

AUSTRALIAN INDIGENOUS
CULTURAL & INTELLECTUAL
PROPERTY (ICIP)

PROTOCOL

FEBRUARY 2023

Acknowledgments

The National Library of Australia acknowledges Australia's First Nations Peoples – the First Australians – as the Traditional Owners and Custodians of this land and gives respect to the Elders – past and present – and through them to all Australian Aboriginal and Torres Strait Islander peoples.

The National Library of Australia rests on the lands of the Ngunnawal and Ngambri people.

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National Library of Australia's Australian Indigenous Cultural & Intellectual Property (ICIP) Protocol
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ICIP Notice

This publication contains Indigenous Cultural and Intellectual Property (ICIP) of Australian First Nations Peoples. All rights reserved. Dealing with any part of this knowledge for any purpose not authorised by the custodians may breach the *Copyright Act 1968* (Cth) and customary law.

Important legal notice

The laws and policies referred to in this publication are current as at 12 November 2021. Any reference to laws and policies are for general use only. You should not rely on this document for legal advice for a specific matter. We recommend you obtain professional legal advice from a suitable, qualified legal practitioner.

Terminology

For the purposes of this Protocol, where the term Indigenous peoples is used, it is understood that this is intended to respectfully include reference to Australia's First Nations peoples, the First Australians and/or Australian Aboriginal and Torres Strait Islander peoples.

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Foreword

Our collections are rich in the documentation of Aboriginal and Torres Strait Islander cultures, collected and created by Indigenous and non-Indigenous people alike. They are full of culture, language and knowledge—full of truths, half-truths and frank misunderstandings. They have the power to grow, to heal and to wound.

They are understood and interpreted differently by individuals, by communities and over time...we have much to learn about the richness and diversity of First Nations cultures, and...we need to fundamentally rethink what we think we know...

Dr Marie-Louise Ayres FAHA – Director General, National Library of Australia

The National Library of Australia (the **Library**) is both a keeper of memories and a server of people. The Library's collections are rich in the documentation of First Nations cultures, collected and created by First Nations and non-Indigenous people alike. The value of the Library's collections grows through the service the Library provides, the relationships the Library develops with communities and the generosity of communities who share their knowledge with the Library.

The Library looks to international instruments, most importantly the *United Nations Declaration on the Rights of Indigenous Peoples* (the **Declaration**), to identify the rights that Indigenous peoples around the world are entitled to hold that ensure self-determination over their unique heritage.

The Library recognises the rights of First Nations people in Article 31 of the Declaration, that:

*Indigenous peoples have the **right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions**, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the **right to maintain, control, protect and develop their intellectual property** over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

The Library also recognises that, pursuant to Article 13 of the Declaration:

Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

In accordance with the contemporary understanding of Indigenous Cultural and Intellectual Property (**ICIP**) Rights, the Library believes that Indigenous peoples have the right to:

- Own and control their ICIP;
- Ensure that any means of protecting ICIP is based on the principle of self-determination;
- Be recognised as the primary guardians and interpreters of their cultures;
- Authorise or refuse to authorise the commercial use of ICIP according to customary laws;
- Maintain the secrecy of Indigenous knowledge and other cultural practices;
- Guard the cultural integrity of their ICIP;
- Be given full and proper attribution for sharing their cultural heritage;
- Share in the benefits of any use of their ICIP; and
- Control the recording of cultural customs and expressions and the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.

This Protocol was developed to underpin the cultural authenticity, integrity and authority of the Library. The Protocol recognises and formalises existing good practice while identifying opportunities to introduce new culturally sound practices. It is intended to be a practical guide to operationalising the ten Guiding Principles outlined below.

Glossary

Access means the right to access and view ICIP material, incorporating any rules, restrictions or obligations on that access as identified by Library, the depositor or Indigenous custodians.

First Nations refers to Australia's First Nations peoples, the First Australians, Australian Indigenous peoples and/or Australian Aboriginal and Torres Strait Islander peoples.

Indigenous refers to the first peoples that originated from a particular place and is used in a global context.

ICIP means Indigenous Cultural and Intellectual Property – see definition in **What is Indigenous Cultural and Intellectual Property (ICIP)?**

ICIP material means material within the Library collections that incorporates ICIP of a particular First Nations people or community.

ICIP Rights means the rights of Indigenous peoples to their cultural heritage – see definition in the **Foreword**.

ICIP rights-holder means the First Nations peoples, custodians or community that retains ICIP Rights in relation to particular ICIP held in the Library collections.

Intellectual Property or **IP** means existing and future industry or intellectual property rights, including copyright, patent, design, trade mark, plant breeder's right, know-how, trade secret and any other rights of a similar nature whether registered or unregistered and wherever existing in the world.

Use means the right to use (which may include the right to download, upload, copy, publish, communicate to the public, edit or adapt) the ICIP material, incorporating any rules, restrictions or obligations on that use as identified by Library, the depositor or Indigenous custodians.

Standard-setting documents

The Library follows all recognised guidelines and protocols in the collection, description, access and use of First Nations material, including ICIP, as informed by the following standard-setting documents:

- *National Library Act 1960 (Cth) and National Library Regulations 2018 (Cth)*
- National Library of Australia's:
 - Reconciliation Action Plan
 - Corporate Plan
 - Collection Development Policy
 - Digital Preservation Policy
 - and any related policies or strategies of the Library
- National and State Libraries Australasia (NSLA) *Position Statement on Aboriginal and Torres Strait Islander collections and services*
- *United Nations Declaration on the Rights of Indigenous Peoples, 2007*
- *UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970*
- *Protection of Moveable Cultural Heritage Act 1986 (Cth)*
- *Protection of Cultural Objects on Loan Act 2013 (Cth)*
- *Archives Act 1983 (Cth)*

- *Copyright Act 1968* (Cth)
- *Privacy Act 1988* (Cth)
- *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth)
- ATSLIRN Protocols for Libraries, Archives and Information Services - and the accompanying NSLA Culturally Safe Libraries Program
- Ministry for the Arts, *Australian Best Practice Guide to Collecting Cultural Material*
- AIATSIS *Code of Ethics for Aboriginal and Torres Strait Islander Research*
- Aboriginal and Torres Strait Islander Data Archive (ATSIDA) Protocols
- Maiam nayri Wingara Key Principles on Indigenous Data Sovereignty and Governance
- Global Indigenous Data Alliance CARE principles for Indigenous Data Governance
- University of Melbourne Indigenous Knowledges Research Libraries Guide.

Review

It is intended that a review of the Library's *Australian ICIP Protocol* should take place at least every five years, with a review point at three years.

Initial version completed by Terri Janke and Company	December 2021
Approved by National Library of Australia	[insert date]

Introduction

The National Library of Australia's *Australian ICIP Protocol* provides the philosophical *statement of intent* and guiding principles that inform the direction of strategies contained in the Library's *Reconciliation Action Plans* – the practical roadmap for achieving the Library's vision for reconciliation – that Australia's First Nations peoples' knowledge and cultures are valued and respected as integral to Australia's identity.

The National Library of Australia was established by the National Library Act 1960. In accordance with that Act, the Library collects documentary resources, particularly relating to Australia and the Australian people, so that the Australian community—now and in the future—can discover, learn and create new knowledge.

Australia has a long and proud First Nations (Australian Aboriginal and Torres Strait Islander) history spanning over 60 000 years told in stories, ceremonies and art, as well as being recorded in many documentary forms.

The Library has custodianship over rich archival, published, pictorial and oral history collections documenting the experiences, culture and language of First Nations peoples – the First Australians.

The Library recognises First Nations people are the primary guardians, interpreters and decision-makers of their heritage with deep cultural connections and authoritative values and perspectives. The continuity of First Nations cultures is built on enduring rights that relate to the ownership of context and interpretation; and the rights to protect, control, benefit from and to maintain, revitalise and advance ongoing practice.

The Library recognises and shares the value and importance of preserving, revitalising and strengthening First Nations cultures, histories and achievements.

For the Library, the connection to community is built on principles of authority, integrity and exchange that fosters meaningful dialogue and consideration of First Nations perspectives and values in a way that is respectful, informed, ethical and timely and where First Nations ownership and custodianship of cultural materials – both tangible and intangible – is acknowledged, honoured and upheld.

The National Library of Australia's *Australian ICIP Protocol* has been developed with the aim of ensuring the Library's community recognises and are appropriately guided in the custodianship of First Nations history contained in the Library collections.

What is Indigenous Cultural and Intellectual Property (ICIP)?

Indigenous Cultural and Intellectual Property or **ICIP** refers to the rights of Australia's First Nations (Aboriginal and Torres Strait Islander) peoples to their heritage.

ICIP incorporates:

- traditional knowledge (scientific, agricultural, technical and ecological knowledge, ritual knowledge),
- traditional cultural expression (stories, designs and symbols, literature and language),
- performances (ceremonies, dance and song),
- cultural objects,
- human remains and tissues,

- the secret and sacred material and information (including sacred/historically significant sites and burial grounds), and
- documentation of First Nations peoples' heritage in all forms of media.

