sup>10</sup> Article 7 of that Law guarantees the preservation of cultural heritage sites.<sup>11</sup> According to article 3 of the Law, "objects of cultural heritage" (historical and cultural monuments) of the Russian people include objects of immovable property (including objects of archaeological heritage) and other objects that are associated with them within historically associated territories.<sup>12</sup> "Objects of archaeological heritage" are defined as partially or fully hidden traces of human existence in past eras (including all archaeological objects and cultural layers associated with such traces), the main or one of the main sources of information about which are archaeological excavations or finds.<sup>13</sup>

Article 3.1 of the Law on Objects of Cultural Heritage provides that the territory of the object of cultural heritage may include land, forests, water bodies, or parts thereof that are under state or

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<sup>8</sup> Law on Territories of Traditional Use art. 10.

<sup>9</sup> *Id.* art. 16.

<sup>10</sup> Federal'nii Zakon Rossiskoi Federatsii ob Ob'ektakh Kul'turnogo Naslediya (Pamyatnikakh Istorii I Kul'turi) Narodov Rossiskoi Federatsii [Federal Law of the RF on Objects of Cultural Heritage (Monuments of History and Culture) of the People of the RF (Law on Objects of Cultural Heritage)] (2002), <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102076756>, archived at <https://perma.cc/824E-FW8S>.

<sup>11</sup> *Id.* art. 7.

<sup>12</sup> *Id.* art. 3.

<sup>13</sup> *Id.*

municipal ownership or are owned by individuals or legal entities.<sup>14</sup> Such objects are classified as having federal, regional, or municipal significance.<sup>15</sup>

## **B. Permit Requirements and Eligibility**

According to article 45.1 of the Law, all archaeological activities, including those aimed at the discovery and storage of archaeological objects, are subject to obtaining a permit (“open list”), which is issued for a period not exceeding one year.<sup>16</sup> The permit is issued by the federal body for the protection of cultural heritage on the basis of the decision of the Russian Academy of Sciences confirming the right of the organization to conduct archaeological activities. The government of the Russian Federation establishes the order and requirements for issuance and cancellation of permits.

Permits may be issued to physical persons (individuals) who are

- citizens of the Russian Federation;
- in possession of the scientific knowledge and professional experience needed to carry out archaeological fieldwork;
- capable of producing a scientific report upon the conclusion of the fieldwork; and
- employed by the legal entity occupied in archaeological fieldwork or scientific research, educational activities, and/or collection activities for museums.<sup>17</sup>

The individual who holds the permit is obliged to inform the local bodies for the protection of cultural heritage about the commencement of archaeological activities in their jurisdiction. This information, along with the date and place of the intended activities, must be submitted to the regional body for the protection of cultural heritage no later than five days prior to starting work.<sup>18</sup>

The Law stipulates that the owners of the plots of land where archaeological excavations are to be conducted are obligated to provide unlimited access to the plots, as well as access to all land areas and water bodies identified in the permit.<sup>19</sup>

If archeological heritage objects are discovered during archaeological fieldwork, an individual who has received a permit must, within ten working days from the date of discovery of these objects, inform in writing the regional authority responsible for cultural heritage protection of the

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<sup>14</sup> *Id.* art. 3.1.

<sup>15</sup> *Id.* art. 4

<sup>16</sup> *Id.* art. 45.1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

objects of cultural heritage. The report must include textual and graphic descriptions of the location of the discovery, as well as a list of geographical coordinates of the discovery.<sup>20</sup>

### **C. Transfer of Findings and Related Reports**

Those who carry out archaeological fieldwork (both the physical and legal persons) are required to transfer within three years from the date of expiry of the permit, and in the manner prescribed by the federal body for the protection of objects of cultural heritage, all archeological objects taken (including man-made, anthropological, paleozoological, paleobotanical, and other objects of historical and cultural value) to the state part of the Museum Fund of the Russian Federation.<sup>21</sup> The Ministry of Culture is responsible for ensuring that all archaeological items taken during archaeological fieldwork are accepted for permanent storage in the state part of the Museum Fund of the Russian Federation.<sup>22</sup>

Those conducting archaeological fieldwork must also prepare a detailed scientific report at the conclusion of their work and submit it to the Archival Fund of the Russian Academy of Sciences for storage within three years after the expiration of the permit.<sup>23</sup>

### **D. Accidental Discoveries**

In the case of an unplanned discovery of an object of archaeological heritage, the person who made the discovery must immediately suspend work and send a written statement about the said objects to the regional body for the protection of objects of cultural heritage within three working days from the date of discovery. The regional body for the protection of cultural heritage then organizes an assessment to determine the cultural and historic value of the finds and their classification.<sup>24</sup>

### **E. Unified Registry**

The Russian Federation maintains a unified registry for objects of cultural heritage, including those of archaeological heritage.<sup>25</sup> Objects included in the registry are subject to special protection by the state. According to article 18(12) of the Law on Objects of Cultural Heritage, objects of archaeological heritage are subject to inclusion in the registry if they are at least one hundred years old.<sup>26</sup> Data included in the registry is the main source of information concerning objects of historical and cultural heritage.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* art. 47.1.

<sup>25</sup> *Id.* art. 15.

<sup>26</sup> *Id.* art. 18(12).

## F. Ownership and Preservation Archaeological Heritage Objects

According to the Law on Objects of Cultural Heritage, objects of archaeological heritage, whether lying on the surface of the earth, underground, or under water, are under state ownership. The Law also states that if there are no approved boundaries of the territory of the archaeological heritage site in the registry, the earth's surface, land plot, or body of water occupied by the archaeological heritage site is considered its territory.<sup>27</sup>

Article 49 of the Law on Objects of Cultural Heritage provides that if an object of archaeological heritage is found on a plot of land plot or in a body of water, from the day of the discovery of this object of archaeological heritage the owner or authorized user of the land or body of water must use or dispose of the land or water with due consideration for the preservation of the object of archaeological heritage.<sup>28</sup>

## III. Land Use and Development Considerations

Russian legislation does not contain specific provisions pertaining to the status of lands in the context of the protection of cultural heritage, including graves, sacred places, and artifacts of indigenous people. The specially protected lands that are part of the traditional use of natural habitats of small-numbered indigenous peoples (including objects of cultural and historic heritage, religious buildings, and places of ancient habitation and ancestral burials) are regulated by the Law on Territories of Traditional Use.<sup>29</sup> The Federal Law on Objects of Cultural Heritage, however, provides a legal framework for land use and development for the area where objects of cultural heritage are located or discovered.

