SECOND REVIEW OF THE Charter of
HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

SUBMISSION BY THE VICTORIAN
ABORIGINAL HERITAGE COUNCIL (2015)

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Executive Summary

1. The Victorian Aboriginal Heritage Council (Council) supports the important role played by the Charter of Human Rights and Responsibilities Act 2006 (Charter). It also supports the reviews of its impact, particularly on Victorian legislative and policy initiatives affecting the rights of the Victorian Aboriginal community.

2. Council, a statutory authority constituted by Traditional Owners, plays a key role in Victoria’s Aboriginal cultural heritage management system. Council’s operations and functions align with the rights of Aboriginal persons to participate in decision-making in matters that affect their rights and to maintain and develop indigenous decision-making institutions, as is recognised under article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).¹

3. In its decision-making in appointing Traditional Owner corporations as Registered Aboriginal Parties (RAPs), Council recognises and gives effect to cultural rights set out under s19(2) of the Charter and the rights of Traditional Owners recognised by the Aboriginal Heritage Act 2006 (AH Act) and relevant international law.

4. The priority accorded to Traditional Owners under the AH Act and supported by s19(2) of the Charter is aligned with other Victorian initiatives, including:
   - legislative change proposals to strengthen this priority in the AH Act;
   - the recommendations of the Victorian Parliamentary Inquiry into the establishment and effectiveness of RAPs (2012);
   - the enactment of the Traditional Owner Settlement Act 2010 (TOS Act);
   - recommendations for the creation of statutory rights for Traditional Owners to access and use natural resources for non-commercial purposes;
   - support for the Right People for Country (RPfC) project, an initiative of the Office of Aboriginal Affairs Victoria (OAAV) to assist Traditional Owner groups to resolve inter and intra-group native title disputes.

These developments recognise an indigenous-led, decision-making approach and the important role of Traditional Owners in Victoria’s Aboriginal community.

5. Council has undertaken significant work to meet its statutory functions to develop measures to promote awareness and understanding of Aboriginal cultural heritage in Victoria. In doing so, Council has highlighted the unique rights and

responsibilities of Victorian Traditional Owners over their cultural heritage in line with the cultural rights of Aboriginal people recognised by the Charter. Council has provided advice to the Minister and Secretary to this end. A particular focus for Council has been the repatriation of stolen Aboriginal Ancestral Remains and the ongoing protection of burial sites. In Council’s experience, the Charter alone is not sufficient to ensure that Traditional Owners are able to fulfil their cultural responsibilities without unnecessary and inappropriate administrative hindrances. For example, under the *Cemeteries and Crematoria Act 2003*, Traditional Owners are currently required to obtain the prior written approval of the Secretary to the Department of Health and Human Services to (re)bury their Ancestors on Country. Traditional Owners should have the right to (re)bury their Ancestors on Country without this requirement.

6. Council’s submission to the four-year Charter review (2011) supported regular auditing as a measure that could encourage a deeper consideration of rights by decision makers. In principle, Council maintains its support for mandatory regular auditing. Regular auditing could encourage public authorities to develop policy exploring the content of the cultural right recognised by s19 and the impact of these authorities’ activities on the rights of Aboriginal Victorians. This will help contribute to the development of a human rights culture within the Victorian public sector.

7. Council acknowledges the Charter as an important catalyst and driver of legislative and policy reform and for promoting a cultural shift towards a greater consideration of human rights in Victoria, including Traditional Owners’ rights. The Charter is a valuable tool in promoting a human rights culture across the Victorian public service, and, as a legislative standard that policy makers must be held to, the Charter assists in promoting a greater understanding and awareness of Victorian Aboriginal cultural heritage.

8. The Charter can enhance decision making by public authorities. As a decision maker for RAP applications, Council has incorporated a consideration of the Charter into its processes to enhance its consideration of the effects of its decisions to register/decline applications upon the rights of applicants.