ICIP is also commonly referred to as “cultural heritage”, “traditional knowledge” or “traditional cultural expression”. For the purpose of this Protocol, these terms are interchangeable.

The Library recognises that ICIP incorporates both tangible and intangible heritage; that ICIP is living heritage, passed through the generations, contributed to by all and constantly evolving; that ICIP is communal, and each First Nations person is a custodian of the ICIP they hold.

The ICIP Rights of First Nations peoples (as identified in the **Foreword**) are not yet effectively recognised under Australian law. As such, Protocols such as this one are necessary to ensure the recognition and protection of the rights of First Nations peoples to their cultural heritage.

Purpose

The National Library of Australia's *Australian ICIP Protocol* is future-focused, guiding the Library in the incorporation of ICIP considerations into all its future policy frameworks, procedures and workflows. This Protocol is a living document, intended to be updated regularly, guided by community considerations, changing interpretation, ongoing engagement and feedback.

The Library is committed to ensuring culturally appropriate engagement with First Nations peoples and ICIP incorporated in the Library collections, in accordance with the Library's Collection Development Policy.

The purpose of the Library's *Australian ICIP Protocol* is to:

- Recognise and respect the rights First Nations peoples have in their cultural heritage;
- Raise awareness of ICIP Rights to the Library community;
- Guide the Library concerning ICIP Rights in relation to its activities, including acquisitions, exhibitions, publication, education, research, description and access, use and engagement with Library collections, including ICIP material.

The Library's *Australian ICIP Protocol* provides a framework for the Library to work towards authenticity, integrity and authority in the management of its collections to ensure greater understanding of Australia and the experiences of all Australian peoples.

By adopting the approaches outlined in this Protocol, the Library strives to engage with First Nations people and their ICIP respectfully and appropriately, building on and establishing deep connections and relationships with First Nations peoples into the future.

Responsibility

It is the responsibility of the Library to effectively implement a vision based on reconciliation and appropriate engagement with Australia's First Nations people.

It is therefore the responsibility of all Library officers, executives, staff, contractors and volunteers to comply with this Protocol, and to ensure Library's partners, affiliates, funders and wider community understand this commitment.

Guiding Principles

To ensure First Nations peoples' rights to their ICIP are appropriately recognised and embedded in the Library's working culture, the Library's *Australian ICIP Protocol* is led by the following guiding principles. The guiding principles are based on the True Tracks® ten principles developed by Terri Janke and Company.

NOTE: The guiding principles are not hierarchical or linear, and should not be interpreted in isolation but together, interrelated and overlapping, reflecting the nature of ICIP itself.

- 1. Recognition & Respect:** The Library recognises and respects the rights of First Nations peoples to protect, maintain, control and benefit from their ICIP.
- 2. Self-determination:** The Library recognises and respects the right of First Nations peoples to be involved in decision-making concerning their ICIP. The right of self-determination extends to maintenance of ongoing relationships concerning the access and use of ICIP including the context in which any ICIP is presented by the Library.
- 3. Collaboration & Consultation:** The Library supports the enduring right of First Nations peoples to be consulted about their ICIP and any use of their ICIP. The Library commits to ensuring such consultation is respectful, informed and ethical and that adequate time is provided to enable meaningful dialogue and consideration by the First Nations peoples.
- 4. Free, Prior Informed Consent:** The Library is committed to ensuring that the free, prior informed consent of First Nations peoples is obtained before using or authorising use of ICIP where possible to do so.
- 5. Interpretation & Cultural Integrity:** The Library supports the right of First Nations peoples to be the primary guardians and interpreters of their ICIP. The Library seeks to ensure that its interpretations of ICIP are respectful of the cultural integrity of that material.
- 6. Secret, Sacred & Private:** The Library acknowledges that some areas of First Nations culture are not appropriate to be shared publicly or may be subject to customary laws or other restrictions. The Library will respect the custodial rights of First Nations peoples and ensure that their decisions in relation to secret, sacred and private business are upheld.
- 7. Attribution:** First Nations peoples are custodians of their ICIP and have the right to be attributed in relation to their ICIP. The Library commits to acknowledging First Nations peoples in relation to their ICIP and any use of their ICIP.
- 8. Benefit Sharing:** The Library acknowledges the right of First Nations peoples to benefit from the sharing of their ICIP and culture.
- 9. Maintaining First Nations Culture:** The Library acknowledges that First Nations cultures are not static and that measures need to be taken so that First Nations peoples can maintain, revitalise and advance their cultures.
- 10. Recognition of Ongoing Rights:** The Library acknowledges that First Nations peoples should be recognised as the guardians of their culture and recognises that the rights of First Nations peoples regarding their ICIP are ongoing.

The guiding principles are fundamental to the Library's engagement with First Nations peoples and their ICIP.

Operating Context

The development of the Library's *Australian ICIP Protocol* provides the guiding principles and frameworks that will ensure the Library operates with a united approach that underpins the cultural integrity and reputation of all stakeholders – the First Nations owners of the cultural material held in the Library's collections, the staff (Indigenous and non-Indigenous) that work with the cultural material, the broader Australian Aboriginal and Torres Strait Islander community, the Library's current and future users and the Library itself.

The Library is a respected custodian of Australia's published, written, oral, visual and digital heritage, and a world-leading provider of access to that heritage. The Library's vision is to connect all Australians with national collections, enriching our understanding about who we are and our place in the world.

The Library's Corporate Plan outlines its mission as:

- We collect today what will be important tomorrow for Australia's increasingly diverse community
- We connect with communities and connect communities with their national collections
- We collaborate with others to deepen the national impact of cultural collections
- We build on strong foundations to maximise the nation's return on its investment in the Library,

with a focus on:

- Working with First Nations communities to ensure the Library's collection reflects their stories in a culturally appropriate way
- Building the Library's collection of materials that hold cultural importance to First Nations peoples
- Strengthening the Library's partnership with First Nations communities and delivering culturally appropriate programs and services
- Building the knowledge and experience of the Library's workforce to deliver the Library's mission.

The guiding principles provided through the Library's *Australian ICIP Protocol*, supported by a range of associated procedural guidelines and checklists, will support these priorities.

Library collections

The Library enables, and is a participant in, the creation of knowledge. The Library collects documentary resources relating to Australia and the Australian people so that the Australian community – now and in the future – can discover, learn and create new knowledge. It develops, curates and preserves an astounding collection that inspires, delights and educates Australians. Its collections have been built over many years and are a rich source of research material.

The Library's collections and services extend understanding of issues of contemporary significance, build strong community connections and underpin its leadership activities. This is achieved through the collection of physical and digital, published and unpublished collections and vibrant onsite and online services connecting communities to collections in diverse ways. The Library's collecting program is marked by rich variety and mass volume, guided by its Collection Development Policy and Collecting Strategy. These policies are revised regularly to reflect the Library's collecting approach, changing research context and practices.

In building the collection, the Library places a high priority on collaboration both internally and externally between collecting institutions, in providing Australians with access to the resources they need to support their research, education, understanding and enjoyment.

The Library works collaboratively with cultural, research and library sectors to develop and serve professional, academic and community researchers, and to ensure that together we:

- Build a comprehensive national collection that is accessible to all Australians,
- Preserve the published output, intellectual and creative endeavour of Australian people and organisations,
- Capture Australian voices published overseas,
- Make the Library's holdings widely known and accessible,
- Repatriate material digitally as resources allow.

ICIP in Library collections

The Library recognises the responsibility it has to ensure the recognition, preservation and sharing of First Nations cultures and ICIP material in Australia in an appropriate and respectful way, and in accordance with this protocol.

The Library maintains a significant and ongoing responsibility in relation to ICIP - collecting, describing, managing, preserving and providing access to material recording First Nations history, experience and culture (collectively ICIP).

By their nature, many of the Library's earliest collections were limited to perspectives on Australian culture reflected through European tradition. However the collecting of material created by First Nations people has become a significant focus of the Library in recent years.

ICIP is incorporated across all of the Library's collections in the form of books, journals, diaries, maps, photographs, artwork, manuscripts, oral histories, digital records, archived websites and objects. The Library's published collections also include copies of Indigenous Australian language dictionaries, word lists and lexicons covering hundreds of languages and dialects (collectively **ICIP material**).

The Library also has legal responsibilities that it must consider in relation to its collections, including its mandate under the National Library Act, intellectual property, copyright and privacy laws and specific deposit, access and use obligations.

Collecting of material created by and representing the views of First Nations people has been a significant focus of the Library in recent years. The Library's Collection Development Policy places a strong priority on collecting retrospective and contemporary material created by First Nations people, including commissioned works in partnership with communities where possible.