The cultural heritage object and the plot of land where it is located are subject to differentiated land-use regimes. This differentiation allows for the possibility of conducting archaeological work regardless of the ownership status of the land. Land development, construction, and amelioration activities must be conducted with due consideration for the preservation of archaeological sites included in the unified registry of objects of cultural heritage, as well as newly-discovered objects of archaeological heritage from such sites.<sup>30</sup>

According to the Law on Objects of Cultural Heritage, a historical and cultural expert assessment must be conducted prior to commencement of planned land development, reclamation, and amelioration activities. The goal of the assessment is to determine the presence or absence of archaeological heritage sites and, if determined to be present, to ensure their preservation.<sup>31</sup> The

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<sup>27</sup> *Id.* art. 49.

<sup>28</sup> *Id.*

<sup>29</sup> Law on Territories of Traditional Use art. 10.

<sup>30</sup> Law on Objects of Cultural Heritage art. 5.1.

<sup>31</sup> *Id.* arts. 28, 31.

contractor or developer is responsible for bearing the costs associated with conducting the assessment.<sup>32</sup>

The government of the Russian Federation has adopted a Regulation with regard to procedures for choosing expert assessors and conducting the historical-cultural assessment.<sup>33</sup> The Regulation stipulates that the assessment must be impartial, transparent, and professional. For example, paragraph 8 of the Regulation specifies that persons who have kinship ties (members of the family) with the contractor, as well as those having a vested financial interest with regard to the outcome of the assessment including financial ties with the contractor, are precluded from conducting the assessment.<sup>34</sup>

The Law on Objects of Cultural Heritage obligates the developer or the contractor to ensure the safety of the objects of cultural and archaeological heritage, including conducting rehabilitation work, if necessary.<sup>35</sup>

In the event that during land and forest exploration, excavation, construction, or ameliorative work objects possessing the attributes of cultural heritage, including those of archaeological heritage, are discovered, the contractor must immediately suspend work and within three days from the date of discovery send to the regional authority for cultural heritage protection a written statement about the discovered cultural heritage objects.

The regional body responsible for the protection of objects of cultural heritage must conduct an assessment of the discoveries and determine their eligibility to be included in the unified registry of protected objects of cultural and archaeological heritage.<sup>36</sup> If the regional body determines that the objects should be included on the list of discovered objects of cultural and historic heritage, it (the regional body) informs the contractor or developer of the decision with instructions underlining protective measures that the developer or contractor must undertake.<sup>37</sup> In cases where the regional body decides not to include the discovered object on the list of protected objects of cultural and historic heritage, it must inform the developer or contractor of its decision. In this case the developer or contractor may continue to work.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Pravitel'stvo Rossiiskoi Federatsii, Postanovlenie ob Utverzhdenii Polozheniya o Gosudarstvennoi Istoriko-Culturnoi Ekspertizi. 15 Iyul'ya, 2009 goda, N 569 [Government of the RF, Regulation on the Approval of the State Historical-Cultural Expert Assessment], July 15, 2009, N569, <http://pravo.gov.ru/proxy/ips///?docbody=&prevDoc=102147815&backlink=1&&nd=102131087> (in Russian), archived at <https://perma.cc/9DWR-UJHG>

<sup>34</sup> *Id.* para. 8.

<sup>35</sup> Law on Objects of Cultural Heritage art. 36.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Archaeological objects discovered in the course of land-based or forestry activities and development or other economic activity must be transferred to the state by the individuals or legal entities carrying out these activities.<sup>39</sup>

#### IV. Protection of Sacred Places (Places of Worship) of Indigenous People

Freedom of religion and conscience is guaranteed in article 28 of the Constitution of the Russian Federation. The Constitution states that “everyone shall be guaranteed freedom of conscience, [and] freedom of religion, including the right to profess individually or together with others any religion or to profess no religion at all.”<sup>40</sup> Article 3 of the Federal Law on Freedom of Conscience and Religious Unions provides guarantees for religious freedom and freedom to engage in the practice of religion.<sup>41</sup> The Law on Guarantees of Rights secures the right of small-numbered indigenous peoples to conduct religious ceremonies in accordance with their cultural traditions.<sup>42</sup>

There is no definition in federal legislation as to what constitutes a place of worship or object of religious or sacred significance for indigenous peoples. For many indigenous peoples of the Russian Federation such places are integral parts of their natural habitats. This is recognized in article 10 of the Law on Territories of Traditional Use.<sup>43</sup>

The definition of sacred places or shrines can be found in the Law on Shrines of Small-Numbered Indigenous Peoples of the Khanty-Mansiyisk Autonomous Region—Ugra (Law on Shrines).<sup>44</sup> The Law defines “shrine” as an element of the natural landscape that is considered to be a sacred place because of its significance for religion and for practicing religious rituals and rites.<sup>45</sup> For shrines and sacred places to be properly protected, they should be included in the registry of objects of cultural and historical heritage. For that purpose, article 5 of the Law on Shrines guarantees the small-numbered indigenous peoples of the Khanty-Mansiyisk Region the right to appeal to the authorized executive body of the autonomous region (*okrug*) with a request to include shrines of indigenous peoples in the regional registry of objects of cultural heritage. Article 5 also guarantees indigenous peoples the right to free access to shrines and sacred places for the performance of religious rites and rituals.<sup>46</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> CONSTITUTION OF THE RUSSIAN FEDERATION art. 28.

<sup>41</sup> Rossiskaya Federatsia, Federal'nii Zakon o Svobode Sovesti i Religioznikh Ob'edineniyakh. 24 Sentyabrya 1998 goda [Federal Law on Freedom of Conscience and Religious Unions] art. 3 (Sept. 24, 1990), <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102049359>, archived at <https://perma.cc/27ZX-AB5X>.

<sup>42</sup> Law on Guarantees of Rights art. 10.

<sup>43</sup> Law on Territories of Traditional Use art. 10.

<sup>44</sup> Zakon Khanti-Masiskogo Avtonomnogo Okruga—Ugri, ot 8 Noyabrya 2005 Goda “O Sviatilishakh Korennikh Malochislennikh Narodov v Khanti-Masiskom Avtonomnom Okruge—Ugre” [Law on Shrines of Small-Numbered Indigenous People of Khanty-Mansiyisk Autonomous Orkug, Ugra (Law on Shrines)], Nov. 8, 2005, available on the website of the Duma (legislature) of Khanty-Masiyisk Autonomous Okrug, at <https://www.dumahmao.ru/decisions/detail.php?ID=7089>, archived at <https://perma.cc/6JQ8-T2GT>.

<sup>45</sup> *Id.* art. 3.

<sup>46</sup> *Id.* art. 5

The Law on Territories of Traditional Use states that, should the specially protected lands of traditional use of the natural habitat be alienated for state or municipal use, the indigenous peoples affected are entitled to equal land plots and other natural objects, as well as to compensation for incurred losses.<sup>47</sup> However, the Law does not provide for specific compensation or restitution for alienation or destruction of the sites containing shrines and places of worship of small-numbered indigenous peoples.