9. Council has undertaken significant work to promote the rights and responsibilities of Traditional Owners to manage their cultural heritage on behalf of all Victorians, in line with the cultural rights of Aboriginal people recognised in the Charter. Council has made submissions to numerous parliamentary inquiries and legislative review processes and worked with a range of stakeholders, including with the following:
   - Film Victoria to assist local filmmakers to engage with relevant Traditional Owner groups regarding film sites;
   - Heritage Council of Victoria to strengthen awareness of the Aboriginal heritage values of sites with shared Aboriginal and non-Aboriginal values on the Heritage Register of Victoria;
   - Koorie Youth Council to encourage young Aboriginal people into the cultural heritage industry in line with Council’s succession planning;
   - Municipal Association of Victoria to build awareness and understanding of Traditional Ownership and the Aboriginal cultural heritage management system, and to encourage support for Local Governments to build better relationships with RAPs in their area;
   - National Trust to strengthen recognition of Aboriginal cultural heritage during Heritage Week activities as well as devising other partnership projects;
   - Parks Victoria to strengthen awareness of Traditional Owner rights and responsibilities and support strong relationships with RAPs across Victoria; and
• Victorian Environmental Assessment Council on a range of investigations.

10. In Council’s experience, the Charter does not always resolve issues or necessarily ensure that Traditional Owners are able to fulfil their cultural responsibilities without inappropriate administrative hindrance. Two areas are discussed below where Council considers that the provisions of the Charter do not provide sufficiently strong support to the rights of Traditional Owners.

11. Since 2012, Council has focused on streamlining processes for the return of Aboriginal Ancestral Remains and protection of burial sites. Council has published discussion, consultation and position papers to test reform proposals, most recently Bringing Our Ancestors Home: We will not be well until this is done (2012). Council’s strategic plan commits Council to doing all we can to ensure Ancestors are returned home in a respectful manner and burial places are cared for properly. Council has co-run five workshops with Traditional Owners across Victoria with OAAV to learn about local priorities as well as provide information about current policies and processes. Council is also currently developing a documentary to showcase and raise awareness of the work being undertaken by Traditional Owners to repatriate their Ancestral Remains and care for burial sites.

12. Council believes very strongly that Traditional Owners should have the right to (re)bury their Ancestors on Country without requiring the prior written approval of the Secretary to the Department of Health and Human Services (DHHS) under the Cemeteries and Crematoria Act 2003. Council made representations through OAAV to DHHS and was advised the Charter provisions were not sufficient to allow administrators to waive or alter the requirements to meet the needs of Traditional Owners. Legislative amendment has been identified as the only option for exempting Traditional Owners.

13. In December 2008, a report was released by the Steering Committee for the Development of a Victorian Native Title Settlement Framework. One of the recommendations included in the report was that the State Government ‘in parallel with the implementation of the Framework, develops a policy for the freestanding statutory recognition of Traditional Owner customary, non-commercial use of and access to natural resources, which would apply to all

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Traditional Owner groups independent of an Individual Framework Agreement, in line with other Australian jurisdictions.\textsuperscript{4}

14. Council acknowledges that efforts to implement the entirety of the Framework are continuing. However, the progress to date on the creation of formal statutory rights for Traditional Owners to use and access natural resources has been disappointingly slow. This is despite the provisions of the Charter which give clear and distinct recognition of the cultural rights of Aboriginal persons, including their right to maintain their relationship to Country,\textsuperscript{5} and therefore support the creation of statutory rights of Traditional Owners to use and access natural resources in accordance with their customs. Yet some administrative decision makers seem to be perhaps somewhat reluctant to refer to the Charter’s provisions to support the implementation of this recommendation.

\textbf{Suggestions for reform}

13. Aligning cultural rights under the Charter with express statutory recognition of Traditional Owners’ unique rights and responsibilities on Country would make it consistent with international law and other legislative and policy initiatives in Victoria. See ‘Appendix - Background information’ for a further discussion of this point.

14. Council believes that regular auditing could encourage a deeper consideration of rights by Victorian decision makers when making decisions. In principle, Council supports mandatory regular auditing and/or subsequent reviews of the Charter.

15. Statements of Compatibility and Human Rights Certificates are mechanisms to ensure that the Charter is considered when new legislation and regulation is developed. Although s 38 of the Charter requires public authorities to properly consider human rights when making policy decisions, there is no equivalent mechanism in place requiring public authorities to demonstrate that proper consideration has occurred when new government policy is developed. This is concerning as such policies can have important impacts on the cultural rights of Aboriginal Victorians.