The Library's collection of First Nations material is driven by its Collection Development Policy which includes the following principles:

- Acquire published and unpublished material relating to all issues concerning First Nations people;
- Work in collaboration with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to support the acquisition and preservation of First Nations languages and related collections;
- Ensure that First Nations knowledge, stories and voices in its collections (ICIP) are honoured, respected and accessible in culturally appropriate ways;

- Establish and maintain the cultural safety of First Nations material in the collection and of First Nations people accessing it;
- Ensure that culturally appropriate description and access conditions are applied to First Nations material at the time of collection and establish principles to guide this process;
- Develop the breadth and depth of the Library’s First Nations collections;
- Ensure that First Nations perspectives and cultural requirements drive the collection of First Nations material;
- Anticipate the needs of future generations of First Nations;
- Actively engage with First Nations individuals, communities and organisations to help build relevant and well understood First Nations collections;
- Prioritise the collection of documentary heritage created by First Nations and relating to First Nations, for the benefit of all Australians;
- Enable First Nations people to connect to information important to their lives, identities and cultural connections;
- Build a collection that is beneficial and relevant to First Nations people.¹

Relationship building

The Library is committed to deepening engagement with First Nations people and communities, and strives to develop inclusive collections, services and relationships and to ensure the perspectives of Australia’s First Nations peoples are reflected throughout.

First Nations history, experience and culture is best interpreted by First Nations peoples.

The Library’s inaugural Reconciliation Action Plan (RAP) functioned as the first formalisation of this commitment. This Protocol complements the Library’s commitment to reconciliation, highlighting the necessity of collaboration between the Library and Australia’s First Nations peoples to develop safe, secure and accessible collections for all Australians.

The Library is committed to continuing to develop and maintain mutually beneficial relationships with First Nations people, communities and organisations into the future.

Indigenous Engagement Section

The Indigenous Engagement Section enables the Library to engage and connect with First Nations people in a genuinely respectful and ongoing relationship, and is responsible for all First Nations engagement and guiding collection activities at the Library.

The key activities of the Indigenous Engagement Section include:

- Provision of advice and support to Library staff in relation to Australian First Nations collections including identification, access and curatorial assistance;
- Building strong relationships with First Nations peoples and communities across Australia;
- Connecting First Nations peoples and communities with the Library and it’s First Nations collections and ICIP;
- Engaging with First Nations peoples and communities in relation to the acquisition, provenance, description, preservation, repatriation, access and use of ICIP.

¹ Collection Development Policy – Revised 2 July 2020.

The Indigenous Engagement Section is the policy owner and the Director - Indigenous Engagement holds responsibility for this Protocol.

Aboriginal and Torres Strait Islander Reference Groups

The Library has established Aboriginal and Torres Strait Islander Reference Groups as the Library's primary consultative mechanism contributing to the strategic development and whole-of-life management of the Library's First Nations collection with cultural authenticity, integrity and authority.

The primary purpose of the Reference Groups is to provide high-level expertise, guidance and advice across all areas of First Nations collection management, education and research, and other subject matter as required.

The Reference Groups contributes to ensuring that First Nations cultural perspectives are prioritised in a way that enables the Library to build its capability while meeting its legislative objectives.

The Indigenous Engagement Section and the Library may seek the guidance of the Reference Groups from time to time to ensure the appropriate implementation of this Protocol.

Australian ICIP Protocol Overview

Identifying ICIP

General Rule

Material in the Library's collections will be subject to this ICIP Protocol where the material:

- Features a First Nations person or First Nations people depicting or describing ICIP, whether that is in relation to their cultural heritage, their connection to land and waters or waterways, or any other element of ICIP;
- Does not feature a First Nations person or First Nations people, but the images, stories, knowledge or Country depicted or described relates to ICIP;
- Contains First Nations languages or word lists;
- Refers predominantly to the history of First Nations people in Australia, including images, recordings, text and fictionalised accounts of such histories;
- Contains, depicts or describes First Nations ceremonies, dance, song or other practices (whether performed by First Nations or non-Indigenous persons);
- Is a cultural object, whether created by First Nations or non-Indigenous people.

The Library's collection includes the Papers of Edward Koiki Mabo. The Papers of Edward Koiki Mabo include manuscripts, artistic works and film and sound recordings by, or about, the life of Mr Edward Koiki Mabo, which have been donated to the Library by the Mabo family. When handling items from the Mabo Family Collection, you should refer to the Mabo Family Collection Protocol for guidance on the consultation and consent process for Mabo Family ICIP.

There may be materials in the Library's collections which describe, depict or contain information about First Nations people, but that do not directly or indirectly relate to or incorporate ICIP or cultural heritage. For example, the Library may hold images of an event that is attended by both First Nations and non-Indigenous Australians but does not relate to First Nations cultural practice (e.g. Anzac Day parade). ICIP is unlikely to be incorporated in those images, unless they are photographs of a cultural activity (e.g. Welcome to Country held prior to the parade).

Consent may not be required from First Nations peoples where the material:

- Contains, depicts or describes First Nations people performing an activity which does not include any reference to ICIP;
- Contains, depicts or describes a First Nations person or First Nations people, but where no reference to ICIP is made;
- Contains, depicts or describes land or waters and waterways, but where no reference to ICIP is made;
- Contains or depicts by way of background only cultural objects where those cultural objects are not discussed or otherwise referenced in the material.

Complexity

Clarification should be sought from the Indigenous Engagement Section if there is uncertainty whether material in the collections contains ICIP and is subject to this ICIP Protocol. The Indigenous Engagement Section can also provide advice on pathways for investigation, collaboration and engagement with First Nations peoples and communities.

It is acknowledged that the Library holds a large collection of published and unpublished material, a significant portion of which has been accessed and used in publicly available research. In addition, digitisation and publication of material that is out of copyright has also made much of Library's collections available to the public.

Regardless of the fact of prior publication or publication by other institutions, ICIP Rights continue in perpetuity and must be considered in relation to all of the Library's collections.

Cultural sensitivity

First Nations cultural protocols or restrictions may apply to access and use of ICIP material in the Library collections, and will differ depending on the ICIP material itself and the First Nations community or group to which the ICIP belongs.

The Library may identify cultural restrictions in relation to ICIP material in its collections following consultation with the Indigenous Engagement Section, First Nations people, formal or informal advice, or feedback given to the Library.

This ICIP Protocol cannot cover all cultural rules, restrictions or obligations that may apply to ICIP material, but instead provides guidance to the Library to enable it to make responsible decisions in the treatment of ICIP in its collections – both internally and externally.

Forms of cultural rules, restrictions or obligations that **may** attach to ICIP material in the Library's collections include:

- Access or Use (collectively reproduction, publication, communication, editing or adapting) of ICIP must be with the prior informed consent of the ICIP rights-holders (e.g. First Nations knowledge-holders or custodians) or the relevant First Nations community or group. This means that anyone wishing to access or use the ICIP material must consult with and seek free, prior informed consent from the relevant ICIP rights-holder. Where the ICIP rights-holders are unknown or cannot be located, guidance from the Indigenous Engagement Section and the Reference Group should be sought;

- All uses of material containing ICIP for commercial purposes (by both internal and external stakeholders) must be with the free, prior informed consent of the relevant ICIP rights-holders, ensuring appropriate benefits to the First Nations community;
- Customary law or practices restricts the access and use of the ICIP material e.g. where the material is secret or sacred. Information may be specific to a First Nations clan/language group, or restricted by gender, for a particular purpose or time, or only available to the initiated. Examples include text, videos, sound recordings describing or images depicting First Nations ancestral remains, sacred sites or ceremonies;
- Use of ICIP material must be with permission or a cultural sensitivity notice must be used because the material contains confidential or personal or private information about First Nations individuals, communities or their ICIP;
- Use of ICIP material is limited for a period of time or a cultural sensitivity notice must be used because the material describes, depicts or contains the image, likeness or name of deceased First Nations persons;
- Cultural sensitivity notices should be used in relation to ICIP materials that describe, depict or contain words, descriptions or images that may be considered sensitive or offensive in today's context.

Who to approach for assistance

ICIP Rights are collective rights which belong to First Nations peoples and clans/language groups (traditional owners or cultural or language custodians) and are commonly exercised by individual knowledge holders, families and communities. Identifying the right people to speak for the cultural material requires the Library to first understand First Nations decision-making processes, and these differ from community to community.

The Library recognises that First Nations people are authorised to speak for ICIP material from their own place of origin. In addition, the Library recognises that the right to speak for ICIP material may be held by more than one knowledge holder or community and may vary from time to time. There may be a range of views and consensus may not be easily obtainable or even achievable.

At first instance, the Indigenous Engagement Section should be contacted for assistance with consultation suggestions. Following this, in any given situation one of the resources listed below may be of assistance in identifying the correct Indigenous stakeholders to contact in determining acquisition, publication, exhibition, use and preservation of cultural heritage.

Where necessary, the Library, through the Indigenous Engagement Section, may seek advice regarding who to consult with and the extent of appropriate consultation in relation to ICIP material from:

- The Library and Indigenous Engagement Section networks and records;
- Aboriginal and Torres Strait Islander Collection Reference Group;
- Cultural advisors, including individuals and communities that the Library has ongoing relationships with;
- State and National libraries, museums and archives;

- Community representative bodies (traditional owner groups and Aboriginal and Torres Strait Islander corporations); Prescribed Bodies Corporate; Registered Aboriginal Parties; Registered Native Title Bodies Corporate, or similar;
- Local Aboriginal Land Councils or Regional Authorities;
- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS);
- First Nations Language Centres and Keeping Places;
- First Nations Art Centres and Peak Bodies;
- Recognised First Nations individuals and academics.