## V. Recent Developments

Several recent developments in the area of protection of cultural heritage could impact the protection of cultural heritage of the indigenous peoples of the Russian Federation.

- On February 21, 2019, amendments to the Law on Objects of Cultural Heritage came into effect. The amendments provide for the protection and demarcation of the territories of historic and cultural museums, reserves, and complexes.<sup>48</sup>
- The State Duma (Committee on the Affairs of Nationalities) supported the initiative to put forward legislation aimed at preserving and developing the nonmaterial cultural heritage of the indigenous peoples of Russia. The legislation seeks to preserve the ethnographic heritage of indigenous peoples, as well as provide a legal definition of “nonmaterial culture.”<sup>49</sup>
- At the international forum concerning the cultural and spiritual heritage of small-numbered indigenous peoples of the North, Siberia, and the Far East, under the auspices of RAIPON (the Russian Association of Indigenous Peoples of the North), participants recommended to the Ministry of Culture the development of “a mechanism for creating and maintaining a register of sacred places, sanctuaries and burials of the indigenous peoples of the North, Siberia and the Far East of the Russian Federation.”<sup>50</sup>

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<sup>47</sup> Law on Territories of Traditional Use art. 12.

<sup>48</sup> Federal'nii Zakon ot 21 Fevralya 2019 goda N11 FZ “O Vnesenii Izmenenii v Federal'nii Zakon ob Ob'ektakh Kul'turnogo Nasledia (Pamyatnikakh Istorii i Kul'turi) Narodov Rossiiskoi Federatsii [Federal Law on Amending the Federal Law on Objects of Cultural Heritage (Monuments of History and Culture) of the People of the RF] (Feb. 21, 2019), <http://www.garant.ru/hotlaw/federal/1260093/>, archived at <https://perma.cc/68VH-BEV2>.

<sup>49</sup> *V Rossii Mozhet Poyavitsya Zakon o Sokhranении Nematerial'nogo Nasledia Korennikh Narodov Rossii* [Law on Protection of Non-Material Heritage of Indigenous People of Russia Could Be Adopted], PARLAMENTSKAYA GAZETA (official publication of the State Duma) (Mar. 22, 2018), <https://www.pnp.ru/culture/v-rossii-mozhet-poyavitsya-zakon-o-sokhranении-nematerial'nogo-naslediya-korennikh-narodov.html>, archived at <https://perma.cc/Z365-ZPXR>.

<sup>50</sup> Mezhdunaronii Forum “Korennie Malochislennii Narodi Severa, Sibiri, i Dal'nego Vostoka Rossiiskoi Federatsii”, Rekomendatsii, Rabochaya Sessia “Dukhovnoje i Kul'turnoye Nasledie Korennikh Malochislennikh Narodov Severa, Sibiri, i Dal'nego Vostoka Rossiiskoi Federatsii” Salekhad 23-25 Marta, 2017 goda [International Forum “Indigenous Small-Numbered People of North, Siberia, and Near East of the RF”, Recommendations of the Working Session on “Spiritual and Cultural Heritage of Indigenous People of North, Siberia, and Near East of the RF,” Salekhad, Mar. 23-25, 2017, available on the website of the Russian Association of Indigenous People of the North (RAIPON), at <http://www.raipon.info/documents/Docs>.

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[РАИФОН/итоговые документы VIII Съезда/Рекомендации рабочей сессии Духовное и культурное наследие коренных малочисленных народов.pdf](https://perma.cc/RHF7-YYK4), archived at <https://perma.cc/RHF7-YYK4>.

# South Africa

*Hanibal Goitom  
Chief, FCIL I*

**SUMMARY** Governed under the 1999 National Resources Heritage Act and its subsidiary legislation, the identification and management of South Africa’s heritage resources is a task shared among national, provincial, and local heritage resource authorities.

The South African Heritage Resources Agency (SAHRA), the national heritage resources authority, or any of the provincial heritage authorities are empowered to declare any place, public or private, a national heritage. Citizens may also nominate places for such declaration.

The Act and its subsidiary legislation seeks to protect heritage resources, including archeological objects and burial grounds and graves, in a number of ways. They bar unauthorized activities that may damage or alter known heritage places or objects, protect unidentified heritage resources or objects by subjecting certain types of development activities to independent impact assessments, and require anyone who comes across a heritage resource during the course of development or other activity to report it. They also regulate the export of heritage objects.

With regard to privately owned heritage objects or places, the heritage resources authorities are authorized to work with owners to ensure their preservation and maintenance, issue compulsory repair orders when they fall into disrepair, or appropriate them, if necessary.

## I. Legal and Administrative Structure

The primary law governing issues of cultural heritage protection, including matters concerning the protection of graves, sacred places, and recently found artefacts, is the 1999 National Heritage Resources Act<sup>1</sup> and its subsidiary legislation.<sup>2</sup>

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<sup>1</sup> National Heritage Resources Act 25 of 1999, 10 STATUTES OF THE REPUBLIC OF SOUTH AFRICA (updated through 2016), a more current version of the legislation is available on the University of Pretoria website, at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/act/25-of-1999-national-heritages-resources-act-1-apr-2000-to-date-pdf/download>, archived at <https://perma.cc/H5KG-KR3H>.

<sup>2</sup> National Heritage Resources Act (25 of 1999) Regulations (commencement Apr. 1, 2000), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-gnr-323-7-apr-2000-to-date-pdf/download>, archived at <https://perma.cc/75GS-JELY>; Regulations in Accordance with the Provisions of Section 9 of the National Heritage [sic] Resources Act No. 25 of 1999 (Commencement Mar. 17, 2017), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-genn-218-17-mar-2017-to-date-pdf/download>, archived at <https://perma.cc/UYS7-ESF9>; South African Heritage Resources Agency (SAHRA) Permit Regulations (Commencement July 8, 2005), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-genn-218-17-mar-2017-to-date-pdf/download>.