16. Specifically, Council recommends that:

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{5}] Section 19(2)(d), the Charter.
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• public authorities subject to the Charter who engage with Aboriginal Victorians, or whose work has an effect upon the cultural rights of Aboriginal Victorians, consider developing a policy document exploring the content of the cultural right recognised by s19 and the impact of their activities on the rights of Aboriginal Victorians;
• accountability mechanisms be implemented to ensure public authorities give consideration to the cultural rights of Aboriginal Victorians when developing new policies that may affect or curtail those rights;
• in the development and implementation of such policies, public authorities consult with the Aboriginal community and with Council specifically, in recognition of the specialist nature of Council; and
• public authorities subject to the Charter are routinely and mandatorily audited to ensure compliance with their s 38 obligations.
Appendix - Background information

17. Aboriginal peoples of Victoria have long fought for recognition of their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional law and customs.

18. The High Court's 1992 Mabo decision and the resulting Native Title Act 1993 (Cth) caused a fundamental change to the way governments and Aboriginal people interact across Australia.

19. The relationship between the Victorian Government and the Aboriginal people of Victoria has seen fundamental shifts by successive governments in legislation, administration and policy towards a greater recognition of the interests of indigenous people to their Country. Milestones include:
   - Enactment of Section 1A Constitution Act 1975 in 2004;
   - Wimmera people's native title consent determination in 2005;
   - Enactment of the AH Act;
   - Recognition of the distinct cultural rights of Aboriginal people in the Charter;
   - Gunditjmara people's native title consent determination in 2007;
   - Enactment of the TOS Act;
   - Recognition and Settlement Agreement (RSA) between State of Victoria and Gunaikurnai peoples 2010;
   - Gunditjmara peoples and Eastern Maar peoples joint native title consent determination 2011; and

20. The AH Act is a positive legal measure of protection, ensuring the effective participation of Aboriginal persons in decisions that affect them.

21. Council was established under the AH Act to provide a ‘state wide voice for Aboriginal people on the management of cultural heritage.' It is made up of Victorian Traditional Owners, all with extensive knowledge and experience in cultural heritage management.

22. Council is a public authority within the meaning of the Charter because it is an entity established by the AH Act that has functions of a public nature.

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6 Note: this information formed the basis of Council's submission to 2011 Charter review.
7 Mabo v State of Queensland (No 2) 1992 175 CLR 1
8 Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly).
23. One of Council’s most important functions is the registration of Traditional Owner corporations as RAPs to manage their cultural heritage of their appointed land. In its decision-making in appointing RAPs, Council is required under s38(1) of the Charter to give proper consideration to relevant human rights contained in part 2 of the Charter and to act in a way that is compatible with human rights.

24. Council’s assessment of RAP applications draws support from the protection of distinct cultural rights of Aboriginal persons set out in s19(2) of the Charter. Section 19(2)(d) particularly recognises the distinctive relationship that Aboriginal people have with the land by providing that they must not be denied the right, with other members of their community, ‘to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.’

25. Council’s other key functions include giving advice to the Minister and Secretary and developing measures to promote public awareness and understanding of Victorian Aboriginal cultural heritage.

*Developments in law and policy recognising Traditional Owners*

26. The decision in Mabo in 1992 and the introduction of the Native Title Act 1993 (Cth) resulted in a fundamental shift in the law and in government policy towards a greater recognition of the interest of Aboriginal persons in their country.

27. In Victoria, the Constitution (Recognition of Aboriginal People) Act 2004 amended the Constitution Act 1975 (Vic) to ‘acknowledge that the events described in the preamble to [the Constitution Act] occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria’ and to ‘give recognition within that Act to Victoria’s Aboriginal people and their contribution to the State of Victoria.’ This amendment recognised the unique status of Victoria’s Aboriginal people as descendants of the original custodians of the land who have a spiritual, social, cultural and economic relationship with their traditional lands and waters and who ‘have made a unique and irreplaceable contribution to the identity and well-being of Victoria’. Fundamentally, it

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10 Defined for the purposes of the Charter to mean 'a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples': section 3(1), Charter of Human Rights and Responsibilities Act 2006.


12 See Explanatory Memorandum to the Constitution (Recognition of Aboriginal People) Bill 2004.
recognised the importance of proper consultation with, and the involvement of, Aboriginal people in decision-making impacting the Victorian community.\textsuperscript{13} Partnerships and ongoing relationships can be achieved through proper consultation with RAPs. These relationships can support creative approaches to thinking through decisions that can effect Aboriginal cultural heritage. The discussions needed should not only begin with a regulatory trigger but rather should begin with early engagement. This can be the foundation to meaningful partnerships.