ICIP and Copyright

First Nations peoples have rights in any records made of their ICIP.

ICIP Rights must be considered and respected in a similar way to copyright, although copyright consents required under law will be different to ICIP consents required by Australia's First Nations people.

The Library aims to make all collections and collection items as accessible as possible once acquired, while respecting the intellectual property, moral rights and cultural sensitivities of donors, creators and subjects. This includes describing the materials and making them accessible on the Library's website and through the Library's services.

ICIP can be protected under Australian intellectual property (IP) laws where it meets the requirements for protection. For example, copyright laws will automatically apply to ICIP that is written down or recorded in some way e.g. a recording of a story or depicted in photographs. However, Australian laws do not adequately protect ICIP or the rights of First Nations peoples as enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*.

Historically, First Nations people have shared their cultural knowledge with non-Indigenous people, through the telling of stories and passing on of information which the non-Indigenous person (whether an explorer, researcher, anthropologist or linguist) has written down or recorded. These stories and information constitute ICIP, however under Australian copyright law, the person who made the record generally owns copyright in what is recorded, and the rights of the storyteller are not always adequately respected. Being the copyright owner of the recording means they have the right to control reproduction, publication, access and use of what has been recorded – including the ICIP contained in that record – often without the permission of the storyteller. The Library is working to create practices that better protect the rights of First Nations interviewees and storytellers.

Performers have certain limited rights in relation to recordings made of their performances under the *Copyright Act 1968* (Cth), including performers of traditional knowledge or cultural expression (ICIP). Performances of ICIP include the telling of First Nations cultural knowledge. If a sound recording is made of a First Nations storyteller expressing their cultural knowledge or ICIP, then they will automatically share copyright ownership with the maker of the recording – unless the recording has been commissioned. A First Nations storyteller may also own copyright in the text of their story, including any written transcript if it is a direct copy of a recording made of them, and has the right to control use of that text. For commissioned oral history interviews for the Library's collection and associated outputs, interviewees are asked to grant rights to the Library and specify usage rights through the rights and access agreement, providing the Library with the ability to manage the material as part of their long-term collection.

It is important to note that for many historical records the details of the First Nations people recorded were not often collected and outstanding provenance issues remain.

ICIP consents

The Library must consider both IP and ICIP Rights in relation to its collections, materials, projects or activities as there may be a distinction between the author or maker of a copyright work and the knowledge rights-holder of the ICIP contained in the material.

The table below summarises the differences in consents to be sought:

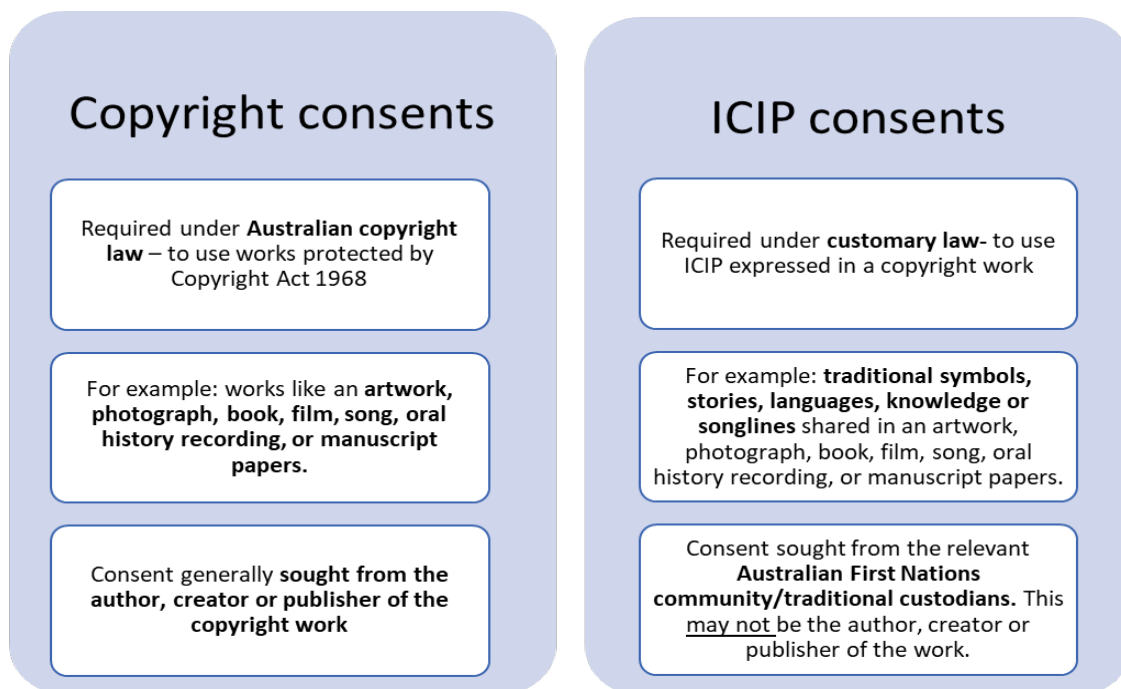


Diagram: *Copyright v ICIP consents* © Terri Janke and Company, 2021

Consent may be required from multiple stakeholders for use of material, for example:

- Author or creator of the material, or their estate if the creator is deceased (usually the copyright owner);
- First Nations persons that are the subject of the material, or their family or community if deceased;
- Cultural rights-holders or custodians of ICIP depicted or described in the material;
- Representative organisation who can speak for the First Nations community, country or language depicted or described in the material.

New copyright material containing ICIP

ICIP rights needs to be recognised when negotiating copyright. Written licences and cultural consent forms for use of ICIP material should be utilised in the same way that permissions for copyright are required. Often, the ICIP clearance will be incorporated in a copyright licence.

Where the Library commissions or creates new copyright material, the Library is committed to discussing copyright ownership as part of the consultation and consent process.

Where a copyright-protected work is created with First Nations people and incorporates ICIP knowledge e.g. in a publication or as part of an exhibition, once having granted free, prior and

informed consent for use of any ICIP in the material (e.g. in the form of a cultural clearance), it is accepted practice for the First Nations persons to:

- be attributed as a co-authors, and share or own the copyright in the material;
- be given an opportunity to review and approve the draft of the material; and
- receive benefits for use of their ICIP in the material e.g. a fee for their input.

The First Nations persons can then enter into a deposit or licence agreement with the Library.

Where it is negotiated that the Library will own copyright of newly created materials, e.g. recordings of an oral history or commissioned photography, the Library must still obtain permission to use ICIP incorporated in the material through agreement with the relevant ICIP rights holder/s.

Ownership of sound recordings

As explained above, it can be argued that a sound recording of a First Nations person providing oral history or transmission of knowledge that incorporates ICIP is the creation of a new copyright work and a performance of traditional knowledge or cultural expression. As part of the rights under the Copyright Act, copyright in a recording of ICIP will be jointly owned by the First Nations storyteller as both the author and the performer, and by the maker of the recording. This is particularly relevant for the Library in relation to its Oral Histories and Folklore collection, as the Library will be the copyright owner of the sound recording for all commissioned oral histories.

Ownership of recordings (film, sound, photograph)

Where ICIP is being recorded, it is appropriate for the First Nations person relaying that knowledge or being recorded to own copyright in the recording that is made (whether by film, sound or photograph) either solely or jointly. The First Nations storyteller or performer can then enter into an agreement for use by the Library of the recording – whether by itself, as part of a collection or to be incorporated in a larger project.

The storyteller or performer may have the authority to provide cultural consent for use of ICIP in the recording by the Library (or third parties). If not, cultural consent from the relevant community may also be necessary.

How the Library (or third parties) can use the recording (and ICIP incorporated in the recording) must be considered carefully and clearly discussed with the subject. It is preferable to seek a licence for the specific use only, and not a broad licence that allows all uses in perpetuity. If the Library (or third parties) want to use the recording for other purposes, they should seek a further licence. This is particularly the case for ICIP rights, which can be dependent upon context.

Orphan works

The requirements of the Copyright Act in relation to orphan works does not change the obligations in relation to ICIP Rights. Where possible, cultural permission should be sought for access and use of ICIP, even if contained in orphan works. Where permission cannot be sought from the relevant ICIP rights-holders, guidance should be sought from the Indigenous Engagement Section.

Contracts

Intellectual Property clauses in Library contracts, deposit agreement and licence agreements should enable First Nations people to own copyright in the relevant material. Additional ICIP clauses should also be added to Library contracts that appropriately address cultural permission for access and use of ICIP incorporated in the material held in collections or being created. ICIP clauses in Employment, Contractor, Partnership and Funding agreements can also ensure that this Protocol must be complied with.