The administration of the country's heritage resources is decentralized. The Act created a three-tiered system for the management of heritage resources. It established a national agency, the South African Heritage Resources Agency (SAHRA), the object of which is to "co-ordinate the identification and management of the national estate."<sup>3</sup> SAHRA has various functions, powers, and duties. Among them is the role of coordinating and managing "the national estate by all agencies of the State and other bodies and monitor[ing] their activities to ensure that they comply with national principles, standards and policy for heritage resources management."<sup>4</sup> Part of SAHRA's obligations is the requirement to "compile and maintain an inventory of the national estate" in a database.<sup>5</sup> In addition to SAHRA, the Act provides for the formation of provincial and local-level heritage resources authorities responsible for provincial and local heritage resources management.<sup>6</sup>

## II. National Estate

The Act in its preamble indicates that it "aims to promote good management of the national estate." Heritage resources that "are of cultural significance or other special value for the present community and for future generations" constitute part of the country's national estate and are managed by the relevant heritage resources authorities.<sup>7</sup> These include

- historical settlements and townships;
- archaeological and paleontological sites;
- ancestral graves, including royal graves and graves of traditional leaders, historical graves and cemeteries, and other human remains; and
- movable objects such as archaeological and paleontological objects found in South African waters or land.<sup>8</sup>

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[heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-gn-548-8-jul-2005-to-date-pdf/download](http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-gn-548-8-jul-2005-to-date-pdf/download), archived at <https://perma.cc/9PL2-QFN3>; Schedule of Fees for Permit Applications Made to the South African Heritage Resources Agency (SAHRA) (Commencement May 5, 2006), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-gn-418-5-may-2006-to-date-pdf/download>, archived at <https://perma.cc/KYJ2-SLCY>; Declaration of Types of Heritage Objects, General Notice 1512, GOVERNMENT GAZETTE No. 24116 (Dec. 6, 2002), available at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/national-monuments-and-archives/national-heritage-resources-act-25-of-1999/regulations-and-notices/25-of-1999-national-heritages-resources-act-regs-gn-1512-6-dec-2002-to-date-pdf/download>, archived at <https://perma.cc/2T6N-RFEL>.

<sup>3</sup> National Heritage Resources Act § 11.

<sup>4</sup> *Id.* § 13.

<sup>5</sup> *Id.* § 39.

<sup>6</sup> *Id.* §§ 4, 8 & 23.

<sup>7</sup> *Id.* § 3.

<sup>8</sup> *Id.*

Any place or object may be deemed a national estate if it has “cultural significance or special value” for any of various reasons, including due to “its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons.”<sup>9</sup>

The Act establishes a grading system for places and objects that are part of the country’s national estate. It does this by creating three categories of heritage resources:

- (a) Grade I: Heritage resources with qualities so exceptional that they are of special national significance;
- (b) Grade II: Heritage resources which, although forming part of the national estate, can be considered to have special qualities which make them significant within the context of a province or a region; and
- (c) Grade III: Other heritage resources worthy of conservation[.]<sup>10</sup>

It is up to SAHRA to establish a grading system and heritage resource assessment criteria, “which must be used by [all relevant authorities] to assess the intrinsic, comparative and contextual significance of a heritage resource and the relative benefits and costs of its protection.”<sup>11</sup>

National, provincial, and local authorities share the responsibility of managing heritage resources on the basis of the grades they are assigned. SAHRA is responsible “for the identification and management of Grade I heritage resources and heritage resources in accordance with the applicable provisions of [the National Heritage Resources Act].”<sup>12</sup> According to the Act, “[a] provincial heritage resources authority is responsible for the identification and management of Grade II heritage resources and heritage resources which are deemed to be a provincial competence” under the Act.<sup>13</sup> Similarly, local heritage resources authorities are “responsible for the identification and management of Grade III heritage resources and heritage resources which are deemed to fall within their competence” under the Act.<sup>14</sup>

SAHRA or a relevant provincial heritage authority may declare any place, public or private, a national heritage.<sup>15</sup> Before doing so, the Authority must notify the owner, mortgage holder, occupier, and any other concerned person of its plans, accord him or her ample time (at least two months) to challenge the declaration, and consider all submissions before making its decision.<sup>16</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* § 8.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 27.

<sup>16</sup> *Id.*

Although it is one of the primary functions/obligations of SAHRA and the provincial heritage resources authorities to identify places worthy of protection under the Act, anyone can nominate a place to be declared a national heritage site or a provincial heritage resource.<sup>17</sup>

Unless done with a permit from the relevant heritage resource authority, it is an offense to “destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site.”<sup>18</sup>

### III. Protection and Management of Heritage Resources

#### A. Archeological Objects

The Act requires that anyone who comes across an archeological object “in the course of development of agricultural activity must immediately report” it to the responsible authority, which in this case is the relevant provincial heritage resources authority unless the object is of a grade that puts its management under the jurisdiction of SAHRA.<sup>19</sup> An “archeological” object includes

- (a) material remains resulting from human activity which are in a state of disuse and are in or on land and which are older than 100 years, including artefacts [sic], human and hominid remains and artificial features and structures; [and]
- (b) rock art, being any form of painting, engraving or other graphic representation on a fixed rock surface or loose rock or stone, which was executed by human agency and which is older than 100 years, including any area within 10m of such representation[.]<sup>20</sup>

The Act adopts a broad definition of the term “development,” including a list of examples of what development work possibly entails:

any physical intervention, excavation, or action, other than those caused by natural forces, which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future well-being, including—

- (a) construction, alteration, demolition, removal or change of use of a place or a structure at a place;
- (b) carrying out any works on or over or under a place;
- (c) subdivision or consolidation of land comprising, a place, including the
- (d) structures or airspace of a place;
- (e) constructing or putting up for display signs or hoardings;
- (f) any change to the natural or existing condition or topography of land; and
- (g) any removal or destruction of trees, or removal of vegetation or topsoil.<sup>21</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 35.

<sup>20</sup> *Id.* § 2.

<sup>21</sup> *Id.*

The Act bars anyone who does not possess a permit issued by the relevant authority from engaging in activities that would

- (a) destroy, damage, excavate, alter, deface or otherwise disturb any archaeological . . . site . . . ;
- (b) destroy, damage, excavate, remove from its original position, collect or own any archaeological . . . material or object . . . ;
- (c) trade in, sell for private gain, export or attempt to export from the Republic any category of archaeological . . . material or object . . . ; or
- (d) bring onto or use at an archaeological . . . site any excavation equipment or any equipment which assist in the detection or recovery of metals or archaeological . . . material or objects . . . .<sup>22</sup>

The Act accords heritage resources authorities investigative and administrative powers to deal with instances where they have “reasonable cause to believe that any activity or development which will destroy, damage or alter” an archaeological site and for which no permit has been issued is underway.<sup>23</sup> In these instances, a heritage authority is authorized to investigate the matter; issue a cease order on the person involved in the activity in question; assist the person in mitigation efforts, if necessary; and recover the cost of its investigation from the person.<sup>24</sup>

## **B. Burial Grounds and Graves**

SAHRA is required to “identify and record” graves that it considers to be of cultural significance and take the necessary steps for their conservation. The Act bars anyone who has not been issued a permit by SAHRA or a relevant provincial heritage resource authority from engaging in an activity that would “destroy, damage, alter, exhume, remove from its original position or otherwise disturb any grave or burial ground older than 60 years which is situated outside a formal cemetery administered by a local authority.”<sup>25</sup>

The Act accords communities that have an interest in the burial ground or grave at issue a say. It does this by barring SAHRA or the relevant provincial heritage authority from issuing a permit allowing a person to engage in any such activity unless it is satisfied that the applicant has

- (a) made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and
- (b) reached agreements with such communities and individuals regarding the future of such grave or burial ground.<sup>26</sup>

A person who, during the course of development activity, discovers a previously unknown location of a grave “must immediately cease such activity and report the discovery to the

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<sup>22</sup> *Id.* § 35.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 36.