28. The implementation of the AH Act, enacted the same year as the Charter, broadened this shift towards recognition of and consultation with Aboriginal people in Victoria, with Traditional Owner groups being appointed as RAPs with cultural heritage management responsibilities for defined areas.\textsuperscript{14}

29. In August 2010, Victoria’s Parliament passed the TOS Act. Settlements under this legislation involve the government reaching RSAs with Traditional Owner groups outside of the Federal Court’s native title processes.

30. There is an alignment of outcomes achieved under the AH Act, TOS Act and native title processes.\textsuperscript{15} Stories told by the Victorian Traditional Owners convey the strength and resilience of their people in the long and arduous struggle for land and culture. They challenge the history of terra nullius and recognise indigenous people’s agency in history.

31. In November 2012, the Victorian Parliamentary Inquiry Report into ‘The Establishment and Effectiveness of RAPs’ saw bi-partisan support for a recommendation that the AH Act “be amended to allow for only incorporated bodies representing traditional owners to be appointed as RAPs”.

32. The Aboriginal Heritage Amendment Bill 2014 included this recommendation, and reform to this end is anticipated under the present Government. Such reform is consistent with the importance of self-determination and Aboriginal people being at the centre of decision making, as highlighted in the Premier’s speech on ‘Closing the Gap Day’.\textsuperscript{16}

\textsuperscript{13} Section 1 A, Constitution Act 1975 (Vic)
\textsuperscript{14} Report of the Right People for Country Project committee, page 1
\textsuperscript{15} See, for example, s 151(2A), AH Act.
The Charter and Traditional Owners’ role in Aboriginal cultural heritage management

33. The preamble of the Charter recognises:

[that] human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

34. The AH Act provides a statutory framework through which Aboriginal cultural heritage is protected and is an important mechanism for maintaining Aboriginal relationships with land and waters. For many Aboriginal people, the right to enjoy identity, culture, language and kinship ties is maintained through their relationship with the land. The AH Act operates to promote those distinct cultural rights which are protected by s19(2) of the Charter.

35. The AH Act objectives draw direct support from rights set out under s19(2).

Section 19(2) provides for the following rights of Aboriginal persons:

(a) to enjoy their identity and culture; and
(b) to maintain and use their language; and
(c) to maintain their kinship ties; and
(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

36. The AH Act objectives relevant to this review are:

To recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect of Aboriginal knowledge and cultural and traditional practices;

To recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;

To accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage.

37. For the purposes of the AH Act, Aboriginal cultural heritage is defined to mean Aboriginal places, Aboriginal objects and Aboriginal human remains. The AH Act sets out that cultural heritage significance includes archaeological,

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17 See s 4(1) of the Aboriginal Heritage Act 2006, definition of Aboriginal cultural heritage. Aboriginal places, Aboriginal objects and Aboriginal human remains are also defined in the AH Act (see s 4).
anthropological, contemporary, historical, scientific, social or spiritual significance and significance in accordance with Aboriginal tradition.\textsuperscript{18}

38. The AH Act expressly requires that Aboriginal cultural heritage should be owned by Aboriginal people with traditional and familial links to the area from which Aboriginal cultural heritage is reasonably believed to have originated in the context of Aboriginal human remains and secret or sacred objects. \textsuperscript{19}

39. This requirement draws support from s19(2), which in turn is based on article 27 of the International Covenant on Civil and Political Rights (ICCPR). Article 27 protects the cultural rights of minority groups and was recognised by the Human Rights Committee (the monitoring body of the ICCPR) as extending to protect the cultural rights of Aboriginal people. \textsuperscript{20}

40. ‘Culture’ is not defined under the Charter, although the inclusion of distinct cultural rights reflects the broad definition recognised in international human rights law, which includes the expression of traditional beliefs, practices and social and economic activities. \textsuperscript{21}

41. Importantly, s19 of the Charter is not limited to minority groups and recognises the cultural rights of Aboriginal persons as distinct from other cultural groups in society. This is in keeping with the preamble to the Charter, which acknowledges that human rights have special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people.