Applying the Guiding Principles

1. Recognition and Respect

Principle: Recognition & Respect: The Library recognises and respects the rights of First Nations peoples to protect, maintain, control and benefit from their ICIP.

1.1. ICIP considered across all aspects of the Library's work

Historically, the collection of ICIP has been from the viewpoint of First Nations peoples as subjects, through the lens of Australia's colonial past. As such, much of the ICIP contained in the Library collections is separated from the First Nations peoples who can speak for that knowledge.

The Library recognises the right of First Nations peoples to maintain, control, protect and develop their ICIP. The Library is committed to ensuring that ICIP Rights are considered in all aspects of the Library's work. This includes identification of ICIP and appropriate engagement to ensure that ICIP Rights are upheld, where possible.

Where it is difficult to identify the provenance of ICIP contained in the Library's collections, Library staff will seek guidance from the Indigenous Engagement Section, who may in turn provide recommendations for further investigation, including direction to the Library's Aboriginal and Torres Strait Islander Collection Reference Group.

1.2. Library Reconciliation Action Plans

The Library is committed to deepening engagement with First Nations peoples and to meaningful reconciliation. The Library understands that there is much to learn about the richness and diversity of First Nations cultures, and that a change of perspective is necessary as part of the reconciliation journey.

This Protocol complements the Library's reconciliation action planning, providing Library staff guidance concerning the stewardship of ICIP contained in the Library collections, and should be read in conjunction with the current plan.

1.3. Indigenous data sovereignty and governance

Indigenous data sovereignty and governance requires consideration of issues around how material concerning First Nations people and their ICIP is collected, recorded, stored, managed and used as part of the Library collections. This necessarily includes digitisation and online publication of ICIP material.

The Library supports the Global Indigenous Data Alliance's CARE principles for Indigenous Data Governance² which were developed to complement the FAIR principles of open data and open science (findability, accessibility, interoperability and reuseability) as a way of identifying and appropriately addressing ICIP Rights of Indigenous peoples.

The CARE principles require:

- Collective benefit for Indigenous peoples in the use of their data;
- Authority of Indigenous peoples to control their data;
- Responsibility to exercise care in how Indigenous data is used; and
- Ethical use of Indigenous data to ensure ICIP Rights.

² <https://www.gida-global.org/care>

In addition, the Library supports the Maiam nayri Wingara Key Principles developed at the Indigenous Data Sovereignty Summit in Canberra in June 2018.

The Library will consider the CARE, Maiam nayri Wingara and other relevant principles when working with First Nations and ICIP materials contained, acquired and used in and in relation to the Library collections.

2. Self determination

Principle: Self-determination: The Library recognises and respects the right of First Nations peoples to be involved in decision-making concerning their ICIP. The right of self-determination extends to maintenance of ongoing relationships concerning the access and use of ICIP including the context in which any ICIP is presented by the Library.

2.1. First Nations engagement

The Library recognises the right and interest that First Nations peoples and communities have in relation to the First Nations collections at the Library and the ICIP contained in the Library collections. This extends to a right to be involved in decision-making concerning the acquisition, provenance, description, preservation, repatriation, access and use of ICIP in the Library collections, where possible.

The Library seeks to work respectfully and ethically, and to be guided by First Nations knowledge-holders, to ensure the Library's appropriate engagement with First Nations peoples and their ICIP.

In accordance with the *National Library of Australia Act*, the Library's collections are collected, preserved and made available to the public to support learning and creative and intellectual endeavours, and to contribute to the continuing vitality of Australia's diverse culture and heritage.

The Library aims to benefit First Nations peoples and communities by prioritising the collection of material created by and representing the views of First Nations peoples, as well as encouraging and supporting reinterpretation of ICIP in the Library collections.

2.2. Informing communities

First Nations peoples and communities are often unaware of what cultural materials are held in Australian collections. It is up to the Library to ensure that First Nations people are informed of the ICIP held in the collections, and to support the rights of First Nations people to access, interpret and use their ICIP, as well as seek the repatriation of their knowledge and objects.

The Library is committed to deepening engagement with First Nations people and strives to develop inclusive collections, services and relationships, and to ensure First Nations perspectives are reflected throughout. The Library's RAP, in conjunction with this ICIP Protocol, provides a framework for appropriate engagement and relationship building with First Nations peoples.

2.3. Culturally Safe library spaces and services

In accordance with Article 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*, the Library is committed to creating appropriate services and safe library spaces for First Nations peoples to engage with the Library collections, making them more accessible and discoverable for the wider community, including online.

The Library has committed to:

- investigate and mitigate potential barriers to First Nations engagement with the Library's services;

- develop and maintain online research guides and guides to collections on First Nations materials;
- develop targeted social media promotion of the Library services and collections to First Nations communities and people.

The Library's collection holds a diverse range of ICIP material, offering a rich interpretation of Australia's past and contemporary First Nations cultures.

2.4. Collections management

ICIP Rights are ongoing, as is the obligation on the Library to seek a greater understanding of ICIP in its collections, and to comply with protocols placed on ICIP material by rights-holders and custodians. This obligation is supported through the Library's Indigenous Engagement Section and the Aboriginal and Torres Strait Islander Collection Reference Group.

The Library undertakes to consult with First Nations peoples in relation to the management of the ICIP in the Library's collections, where possible. First Nations cultures are not static and Library staff may need to re-consult with ICIP rights-holders concerning the ongoing management of ICIP material.

The Library will work to establish ongoing relationships with First Nations peoples and communities who can speak for ICIP material held in the Library's collections so that:

- First Nations people can view the Library's collections and identify ICIP;
- First Nations people can view ICIP material in the Library's collections and advise on description, storage, management, interpretation, access and use;
- First Nations people can identify appropriate cultural protocols or restrictions on access and use of ICIP, including gender and initiation restrictions, that the Library can apply;
- where ICIP material in the Library collections is not identified as connected to a particular First Nations clan or group, the Library can work with First Nations peoples to locate ICIP rights-holders.

2.5. Acquisitions

The Library prioritises the collection of material produced by First Nations Australians.

Acquisitions are in accordance with the Library's Collection Development Policy, and the Library exercises best ethical and professional practice and judgment in collecting cultural materials, including respecting First Nations' protocols, cultural restrictions and sensitivities.

The Library:

- undertakes appropriate due diligence, including provenance and title research, and is accountable and transparent in acquiring material by purchase, gift, and bequest;
- respects First Nations cultural restrictions and acknowledges the Library's legal and ethical responsibility to First Nations peoples;
- ensures all cultural material acquired has been legally exported from the country of origin;
- does not acquire cultural material where there is suspicion that it was obtained through unauthorised means or theft;
- reviews new information about an item in the collection and undertakes further investigations;
- subject to cultural clearances, makes information about its acquisitions public via the Library catalogue.

Where provenance of any ICIP in material to be acquired is unknown or permission has not been sought from ICIP rights-holders (i.e. First Nations custodians or communities) for the acquisition, the Library will use best endeavours to investigate cultural origins further, and will seek advice from the Indigenous Engagement Section before proceeding with the acquisition.

The Library will not intentionally seek to acquire material containing secret or sacred knowledge or private or confidential information of First Nations peoples, unless at the express request of the ICIP rights-holder.

2.6. Commissioning

When commissioning works, in particular oral histories, it is good practice to ensure the First Nations creators are acknowledged as owners of intellectual property in the commissioned work, or the recordings or photographs taken by those creators, and provide permissions back to the Library for use.

Any commissioning agreement should address ICIP and incorporate free, prior informed consent, restrictions or cultural protocols concerning preservation, storage, access and use, and conditions around attribution.

A separate agreement may need to be sought from the ICIP rights-holders (e.g. First Nations custodians or communities) for use of ICIP incorporated in the commissioned work.

Historically, no oral history interviewees have been remunerated for their contribution. The practice of commissioning interviewees, particularly of First Nations people, can involve considerable time and effort, where it could be argued that remuneration would be appropriate. The Library will consider how this approach might be adapted – both in individual cases, and more broadly – into the future.

2.7. Acquisitions

The Library acquires material for its collection through a range of means. This includes purchase, legal deposit, commission and donation. The Library is guided by its comprehensive, representative and selective collecting principles to fulfil its purpose of collecting documentary resources relating to Australia and the Australian people so that the Australian community – now and in the future – can discover, learn and create new knowledge.

The Library will endeavour to ensure that where ICIP is identified as being contained in material being acquired, that information as to the provenance of the ICIP, and details of the relevant ICIP rights-holder (i.e. First Nation clan/group or community) is collected along with intellectual property information.

Where provenance of ICIP is unknown or permission has not or cannot be sought from First Nations rights-holders for the acquisition, the Library must seek advice from the Indigenous Engagement Section.

2.8. Access & Use

The Library encourages open access and use of its collections unless restricted. The Library will continue to ensure First Nations access to and use of the Library collections and ICIP contained in those collections, and explore opportunities to provide First Nations peoples with greater access and use of the Library collections, including digitisation to facilitate remote access, where possible.