<sup>26</sup> *Id.*

responsible heritage resources authority.”<sup>27</sup> The Authority must then, with the assistance of the South African Police Service,

- (a) carry out an investigation for the purpose of obtaining information on whether or not such grave is protected in terms of this Act or is of significance to any community; and
- (b) if such grave is protected or is of significance, assist any person who or community which is a direct descendant to make arrangements for the exhumation and re-interment of the contents of such grave or, in the absence of such person or community, make any such arrangements as it deems fit.<sup>28</sup>

### C. Certain Development Activities

Anyone interested in engaging in certain types of development work is required to “notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development.”<sup>29</sup> Work subject to the notification requirements includes

- (a) the construction of a road, wall, powerline, pipeline, canal or other similar form of linear development or barrier exceeding 300m in length;
- (b) the construction of a bridge or similar structure exceeding 50 m in length;
- (c) any development or other activity which will change the character of a site—
  - (i) exceeding 5 000 m<sup>2</sup> in extent; or
  - (ii) involving three or more existing erven or subdivisions thereof; or
  - (iii) involving three or more erven or divisions thereof which have been
  - (iv) consolidated within the past five years; or
  - (v) the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority;
- (d) the re-zoning of a site exceeding 10 000 m<sup>2</sup> in extent; or
- (e) any other category of development provided for in regulations by SAHRA or a provincial heritage resources authority[.]<sup>30</sup>

If the heritage resources authority has reason to believe that the activity will impact heritage resources, it is required to get the person to submit an impact assessment report to be prepared by someone approved by the Authority.<sup>31</sup> The Report must, among others, include information regarding whether the activity will have an adverse impact on heritage resources and plans for mitigation of such adverse effects.<sup>32</sup> After having received the Report, the Authority would then make a decision (after consulting SAHRA in the case of provincial authorities) on

- (a) whether or not the development may proceed;
- (b) any limitations or conditions to be applied to the development;

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* § 38.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

- (c) what general protections in terms of this Act apply, and what formal protections may be applied, to such heritage resources;
- (d) whether compensatory action is required in respect of any heritage resources damaged or destroyed as a result of the development; and
- (e) whether the appointment of specialists is required as a condition of approval of the proposal.<sup>33</sup>

The rules described in this section do not apply if the heritage resources already under the protection of SAHRA and to projects the development of which already requires the submission of a heritage resources impact report.<sup>34</sup>

#### D. Export of Heritage Objects

One of the objectives of the National Heritage Resources Act is to “control the export of nationally significant heritage objects.”<sup>35</sup> It does this by allowing SAHRA to identify and declare items as heritage objects and regulate their export. SAHRA may declare as a national object “[a]n object or collection of objects, or a type of object or list of objects, whether specific or generic, that is part of the national estate and the export of which SAHRA deems it necessary to control.”<sup>36</sup> These include objects that have cultural or historical significance and “objects to which oral traditions are attached and which are associated with living heritage.”<sup>37</sup>

In 2002, SAHRA issued a list of objects “to be types of objects that are deemed protected in terms of the National Heritage Resources Act and for which a permit in terms of the said Act is required for export from the country.”<sup>38</sup> These include

1. Any archaeological artefact, palaeontological and rare geological specimens and meteorites found in South Africa and its territorial waters and maritime cultural zone;
2. Antiquities such as coins, utensils, pottery, jewellery, seals, weapons (including firearms) tools and inscriptions that have been in South Africa for more than 100 years;
3. . . .
4. South African ethnographic art and objects;
5. . . .
6. South African items of artistic interest that have been in South Africa for 50 years or more, including -
  - (a) paintings and drawings produced by hand on and in any material;
  - (b) original prints, posters and photographs, as the media for creative activity;
  - (c) original artistic assemblages and montages in any material;
  - (d) works of statuary art and sculpture in general;
  - (e) works of applied art in such materials as glass, ceramics, metal and wood; and

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Preamble.

<sup>36</sup> *Id.* § 32.

<sup>37</sup> *Id.*

<sup>38</sup> Declaration of Types of Heritage Objects, GOVERNMENT GAZETTE No. 24116 (Dec. 6, 2002).

- (f) objects of ritualistic and symbolic significance and personal adornment such as beads, leather or metalwork;
- 7. . . .
- 8. . . .
- 9. . . .
- 10. South African furniture, tapestries, carpets, items of dress and musical instruments older than 100 years; . . .
- 11. . . .
- 12. The above exclude any object made by any living person.<sup>39</sup>

Anyone who wishes to export from South Africa any of the above-listed types of heritage s must obtain a permit from SAHRA.<sup>40</sup>

### E. Cooperation, Compulsory Repair Order, and Expropriation

A heritage resource authority appears to have several tools to ensure the protection of a heritage site not under its possession. One way to do this is through an agreement with the owner of the site for preserving and maintaining a heritage site. The Authority may enter into an agreement to

- (a) conserve or improve any heritage site;
- (b) construct fences, walls or gates around or on a heritage site;
- (c) acquire or construct and maintain an access road to a heritage site over any land, and construct upon such land fences, walls or gates; or
- (d) erect signs on or near a heritage site.<sup>41</sup>

The Authority also has the power to issue what is known as a compulsory repair order in certain circumstances. The Authority may order the owner of a heritage site “to repair or maintain” the site to its satisfaction and within a reasonable, specified timeframe if it determines that the site

- (a) has been allowed to fall into disrepair for the purpose of—
  - (i) effecting or enabling its destruction or demolition;
  - (ii) enabling the development of the designated land; or
  - (iii) enabling the development of any land adjoining the designated land; or
- (b) is neglected to such an extent that it will lose its potential for conservation[.]<sup>42</sup>

The order cannot be for work beyond that which “is necessary to prevent any further deterioration in the condition of the place.”<sup>43</sup> If the owner fails to follow the order, the Authority may do the repairs itself and recoup the cost from the owner afterwards.<sup>44</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> National Heritage Resources Act § 32.

<sup>41</sup> *Id.* § 27.