42. Through its decision-making function in the appointment of RAPs, Council gives content and meaning to the cultural rights set out in s19(2)(a)-(d) of the Charter. Council has incorporated a consideration of the Charter into its decision-making processes to ensure that it considers the effects of its decisions to register/decline applications on the rights of applicants.

43. The objectives of the AH Act emphasise that Aboriginal people with traditional and familial links ought to be involved in the management and the protection of Aboriginal cultural heritage. These objectives are also reflected in the requirement that Council members have traditional and familial links to an area in

\textsuperscript{18} See s 4(1) of the \textit{Aboriginal Heritage Act 2006}, definition of cultural heritage significance.

\textsuperscript{19} Section 12, \textit{Aboriginal Heritage Act 2006}

\textsuperscript{20} The right to maintain a distinctive relationship with the land in s19(2)(D) was modelled in particular on Article 25 of the then draft UN Declaration. See clause 19, Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006: “Sub-clause (2) specifically recognises that Aboriginal persons in Victoria have a right to enjoy their own culture. It is based on article 27 of the Covenant and decisions of the United Nations Human Rights Committee extending article 27 to protect the cultural rights of indigenous peoples. Paragraph (d) is also modelled on article 25 of the \textit{United Nations Draft Declaration on Indigenous Rights}.

\textsuperscript{21} See UN Human Rights Committee, \textit{General Comment No 23: The Rights of Minorities}, UN Doc CCPR/C/21/Rev.1/Add 5 (8 April 1994).
Victoria. The giving of priority to traditional (group) interests and connection to country is paramount to recognition of Aboriginal culture in Victoria. Council’s decision making is driven by these principles, which give effect to the protection of culture anticipated by the s19(2) rights under the Charter.

44. Council sees traditional Aboriginal cultural heritage as inextricably connected to traditional country, as recognised by its principles and consistent with its decision making in appointing Traditional Owner groups as RAPs. This is consistent with the position taken under international human rights law (and the jurisprudence of the UN Human Rights Committee) in respect of the cultural rights of indigenous groups.

Section 19 of the Charter

45. Section 19(2)(a) provides that Aboriginal persons cannot be denied the right to enjoy their identity and culture.

46. ‘Culture’ manifests in a number of forms and embraces the maintenance and expression of traditional beliefs, practices and social and economic activities that are part of a group’s tradition. It includes a particular way of life associated with land resources, especially in the case of indigenous peoples. It may also include traditional activities for Aboriginal people including fishing or hunting. Certain activities may be cultural even though undertaken for economic gain. Where that is the case, they must be an essential element in the culture of a community.

47. Section 19(2)(d) is directly relevant to the protection of Aboriginal cultural heritage in Victoria as it provides that Aboriginal persons hold distinct cultural rights and must not be denied the right to maintain their distinctive spiritual, material and economic relationship to the land, waters and other resources with which they have a connection under traditional laws and customs. The right is an express recognition of the role of Traditional Owners in the protection of their heritage. This recognition draws support from Article 25 of the United Nations Draft Declaration on Indigenous Rights, which reads:

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22 Human Rights Committee, General Comment No. 23: The Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add 5 (8 April 1994).
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

48. This right is designed to protect the distinctive relationship between Aboriginal persons and traditional lands, waters and other resources. The former Chairperson-Rapporteur of the working group on indigenous populations identifies a number of unique elements that explain the nature of the relationship to the land of indigenous peoples, as follows:26

A profound relationship exists between indigenous peoples and their lands, territories and resources;
This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities;
The collective dimension of this relationship is significant; and
The intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival and cultural viability.

49. An Aboriginal person has traditional or familial links to an area when the person has particular knowledge about traditions, observances, customs or beliefs associated with the area and has certain responsibilities under Aboriginal tradition, or is a member of a family or clan group that is recognised as having traditional responsibility for significant Aboriginal places or objects to an area.27 This incorporates the individual and group aspects of cultural rights28 and focuses on recognition rather than strictly biological descent. This is consistent with Australian case law that emphasises the role of self-identification and community recognition in determining indigenous identities and membership in Aboriginal groups.29

50. Council believes that s19(2) of the Charter supports the role and functions of appointed RAPs in the management and protection of cultural heritage in Victoria, and vice versa. When deciding on RAP applications, Council considers the content of the s19(2) rights and those rights inform its decision making.

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27 See s 7(1) of the Aboriginal Heritage Act 2006.