Donors are able to specify terms and conditions of access and use of their collection materials in the Library's rights agreement at the point of acquisition, including restricting access to sensitive material or cultural protocols that apply to any ICIP. The Library makes materials available for public access and use in accordance with these rights agreements.

The Library may rely on cultural permissions granted by First Nations people or communities in relation to access and use of ICIP, for example, that particular material is appropriate for public viewing and can be made available as part of the Library's digital collection. Where cultural permission has been granted but another person or group questions that permission, the Library will generally rely on the original cultural permission granted. Where a person or group dispute permission that has been given for use of ICIP by another person within the same community, guidance from the Indigenous Engagement Section should be sought.

Any project or activity being undertaken by or in-collaboration with First Nations people or communities must consider access and use restrictions at the time of initial consultations.

The Library acknowledges that the rights of access and use of First Nations cultural material may be held by an individual, but custodianship of ICIP in the material is often held at the community level. If it is culturally appropriate, the Library may need to seek permission from both the individual who owns or holds the cultural material, as well as the community, for access and use of any ICIP incorporated in the material, for example, in an artwork, photograph or recording. The individual rights-holder may be able to speak for the ICIP and provide cultural consent as well.

Where the ICIP rights-holder is unknown, the Library will undertake a risk assessment and seek guidance from the Indigenous Engagement Section.

2.9. Third Party Access & Use

While the Library supports the availability of its collection items for public access and use, the Library will restrict or refuse access to and use of collection items where it is found that such material is not appropriate to be viewed publicly or otherwise reproduced or used, or where the use of the material is considered inappropriate or offensive.

In upholding ICIP Rights, the Library acknowledges that it is not appropriate to authorise public use of ICIP without permission from the relevant ICIP rights-holders or custodians of that ICIP. While it may be permissible for the public to access (or view) ICIP, including online through the Library catalogue, eResources or Trove, it may not be appropriate for such ICIP to be otherwise used (copied, published, communicated, edited or adapted) by third parties.

Similarly to any intellectual property obligations on public use of collections material, the Library must ensure that users are directed to seek permission and obtain free, prior informed consent from ICIP rights-holders before using ICIP, unless access conditions have already been established by the Library.

Where the ICIP rights-holder is unknown, the Library will undertake a risk assessment and seek guidance from the Indigenous Engagement Section.

The Library will ensure that any internal or external users are aware of the obligation to acknowledge ICIP incorporated in the relevant material, and attribute the relevant ICIP rights-holders or the First Nations community, where known.

3. Consultation & Collaboration

Principle: Collaboration & Consultation: The Library supports the enduring right of First Nations peoples to be consulted about their ICIP and any use of their ICIP. The Library commits to ensuring such consultation is respectful, informed and ethical and that adequate time is provided to enable meaningful dialogue and consideration by the First Nations peoples.

Where research, projects, programs, exhibitions or other activities are undertaken by the Library that involve or incorporate First Nations peoples or their ICIP, the Library commits to seeking free, prior informed consent for the activities and any use of ICIP. To achieve this, consultation and collaboration must take place.

The Library is committed to respectful and meaningful consultation and collaboration with First Nations peoples to ensure activities incorporating ICIP are First Nations-led or co-designed and appropriately represent First Nations knowledge, opinions and interpretation.

To determine who are the right First Nations people to consult and collaborate with, the Library will seek to first identify and speak to the First Nations stakeholders who will be involved in or affected by the activity, starting with the source communities. This may include a range of people, communities, groups and organisations, the size of which will be influenced by the scale of the activity. Where multiple First Nations stakeholders are identified, consultation should be with all stakeholders.

Where the source community or ICIP rights-holder is unknown, the Library will undertake a risk assessment and seek guidance from the Indigenous Engagement Section.

Consultation is necessary at the inception of a project, program, research or exhibition to identify whether the concept or idea is appropriate. The Library will consult with First Nations peoples or the relevant First Nations community/ies to identify whether the activity and intended use of ICIP is appropriate, the scope of the activity, and what the needs of the community are. It is important to consult widely to ensure that the activity gains the perspectives of the whole community it affects.

Collaboration is necessary to determine how a project involving First Nations people or ICIP can and should be developed and implemented. As the ICIP rights-holders, Indigenous-led or co-designed projects are preferable to projects that involve First Nations people as subjects only.

The Library aims to build trust and establish long-term, mutually beneficial relationships with First Nations people and communities, that continue beyond the completion of a particular project. Adequate time for consultation and collaboration should be embedded in project schedules in accordance with free, prior informed consent obligations, ensuring sensitive responses to community ways of working and values.

4. Free, Prior Informed Consent

Principle: Free, Prior Informed Consent: The Library is committed to ensuring that the free, prior informed consent of First Nations peoples is obtained before using or authorizing use of ICIP where possible to do so.

The Library will ensure that the free, prior informed consent of First Nations people or communities is obtained before using or authorising access or use of ICIP in its collections, where possible.

For external users, it is the Library's practice to ask them to seek appropriate permissions from ICIP rights-holders and provide evidence to the Library that this has been gained.

4.1. Obtaining consent

Before the Library makes any public access or use is made of ICIP, the Library commits to engage in good faith consultations with First Nations people in accordance with Principle 3. The Library will provide clear and detailed information about its intended use of ICIP, including:

- Identification of the ICIP, and the proposed access or use of the ICIP;
- Whether the access or use will be Indigenous-led or co-designed with the Library;

- Any third parties or partner organisations involved in the access or use;
- The size and scale, and medium and format of the access or use;
- The intended and likely audience and outcomes of the access or use.

Where this is not possible, the Library will reconsider the inclusion of the material in consultation with Indigenous Engagement Section.

The Library acknowledges that multiple consents may be required, including from:

- The copyright owners;
- The First Nations participants;
- The First Nations community or cultural rights-holders for access or use of any ICIP.

The Library will ensure First Nations peoples approached for consent are provided with appropriate time to consider the context for access or use of ICIP, and to make an informed decision.

The same obligations concerning consent apply to internal Library users as well as external third-party users of ICIP in the Library collections and contributors to the Library collections.

4.2. When consent cannot be sought

Where consent for access or use of ICIP cannot be sought whether due to lack of provenance concerning the ICIP or difficulty identifying and locating the relevant First Nations ICIP rights-holders, Library staff will seek guidance from the Indigenous Engagement Section, who may in turn seek support from the Aboriginal and Torres Strait Islander Reference Groups and external advisors. If the Library decides to proceed with the access or use of the ICIP, it will do so in an ethical and responsible manner, in accordance with the Guiding Principles in this Protocol.

A disclaimer can be used where free, prior informed consent has been unable to be obtained.

4.3. Where there are multiple rights-holders

Where there are multiple ICIP rights-holders, the Library will endeavour to seek consent or support from all rights-holders. Where consensus of all the ICIP rights-holders cannot be reached, or consent is withheld by one or more ICIP rights-holders, the Library will seek guidance from the Aboriginal and Torres Strait Islander Collections Reference Group whether to proceed with the access or use.

4.4. Recording cultural consent

Where possible, the Library will obtain written cultural consent or make a record of that cultural consent (including but not limited to film, sound recording or written file note signed by an ICIP rights-holder or email documenting the process for obtaining consent) from the appropriate ICIP rights-holders that clearly outlines what has been agreed to in relation to access or use of ICIP.

Note that where First Nations people are participants in the access or use, they will also need to provide individual consent. See

ICIP and Copyright section above.

4.5. Collection Digitisation

Digitisation of the Library collections supports the Library's aim to make its collections accessible, and to ensure their long-term preservation. The Library digitises a range of materials and has two major digitisation streams: digitisation-on-demand and selective digitisation (including but not limited to digitisation for preservation, philanthropic funded digitisation and contributor funded digitisation). Digitisation of Library materials can take place onsite or offsite at a digitisation

supplier's premises.

Indigenous data sovereignty and governance requires consideration of issues around how data concerning First Nations people and their ICIP is collected, recorded, used and stored. This includes, importantly, positioning within the digital space.

All reasonable endeavours should be taken to establish provenance of the ICIP material to be digitised prior to digitisation. To do this, appropriate consultation and collaboration with First Nations people who can speak for the ICIP in question should be undertaken in accordance with this Protocol. Where unknown, guidance should be sought from the Indigenous Engagement Section.

The Library supports First Nations people's self-determination and control in relation to the digitisation and sharing of ICIP online. The Library aims to engage and collaborate with First Nations people in relation to digitisation projects with a view to increasing access and prioritising the needs of First Nations peoples. The Library will also endeavour to provide opportunities for First Nations people to engage in the preparation of ICIP materials for digitisation, to ensure cultural protocols and restrictions are applied appropriately and effectively.

Selective digitisation

In determining which collections should be prioritised for digitisation, the Library will have consideration of whether all material in a particular collection is appropriate for digitisation, and for online access through the Library's catalogue.