<sup>42</sup> *Id.* § 45.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Another tool available to the Authority is purchase or expropriation. The Minister responsible for arts and culture may, “on the advice of SAHRA and after consultation with the Minister of Finance, purchase or, subject to compensation, expropriate any property for conservation or any other purpose under this Act if that purpose is a public purpose or is in the public interest.”<sup>45</sup> This process is governed under the 1975 Expropriation Act and the 1996 Constitution.<sup>46</sup>

#### IV. Penalties

Violations of different provisions of the National Heritage Resources Act are offenses subject to fines and custodial sentences. For instance, a person who “destroy[s], damage[s], deface[s], excavate[s], alter[s], remove[s] from its original position, subdivide[s] or change[s] the planning status of any heritage site without a permit” commits a crime, on conviction, punishable by a fine and/or up to five years in prison.<sup>47</sup> Exporting or attempting to export any heritage object without a SAHRA-issued permit is also an offense subject to the same penalties.<sup>48</sup> Anyone who “destroy[s], excavates[s], alter[s], deface[s]” an archeological or paleontological site commits a crime, on conviction, punishable by a fine and/or a custodial sentence not exceeding three years.<sup>49</sup> A similar act involving a burial ground or grave is punishable by a fine and/or a prison term of up to six months.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; Expropriation Act 63 of 1975 (Jan. 1, 1977), available on the Pretoria University website, at <http://www.lawsofsouthafrica.up.ac.za/index.php/browse/land/expropriation-act-63-of-1975/act/63-of-1975-expropriation-act-1-apr-1994-to-date-pdf/download>, archived at <https://perma.cc/3B37-2HD5>; S. AFR. CONST. 1996, § 5, available on the South Africa government portal online, at <https://www.gov.za/documents/constitution/chapter-2-bill-rights#25>, archived at <https://perma.cc/G9ER-6NGW>.

<sup>47</sup> National Heritage Resources Act §§ 27 & 51.

<sup>48</sup> *Id.* §§ 32 & 51.

<sup>49</sup> *Id.* §§ 35 & 51.

<sup>50</sup> *Id.* §§ 36 & 51.

# Taiwan

*Laney Zhang*  
*Foreign Law Specialist*

**SUMMARY** In 2005, Taiwan passed the Indigenous Peoples Basic Law. According to the Law, whenever the government or private parties engage in land development, resource utilization, ecology conservation, or academic research on the indigenous land, tribes, or public land adjacent to the indigenous land or tribes, the indigenous peoples or the tribes must be consulted, and their consent or even participation is required. In the designated indigenous peoples' regions, the government is required by the Law to restore the traditional names of indigenous tribes, mountains, and rivers in accordance with the will of indigenous peoples.

Protection of indigenous people's cultural heritage is governed by the general rules of the Cultural Heritage Preservation Act (Heritage Act) and its subsidiary legislation on indigenous heritage. In planning and implementing the preservation of any indigenous heritage, the authorities, owners of indigenous heritage, or the managing organs must consult the indigenous people to which the indigenous heritage belongs, the relevant tribes, or other traditional organizations.

Graves may be protected by the Heritage Act under the categories of "monuments, historic buildings, and commemorative buildings," and indigenous villages are protected under the category of human settlements. In the course of construction or other land development activities, if any structure deserving of the designation of a monument, a historic building, a commemorative building, or a human settlement is discovered, the development must immediately stop and a report thereon must be made to the competent authority. Under the Heritage Act, national treasures and significant artifacts are generally prohibited from being exported from Taiwan.

Although not expressly addressed by any existing laws or regulations, the return of indigenous people's human remains appears to be taking place in Taiwan and the supervisory branch of the government has called for consideration of a mechanism to facilitate the return.

## I. Legal Framework

The Taiwanese constitutional amendments declare that the state safeguards the status of the indigenous peoples and preserves and fosters their cultures. These are among the basic national policies under article 10 of the Additional Articles of the Constitution of the Republic of China (Constitution Additional Articles).<sup>1</sup>

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<sup>1</sup> Additional Articles of the Constitution of the Republic of China (promulgated May 1, 1991, last amendment promulgated June 10, 2005) (Constitution Additional Articles) art. 10, Laws and Regulations Database of the Republic of China, <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=A0000002>, archived at

In February 2005, Taiwan promulgated the Indigenous Peoples Basic Law, a fundamental law in protecting and promoting the rights of the indigenous peoples.<sup>2</sup> The Law was most recently amended on June 20, 2018.<sup>3</sup> A series of other laws and regulations have been made concerning indigenous people and protection of their rights.<sup>4</sup>

However, there is no law comparable to the US Native American Graves Protection and Repatriation Act. Protection of indigenous people's cultural heritage is governed by the general rules of the Cultural Heritage Preservation Act (Heritage Act) and its subsidiary legislation on indigenous heritage. The Heritage Act was first promulgated on May 26, 1982, and most recently revised on July 27, 2016.<sup>5</sup> On July 18, 2017, relevant central authorities jointly issued the Measures for Handling Indigenous Cultural Heritage (Indigenous Heritage Measures), which became effective on the same day.<sup>6</sup>

## II. Constitutional Amendments

Article 10(11) of the Constitution Additional Articles addresses cultural pluralism and the preservation of indigenous languages and cultures. It states that

[t]he State affirms cultural pluralism and shall actively preserve and foster the development of aboriginal languages and cultures.<sup>7</sup>

The constitutional amendments further declare the responsibility of the state to safeguard the status and political participation of the indigenous peoples and to guarantee and promote indigenous culture, economy, land, etc. Article 10(12) of the Additional Articles states that

[t]he State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines. The State shall also guarantee and provide assistance and encouragement for aboriginal education, culture, transportation, water conservation, health and medical care, economic activity, land, and social welfare,

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<https://perma.cc/H3AN-2LBD>; English translation available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000002>, archived at <https://perma.cc/3PAX-WUUZ>.

<sup>2</sup> Indigenous Peoples Basic Law (promulgated Feb. 5, 2005, last amended June 20, 2018) (Basic Law) art. 1, <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=D0130003>, archived at <https://perma.cc/5K6H-UVXY>; English translation available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0130003>, archived at <https://perma.cc/9NCM-DSKU>.

<sup>3</sup> *Id.*

<sup>4</sup> See generally COMPILATION OF LAWS AND REGULATIONS OF INDIGENOUS PEOPLES (Council of Indigenous Peoples, Executive Yuan eds., 2011) (in Chinese).

<sup>5</sup> Cultural Heritage Preservation Act (promulgated May 26, 1982, last revised July 27, 2016) (Heritage Act), <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=H0170001>, archived at <https://perma.cc/AGM6-3LLY>; English translation available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=H0170001>, archived at <https://perma.cc/M2L9-57XW>.