The Library will actively undertake ICIP-related digitisation projects in collaboration and with the guidance of ICIP rights-holders, where possible. When selecting material to be digitised, it is important to understand the wishes of the relevant ICIP rights-holders and to ask:

- What ICIP is incorporated in the material selected for digitisation?
- Is the digitisation of the ICIP material appropriate and necessary?
- Are the First Nations people who speak for the ICIP aware that digitisation of the material is being proposed?
- Is digitisation of the ICIP a priority for the First Nations people who speak for this ICIP?
- What are the cultural protocols or restrictions on access or use of the ICIP material?

Where the relevant First Nations rights-holders are unknown, guidance must be sought from the Indigenous Engagement Section concerning digitisation.

In making a final determination, the Library will take a risk management approach to digitisation of ICIP in accordance with the Library's Collection Digitisation Policy.

Digitisation on demand

Every effort should be taken to obtain free, prior and informed consent to be obtained for public use of ICIP material or data, whether in analogue or digital form.

While the Library has a mandate to build an accessible national collection, public users are not bound by the same statutory and cultural obligations, and there is a serious risk of misuse and misappropriation of ICIP material.

In determining whether access should be provided, the Library will consider whether it is being requested for personal use, research and study purposes or for publication. The Library will ensure that public users are made aware of ICIP considerations, and in granting access to or use of ICIP material, will clearly identify where additional ICIP permission must be sought and direct public users to the relevant ICIP rights-holders. If the ICIP rights-holders are unknown, Library staff will:

- consider, in line with the Guiding Principles in this Protocol, whether the access or use is appropriate and whether authorising access or use will infringe existing ICIP Rights, and
- seek guidance from the Indigenous Engagement Section.

4.6. Online Access and Publication

The Library must weigh its statutory obligations with its responsibility to First Nations people as a custodian of ICIP in considering whether the ICIP is suitable for online access and publication, as well as public access and use restrictions that may apply. Online publication includes making digitised or born digital ICIP material available via online databases including the Library’s catalogue and Trove as well as on websites or online exhibitions.

Library staff should apply the Guiding Principles in making a determination concerning the access and use, and publication, of ICIP material online. It is irrelevant whether the ICIP material has already been made available elsewhere (including online) – ICIP Rights must still be considered and applied.

Most digitisation is undertaken by the Library with the intent of making digitised material available online. The Library will endeavour to ensure ICIP material made available online or via other digital platforms or databases is with the permission of the ICIP rights-holders where possible. Prior to making ICIP available to the public, the Library will consult with the ICIP rights-holders to confirm the material is suitable for public display and seek free, prior informed consent for online access or publication.

Where ICIP rights-holders are unknown (e.g. in relation to legacy materials, orphan works, old photographs), online access or publication of ICIP should only be undertaken to promote and support increased access to these collection materials, in order to identify the relevant First Nations rights-holders or custodians. In these circumstances, the Library must seek guidance from the Indigenous Engagement Section and collaborate with First Nations people to undertake appropriate discovery.

Where ICIP material is made available online or via other digital platforms or databases, the Library must use cultural notices (see **7.2 Cultural notices**), direct public users to this Protocol or similar information, and apply terms and conditions relating to access and use restrictions. Public users must be warned against the misuse and misappropriation of ICIP and the risks of sharing ICIP material in an online environment.

The Library will notify public users of attribution requirements where consent for use of ICIP is granted.

4.7. Data Management

Digital collections that contain ICIP need to be stored and maintained in a way that upholds ICIP Rights of First Nations peoples, including describing and storing digital collections in a manner consistent with cultural protocols around access and use, both by the Library and the wider public, particularly with respect to secret and sacred material.

In relation to description, it should be noted that, where possible, the Library’s preference is to utilise existing descriptive metadata created by others where available, and may be obtained and reused from a range of sources including creators, interviewers, donors, publishers and vendors noting the original source of the metadata may not be recorded. These records are amended in accordance with the Library collection description policies and in consultation with the Indigenous Engagement Section, and when advised the description is potentially culturally inappropriate.³

³ Collection Description Policy, 2021.

Sustainable choices of formats and preservation strategies should ensure long-term access to digital collections by First Nations people but must be balanced with cultural considerations. Digital collections will be stored and preserved in accordance with the Library's Digital Preservation Policy.

4.8. Filming, Recording and Photography activities of the Library

The Library seeks consent from all subjects when filmed, recorded or photographed whether to document collection materials or as a result of an organised interview, exhibition, project or at a Library event.

First Nations authors and creators will under the Copyright Act in the first instance own copyright in any material they are commissioned to create for the Library, and will provide permissions to the Library for use of the copyright and any incorporated ICIP. This may involve seeking separate cultural consent from ICIP rights-holders directly.

First Nations subjects participating in a Library project, program, exhibition or activity should own or jointly own the copyright in any materials created that incorporate their stories, knowledge or ICIP. Permission will be provided to the Library for use of the copyright, as well as any incorporated ICIP. This may involve seeking separate cultural consent from ICIP rights-holders directly.

5. Interpretation & Cultural Integrity

Principle: Interpretation & Cultural Integrity: The Library supports the right of First Nations peoples to be the primary guardians and interpreters of their ICIP. The Library seeks to ensure that its interpretations of ICIP are respectful of the cultural integrity of that material.

5.1. First Nations reinterpretation (Truth Telling)

The Library recognises that there is a wealth of First Nations cultures across Australia, each with their own unique history, stories, cultural heritage and ICIP, and supports the right of First Nations peoples to be the primary interpreters of their ICIP.

The Library recognises that much of what is historically recorded reflects European and colonial perspectives of First Nations people and their culture, excluding First Nations voices, and has been collected without free, prior informed consent or acknowledgement.

The Library is committed to building strong relationships, ensuring appropriate engagement with First Nations peoples to foster truth telling practices, to provide ongoing feedback concerning the interpretation of ICIP in the Library collections, and to maintain the authenticity and cultural integrity of ICIP in the Library collections and in any use of ICIP.

The Library will carefully consider requests for changes to its interpretation or use of ICIP in its exhibitions, publications or interpretive resources it might develop. In circumstances where there are differing views, the Library will seek guidance from the Indigenous Engagement Section in responding to such requests.

5.2. Terminology

The Library will be guided by First Nations peoples in the appropriate terminology, description and spelling that applies to ICIP material in the collections or being used by the Library, where possible. The Library will seek guidance from the Indigenous Engagement Section where multiple interpretations or differing advice is provided.

5.3. Presentation and Programs

In the development of presentations and programs associated with the Library collections, Library staff will, in considering the cultural integrity of interpretation and use, seek First Nations

perspectives and reinterpretation to identify inaccuracies and misinterpretations of material containing ICIP.

The Library will use cultural sensitivity notices to identify where collection material may encapsulate insensitive, outdated or offensive interpretations to ensure the context for the material is understood. See **7.2 Cultural notices**.

The Library will seek to ensure the Library projects, programs, exhibition and activities involving ICIP are Indigenous-led and co-designed, engaging First Nations people who can speak for the ICIP to guide the interpretation and use of ICIP.

5.4. Legacy material

Holding such a vast historical collection of legacy material inevitably means that there may be limitations to the provenance information collected about that material. This includes legacy material that contains ICIP such as historical images, recordings and written materials.

The Library is committed to the identification of ICIP in its collections, where reasonably possible.

Where ICIP is identified in legacy material, the Library is committed to investigating and seeking the First Nations peoples or communities who have an interest in that material, with the assistance of the Indigenous Engagement Section and the Aboriginal and Torres Strait Islander Collections Reference Group.

It is acknowledged that this Protocol is forward-focused, and it is important to ensure that the collection and preservation of First Nations history, experience and culture into the future is appropriately recorded to ensure the provenance of ICIP is identified. See also **2.5 Acquisitions**.

5.5. Description

The Library will work to ensure that ICIP in its collections is appropriately acknowledged in accordance with the Library collection description policies and guidelines for First Nations material⁴ to enable identification and discovery.

The Library will comply with the CARE principles – see **1.3 Indigenous data sovereignty and governance** – and ensure sensitivity of ICIP material is identified and maintained.

When working with First Nations communities, whether in relation to existing ICIP or new collection material, the Library will seek the assistance or co-design of the community to ensure culturally appropriate names and descriptions are used to identify and catalogue the material.

The Library is also committed to strengthening the discoverability and promotion of First Nations language materials, and will:

- Ensure all newly acquired Library materials are allocated appropriate language designators and culturally appropriate names and subject descriptions;
- Embed easy discovery of First Nations languages materials within Trove;
- Provide all Trove partners with up-to-date statistics about identified First Nations materials within their collections on request.

6. Secret, Sacred & Private

⁴ Collection Description Policy , 2021,.

Principle: Secret, Sacred & Private: The Library acknowledges that some areas of First Nations culture are not appropriate to be shared publicly or may be subject to customary laws or other restrictions. The Library will respect the custodial rights of First Nations peoples and ensure that their decisions in relation to secret, sacred and private business are upheld.

6.1. Management of secret, sacred and private material

Library staff are aware that they may be privy to secret, sacred, private or confidential information relating to First Nations peoples or communities.

The Library manages secret and sacred material in its collections in a sensitive and respectful manner, in accordance with the Library's policies and guidelines, and where possible, in consultation with First Nations people who can speak for the ICIP. Appropriate warnings and notices are applied to all secret, sacred, private and confidential material held by the Library, including on packaging and storage locations for material. The Library will ensure that culturally safe storage and access processes for this material is developed in consultation with First Nations subject matter specialists.

The Library ensures that secret and sacred material is not made available for access or use, publication or general viewing without permission from the First Nations peoples who speak for the ICIP.

Where secret or sacred material is held by the Library, but without ICIP provenance, the material will not be made publicly accessible by the Library until such time as the relevant First Nations peoples or communities to which the ICIP material belongs can be identified.

6.2. Deceased persons

Where it is known that material contains the name, voice or image of a deceased First Nations person, the Library will comply with any directions of the person's family, where known, apply appropriate warnings and notices in accordance with Library policies and procedures, and seek guidance from the Indigenous Engagement Section concerning any access or use of the material.

The Library applies deceased notices wherever possible and appropriate. The Library will continue to utilise deceased persons notices where relevant and appropriate, or as otherwise notified.

7. Attribution

Principle: Attribution: First Nations peoples are custodians of their ICIP and have the right to be attributed in relation to their ICIP. The Library commits to acknowledging First Nations peoples in relation to their ICIP and any use of their ICIP.

7.1. Acknowledging First Nations custodians and communities

First Nations peoples and communities should be attributed in relation to ICIP in the Library's collections, wherever possible, and in circumstances where they have led, designed, been commissioned to develop or contributed to the Library's projects, programs, exhibitions or activities that incorporate ICIP.

ICIP rights-holders should also be attributed in any use, whether by the Library or public users, of ICIP in the same way that authors or creators of copyright works are attributed, unless the ICIP rights-holders advise that they do not wish to be named.

Consultation with First Nations people concerning attribution, including correct titles, spelling and reference should be undertaken where possible.

The Library will develop systems for recording the details and preferences of First Nations people for the attribution of their ICIP, including what details may be made available online, on request to the public or only to Library staff. Ideally, information concerning accessing this material would be made publicly available, however, at a minimum, this information will be made available in a similar way as that for copyright, donor and other required attributions.

The Library will ensure that Library staff and public users of Library collections are informed of their responsibility to identify and attribute ICIP rights-holders in any authorised use of ICIP, including in the creation of new works.

The Library will provide guidance to Library staff, community and public users on the appropriate referencing and citation of ICIP material in the Library collections and First Nations peoples and communities to which ICIP applies.

7.2. Cultural notices

The Library will strive to use appropriate cultural notices, including online where appropriate, to identify:

- ICIP material in its collections,
- the relevant First Nations peoples and communities from which the ICIP originates,
- any access and use restrictions in relation to the ICIP,
- the impact of misuse or misappropriation of ICIP on First Nations peoples, and
- the attribution and citation requirements where ICIP use is authorised.

The Library will ensure that cultural notifications are applied consistently across all of its operational domains. A separate ICIP identifier will be created that can be applied to all material incorporating ICIP.

8. Benefit Sharing

Principle: Benefit Sharing: The Library acknowledges the right of First Nations peoples to benefit from the sharing of their ICIP and culture.

8.1. Financial & Non-financial

First Nations people have the right to share in the benefits from use of their ICIP by the Library and the wider community. This is particularly important where ICIP is used for publication or for commercial purposes.

First Nations peoples collaborating with, engaging in knowledge transfer, or providing services to the Library must be fairly compensated for their time and effort, including in relation to consent for use of ICIP.

Benefit sharing should be discussed with First Nations peoples as part of any collaboration, consultation and consent process. The Library should be guided by the relevant community in relation to the benefits they would prefer to receive. Benefits to First Nations people can be non-financial, but should always be relevant and useful for the source community.

Examples of benefits include:

- Fair payment for consultation and consent processes and liaison services;
- Access to ICIP in Library collections, including online;
- Repatriation of relevant ICIP;
- Employment and training opportunities for community members;
- Capacity building of First Nations curators, linguists, researchers, librarians and archivists;
- Invitations to attend and speak at events relating to their contribution or ICIP.

8.2. Merchandise

The Library ensures that First Nations art, books and other merchandise sold by the Library are authentic, attributed correctly and the result of ethical practices, with appropriate and direct benefits received by First Nations authors and creators as a result of product sales.

Material commissioned by the Library from First Nations authors and creators for use in merchandise should follow the protocol for commissioning outlined in **2.6 Commissioning** and **4.4 Recording cultural consent**.

9. Maintaining First Nations Culture

Principle: Maintaining First Nations Culture: The Library acknowledges that First Nations cultures are not static and that measures need to be taken so that First Nations peoples can maintain, revitalise and advance their cultures.

9.1. Repatriation

The Library will seek to repatriate ICIP material in the Library collections where possible on a case-by-case basis. Library staff will consult with First Nations peoples and communities regarding the appropriate return of ICIP material, including secret and sacred material held in the Library's collections.

9.2. Preservation

The Library is committed to preserving material recording First Nations history, experience and culture (collectively ICIP). Preservation of these materials extends from collecting the material in the first instance, to the use of conservation technologies on that material to extend its life, and the creation of a digital surrogate.

The Library will ensure that it seeks First Nations people's perspectives, guidance and continued involvement in the preservation of ICIP in the Library collections in accordance with cultural protocols and the Guiding Principles outlined in this Protocol.

See also the **ICIP in Library collections** section above.

9.3. Collections Management

The Library undertakes to consult with First Nations peoples and communities in the management and storage of ICIP in the Library's collections. See also **1.3 Indigenous data sovereignty and governance** and **4.7 Data Management**.

9.4. Sharing

The Library will share ICIP in its collections, including online, to ensure greatest access and continued use of knowledge by First Nations peoples and communities.

Sharing of ICIP will be in consultation with ICIP rights-holders, where known, and in accordance with any cultural protocols or restrictions applied to the material by the relevant ICIP rights-holders. Where the ICIP rights-holders are unknown, sharing of ICIP will be in accordance with this Protocol.

See also **4.5 Collection Digitisation** and **4.6 Online Access and Publication**.

9.5 Right of Reply

The Library actively seeks feedback and comments from the public in relation to the collections shared by the Library, including in relation to cultural sensitivity.⁵ Feedback from First Nations people is addressed in a timely manner and material identified as culturally sensitive is removed from public access until an informed determination can be made in consultation with the Indigenous Engagement Section.

9.6 Naming / Titles / Use of Language words

The Library respects the rights of First Nations peoples to their unique languages.

It is a growing practice to refer to First Nations place names when identifying the location or site of an event, meeting or workplace. This is acceptable practice and a sign of respect towards First Nations peoples and their cultural connection to place.

However, any specific use of First Nations languages, including words, name and titles, in relation to Library activities, sites or facilities must be with the permission of the relevant First Nations clan or group. For example, if Library wish to name a particular building, room, location, event or exhibition using a First Nations language, free, prior informed consent must first be sought from the relevant language group. Library staff should contact the Indigenous Engagement Section for assistance.

10. Recognition of Ongoing Rights

Principle: Recognition of Ongoing Rights: The Library acknowledges that First Nations peoples should be recognised as the guardians of their culture and recognises that the rights of First Nations peoples regarding their ICIP are ongoing.

10.1. Building and maintaining relationships

The Library is committed to respectful engagement with First Nations peoples and communities, and to the development of ongoing relationships of trust and mutual recognition.

10.2. Raise awareness of ICIP Rights

The Library's *Australian ICIP Protocol* provides a framework by which the Library, its partners and its stakeholders can be guided in the ongoing recognition of and respect for First Nations peoples ICIP Rights into the future.

This begins with raising awareness of Library staff and assisting them to consider and implement the Guiding Principles in all aspects of the Library's work.

The Library aims to raise awareness of ICIP Rights with the wider Library community in relation to its collections and activities, including through its online catalogues and resources, by providing clear explanation of ICIP Rights, identification of ICIP in its collections, and using appropriate cultural notices.

10.3. ICIP addressed in Library agreements

The Library will ensure that ICIP Rights are appropriately considered and, where relevant, addressed in Library contracting, including incorporating ICIP definitions and clauses in deposit, acquisition, commission, project, program, exhibition and access & use agreements that identify:

- ICIP material;

⁵ <https://trove.nla.gov.au/cultural-sensitivity-feedback>

- ICIP Rights and ICIP rights-holders;
- Cultural protocols that apply to ICIP material;
- Access and use restrictions that apply to ICIP material;
- Benefits to the ICIP rights-holders, where relevant; and
- Appropriate acknowledgement of ICIP rights-holders.

10.4. Notification of ICIP licensing and deposit obligations

The Library will ensure that donors and depositors of collection material, as well as third-party public users of collection material, are notified of ICIP Rights obligations in relation to the deposit, access and use of ICIP material.

End of Protocol