<sup>6</sup> Measures for Handling Indigenous Cultural Heritage (July 18, 2017, effective on the same day) (Indigenous Heritage Measures), <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=H0170135>, archived at <https://perma.cc/273P-9BA6> (Chinese only).

<sup>7</sup> Constitution Additional Articles art. 10(11).

measures for which shall be established by law. The same protection and assistance shall be given to the people of the Penghu, Kinmen, and Matsu areas.<sup>8</sup>

### III. Indigenous Peoples Basic Law

#### A. Indigenous Peoples

The term “indigenous peoples” under the Indigenous Peoples Basic Law refers to the traditional peoples who have inhabited Taiwan and are subject to the state’s jurisdiction, including the Amis tribe, Atayal tribe, Paiwan tribe, Bunun tribe, Puyuma tribe, Rukai tribe, Tsou tribe, Saisiyat tribe, Yami tribe, Tsao tribe, Kavalan tribe, Taroko tribe, and any other tribes who regard themselves as indigenous peoples and obtain the approval of the central indigenous peoples authority.<sup>9</sup> Individuals who are members of any of those groups are referred to as “indigenous persons.”<sup>10</sup>

#### B. Indigenous Land

The Indigenous Peoples Basic Law restricts activities such as land development and resources utilization on or around the indigenous land, which must be agreed by the indigenous peoples. Indigenous land under the Law refers to the traditional territories and reservation land of the indigenous peoples.<sup>11</sup> According to article 21 of the Law, whenever the government or private parties engage in land development, resource utilization, ecology conservation, or academic research on the indigenous land, tribes, or public land adjacent to the indigenous land or tribes, the indigenous peoples or the tribes must be consulted, and their consent or even participation is required. Any relevant profits should be shared with the indigenous persons there.<sup>12</sup>

The Law further requires the government to respect indigenous peoples’ rights to choose their lifestyle, customs, clothing, modes of social and economic institutions, methods of resource utilization, and types of land ownership and management.<sup>13</sup>

#### C. Indigenous Peoples’ Regions

According to the Indigenous Peoples Basic Law, the Executive Yuan may designate indigenous peoples’ regions upon an application being made to the central indigenous peoples authority. These are areas where indigenous peoples have traditionally lived and that feature indigenous history and cultural characteristics.<sup>14</sup>

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<sup>8</sup> *Id.* art. 10(12).

<sup>9</sup> Basic Law art. 2.

<sup>10</sup> *Id.* art. 2

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* art. 21.

<sup>13</sup> *Id.* art. 23.

<sup>14</sup> *Id.* art. 2.

In the designated indigenous peoples' regions, the government is required by the Law to restore the traditional names of indigenous tribes, mountains, and rivers in accordance with the will of indigenous peoples.<sup>15</sup>

Furthermore, before establishing national parks, ecological protection zones, recreation zones, and other resources management organs in the indigenous peoples' regions, the government must obtain consent from the locally-affected indigenous peoples and formulate a common management mechanism.<sup>16</sup>

#### **IV. Cultural Heritage Preservation Act**

The Heritage Act governs the preservation, conservation, promotion, and transfer of Taiwan's cultural heritage.<sup>17</sup> Article 13 of the Act specifically addresses indigenous heritage, providing that any matters relating to the investigation, research, designation, registration, revocation, alteration, management, conservation, restoration, and reuse of indigenous peoples' cultural heritage must be stipulated jointly by the central competent authority and the central indigenous peoples authority.<sup>18</sup> The Indigenous Heritage Measures were issued based on this article.<sup>19</sup>

##### **A. Indigenous Heritage**

The Heritage Act protects designated or registered tangible or intangible cultural heritage that is of cultural value from the point of view of history, art, or science.<sup>20</sup> Indigenous heritage protected by the Act is that designated or registered cultural heritage which has characteristics and values of indigenous culture.<sup>21</sup>

According to the Indigenous Heritage Measures, in planning and implementing the preservation of any indigenous heritage, the authorities, owners of indigenous heritage, or the managing organs must consult the indigenous people to which the indigenous heritage belongs, the relevant tribes, or other traditional organizations.<sup>22</sup>

##### **B. Graves and Indigenous Villages**

Tangible heritage protected by the Heritage Act includes monuments, historic buildings, commemorative buildings, and human settlements.<sup>23</sup> The Act's enforcement rules specify items

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<sup>15</sup> *Id.* art. 11.

<sup>16</sup> *Id.* art. 22.

<sup>17</sup> Heritage Act art. 2.

<sup>18</sup> *Id.* art. 13.

<sup>19</sup> Indigenous Heritage Measures art. 1.

<sup>20</sup> Heritage Act art. 3.

<sup>21</sup> Indigenous Heritage Measures art. 3.

<sup>22</sup> *Id.* art. 5.

<sup>23</sup> Heritage Act art. 3.

that may be protected as monuments, historic buildings, and commemorative buildings, which include graves, ancestral halls, temples, and churches, among other things.<sup>24</sup> Also according to the enforcement rules, indigenous villages fall into the category of human settlements.<sup>25</sup> Indigenous people's human remains do not appear to be specifically protected under the Heritage Act or Indigenous Heritage Measures.

According to the Heritage Act, in the course of construction or other land development activities, if any structure deserving of the designation of a monument, a historic building, a commemorative building, or a human settlement is discovered, the development must immediately stop and a report thereon must be made to the competent authority.<sup>26</sup>

The Heritage Act prohibits construction work or other land development activities from damaging the integrity of the monuments, historic buildings, commemorative buildings, and groups of buildings protected by the Act.<sup>27</sup>

Monuments—defined as architectural works and their ancillary facilities built for the needs of human life that are of outstanding universal value from the point of view of history, art, or science—cannot be relocated or demolished unless such relocation or demolition is made for national security, significant public safety, or major national construction projects.<sup>28</sup>

### C. Artifacts

Artifacts, as well as archaeological sites, historic sites, cultural landscapes, and natural landscapes and natural mementos, are also protected under the Heritage Act as tangible heritage.<sup>29</sup> The Act categorizes artifacts into three groups: national treasures, significant artifacts, and general artifacts.<sup>30</sup> Among those, national treasures and significant artifacts are generally prohibited from being exported from Taiwan.<sup>31</sup>

## V. National Policies

On August 1, 2016, the Taiwanese President Tsai Ing-wen, on behalf of the government, apologized to Taiwan's indigenous peoples "for the pain and mistreatment the indigenous

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<sup>24</sup> Enforcement Rules of the Cultural Heritage Preservation Act (issued Feb. 22, 1984, last amended July 27, 2017) (Enforcement Rules) art. 2, <https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=H0170004>, archived at <https://perma.cc/474A-J5XB>; English translation available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=H0170004>, archived at <https://perma.cc/KUK7-8TUF>.

<sup>25</sup> *Id.* art. 3.

<sup>26</sup> Heritage Act art. 33.

<sup>27</sup> *Id.* art. 34.

<sup>28</sup> *Id.* art. 36.

<sup>29</sup> *Id.* art. 3.

<sup>30</sup> *Id.* art. 65.

<sup>31</sup> *Id.* art. 73.

peoples have endured for the past four centuries.”<sup>32</sup> She also announced the establishment of the Presidential Office Indigenous Historical Justice and Transitional Justice Committee chaired by herself. The Committee is tasked with, among other things, drawing up legislation to “provide restitution, reparations, or compensation for violations against indigenous peoples and deprivation of indigenous rights.”<sup>33</sup>

Although not expressly addressed by any existing laws or regulations, the return of indigenous people’s human remains appears to be taking place in Taiwan. Recently, in July 2018, Taiwan’s Control Yuan, the supervisory branch of the government, released a report on a request from an indigenous group that was submitted to the National University of Taiwan seeking the return of their ancestors’ remains that university researchers had obtained in around 1960. Noting that the university had agreed to return the remains, the report found that there are no laws or regulations governing matters related to indigenous people’s remains, such as their excavation and preservation. The Control Yuan called for further consideration of a mechanism to facilitate the return of human remains to indigenous peoples.<sup>34</sup>

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<sup>32</sup> *The Committee*, PRESIDENTIAL OFFICE INDIGENOUS HISTORICAL JUSTICE AND TRANSITIONAL JUSTICE COMMITTEE, <https://indigenous-justice.president.gov.tw/EN/Page/46> (last visited Feb. 26, 2019), archived at <https://perma.cc/WJE2-X4PV>.

<sup>33</sup> *Id.*

<sup>34</sup> Press Release, Control Yuan of the Republic of China (Taiwan), Ma Yuan Ancestors’ Human Remains Case: Control Yuan Urges National Taiwan University to Properly Handle the Return (July 12, 2018), [https://www.cy.gov.tw/sp.asp?xdURL=./di/Message/message\\_1t2.asp&ctNode=2394&mp=1&msg\\_id=6617](https://www.cy.gov.tw/sp.asp?xdURL=./di/Message/message_1t2.asp&ctNode=2394&mp=1&msg_id=6617) (in Chinese), archived at <https://perma.cc/XI7H-GHVP>.

# European Union

Jenny Gesley  
Foreign Law Specialist

One of the founding values of the EU is respect for human rights, including the rights of persons belonging to minorities.<sup>1</sup> The European Commission guarantees the compliance with fundamental rights and has in place a set of policy measures including guidance to tackle discrimination or creating specific fora to exchange good practices and discuss common concerns. However,

[b]eyond those instruments and policies, the Commission has no general power as regards minorities, in particular over issues relating to the recognition of the status of minorities, their self-determination and autonomy or the regime governing the use of regional or minority languages. It is for Member States to ensure compliance with their constitutional order and their obligations under international law.<sup>2</sup>

Promoting the rights of indigenous peoples and establishing a strengthened policy on indigenous issues are among the European Union (EU) priorities to advance human rights.<sup>3</sup> The main documents on indigenous peoples are the Council Resolution of November 30, 1998, on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Members States,<sup>4</sup> and the Council Conclusions of November 18, 2002, on Indigenous Peoples.<sup>5</sup>

The 1998 Council Resolution provides that the concern for indigenous peoples should be integrated “as a cross-cutting aspect at all levels of development cooperation, including policy dialogue with partner countries” and that the “capacities of indigenous peoples’ organisations to take an effective part in the planning and implementation of development programmes” must be enhanced. The Resolution proposes a review of existing procedures, guidelines, and manuals to ensure indigenous peoples are able to offer an informed view on EU activities that might affect them. The 2002 Council Conclusions provide a similar approach. In 2017, the Council again

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<sup>1</sup> Consolidated Version of the Treaty on European Union (TEU), art. 2, 2016 O.J. (C 202) 13, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016M/TXT&from=EN>, archived at <http://perma.cc/7CDB-CH8A>.

<sup>2</sup> EUROPEAN PARLIAMENT, *Parliamentary Questions. Answer Given by Ms Jourová on Behalf of the European Commission* (Aug. 28, 2018), [http://www.europarl.europa.eu/doceo/document/P-8-2018-003699-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/P-8-2018-003699-ASW_EN.html), archived at <http://perma.cc/255U-XBRU>.

<sup>3</sup> COUNCIL OF THE EUROPEAN UNION, *EU STRATEGIC FRAMEWORK AND ACTION PLAN ON HUMAN RIGHTS AND DEMOCRACY*, at 2 & 21 (June 2012), <https://europa.eu/capacity4dev/file/13464/download?token=aUOs-5sz>, archived at <http://perma.cc/ACA6-TS6E>.

<sup>4</sup> Council Resolution, *Indigenous Peoples within the Framework of the Development Cooperation of the Community and Members States*, Nov. 30, 1998, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0193.dir/Council%20Resolution%20Nov%201998.pdf>, archived at <http://perma.cc/M8TJ-SRCV>.

<sup>5</sup> Council of the European Union, 2463rd Council Meeting, General Affairs, *Indigenous Peoples. Council Conclusions*, Doc. No. 13466/02 (Nov. 18, 2002), at IX, [https://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/gena/73248.pdf](https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/73248.pdf), archived at <http://perma.cc/6K9B-39W4>.

published Council Conclusions on Indigenous Peoples and reiterated the importance of full participation and free, prior, and informed consent of indigenous peoples for EU projects.<sup>6</sup>

Furthermore, the EU supported the adoption of the United Nation Declaration on the Rights of Indigenous Peoples in 2007, which, among other things, provides for the “right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, [and] artefacts.”<sup>7</sup>

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<sup>6</sup> Council of the European Union, Council Conclusions on Indigenous Peoples (May 17, 2017), at 4, No. 8, <http://data.consilium.europa.eu/doc/document/ST-8814-2017-INIT/en/pdf>, archived at <http://perma.cc/WUG3-525S>.

<sup>7</sup> *Rights of Indigenous Peoples*, EUROPEAN COMMISSION, [https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/anti-discrimination-movements-1\\_en](https://ec.europa.eu/europeaid/sectors/human-rights-and-governance/democracy-and-human-rights/anti-discrimination-movements-1_en) (last updated Jan. 10, 2019), archived at <http://perma.cc/B9FK-H7HP>; United Nation Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007), art. 11, [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), archived at <http://perma.cc/N3K8-HE88>.