Executive Summary

1. The Victorian Aboriginal Heritage Council (VAHC) supports the important role played by the Charter of human rights and responsibilities act 2006 (Charter).

2. Specifically, in its decision making function on the appointment of registered Aboriginal parties (RAPs), the VAHC recognises and gives effect to the cultural rights set out under the Charter and the rights of Traditional Owners recognised by the Aboriginal Heritage Act 2006 (AHA) and relevant international law. The priority accorded to Traditional Owners under the AHA draws support from the rights set out under s19(2) of the Charter recognising that Aboriginal persons hold distinct cultural rights and the approach taken under international law to respect and protect those distinct cultural rights.

3. Further, the operations and functions of the VAHC align with the right of Aboriginal persons to participate in decision-making in matters that would affect their rights, as well as to maintain and develop their own indigenous decision-making institutions as is recognised under article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UN declaration). The VAHC, as a body constituted by Traditional Owners plays a key role in the discussion of Aboriginal cultural heritage management in Victoria.

4. The VAHC supports the Charter and its effect on the Victorian legislative and policy initiatives affecting the rights of the Victorian Aboriginal community. The Charter is an important catalyst and driver for legislative reform in Victoria.

5. The priority accorded to Traditional Owners under the AHA that is supported by s 19(2) of the Charter is aligned with a number of Victorian initiatives, including the recent enactment of the Traditional Owner Settlement Act 2010 (TOS Act); the conservation of forests and lands act 2010 (CFLA) and also policy objectives surrounding the recognition of a free standing statutory right for Traditional Owners to use and access natural resources for non-commercial purposes as well as the right people for country project, an initiative of

---

Aboriginal affairs Victoria to assist groups to resolve inter and intra-group native title disputes. These developments recognise an indigenous-led decision making approach and the important role played by Traditional Owners in the Victorian Aboriginal community.

6. The VAHC supports regular auditing as a measure that could encourage a deeper consideration of rights by decision makers when making decisions. In principle, Council supports mandatory regular auditing. The VAHC is of the view that regular auditing could also encourage public authorities to the Charter to consider developing policy documents that explore the content of the cultural right recognised by s19 and the impact of the activities of that public authority on the rights of Aboriginal Victorians

**Background**

7. The 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.

8. 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.

9. In Victoria the relationship between the Victorian Government and the Aboriginal people of Victoria has seen fundamental shifts by successive Victorian governments in legislation, administration and policy towards a greater recognition of the interests of indigenous people to their Country. Milestones along the way include the

- The enactment of Section 1A *Constitution Act 1975* in 2004
- Wimmera People’s native title consent determination in 2005
- The enactment of the *Aboriginal Heritage Act 2006*
- The recognition of the distinct cultural rights of Aboriginal people in the *Charter of Human Rights and Responsibilities 2006*
- Gunditjmara People’s native title consent determination in 2007
- The enactment of the *Traditional Owner Settlement Act 2010*

---

2 Mabo v State of Queensland (No 2) 1992 175 CLR 1
• The Recognition and Settlement Agreement between the State of Victoria and the GunaiKurnai peoples 2010

10. The AHA is a positive legal measure of protection, ensuring the effective participation of Aboriginal persons in decisions which affect them.

11. The VAHC is established under the AHA 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.

12. The VAHC is a public authority within the meaning of the Charter because it is an entity established by the AHA that has functions of a public nature.

13. One of the most important functions of the VAHC is the registration of RAPs. In its decision making function for the appointment of RAPs, the VAHC is required under s 38(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.

14. The VAHC’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) in particular 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.

15. It is helpful to recall that, for the purposes of the AHA, Aboriginal cultural heritage is defined to mean Aboriginal places, Aboriginal objects and Aboriginal human remains. The comments in this submission relating to Aboriginal cultural heritage should be read in this light.

---

3 Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly).
4 See section 4(1)(b), Charter of Human Rights and Responsibilities Act 2006
5 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.
6 See s 4(1) of the Aboriginal Heritage Act 2006.
Developments in law and policy recognising Traditional Owners

16. The decision in *Mabo*\(^8\) in 1992 and the Commonwealth Government’s introduction of the *Native Title Act 1993* (Cth) that followed, 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.

17. In November 2004 in Victoria, the *Constitution (Recognition of Aboriginal People) Act 2004* was passed to amend 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 gave recognition to the unique status of Victoria’s Aboriginal people as descendants of the original custodians of the land who have spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria and ‘have made a unique and irreplaceable contribution to the identity and well-being of Victoria’.\(^9\) Fundamentally, it recognised the importance of proper consultation with, and the involvement of, Aboriginal people in decision-making impacting the Victorian community.\(^10\)

18. The implementation of the AHA, which was enacted in 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.\(^11\) In Victoria, one of the critical threshold issues affecting the rate of settlement of native title claims and the appointment of RAPs is the issue of native title or Traditional Owner group composition and the extent of their country.

19. In August 2010, the Victorian Parliament passed the TOS Act. Settlements under this legislation involve the government reaching recognition and settlement agreements with Traditional Owner groups outside of the Federal Court’s native title processes. There is an alignment of Aboriginal heritage management and native title outcomes. Stories told by the Victorian Traditional Owners convey the strength and resilience of their people in the

---

\(^8\) *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
\(^9\) See Explanatory Memorandum to the Constitution (Recognition of Aboriginal People) Bill 2004.
\(^10\) Section 1A, *Constitution Act 1975* (Vic)
\(^11\) Report of the Right People for Country Project committee, page 1
long and arduous struggle for land and culture. They challenge the history of *terra nullius* and recognise indigenous people's agency in history.

**The Charter and the role of Traditional Owners in the protection of Aboriginal cultural heritage**

20. The preamble of the Charter recognises:

[t]hat 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.

21. The AHA 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 are maintained through their relationship with the land. The AHA operates to promote those distinct cultural rights which are protected by s 19(2) of the Charter.

22. The objectives of the AHA draw direct support from the rights set out under s 19(2) of the Charter:

(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.

23. The objectives of the AHA relevant for the purpose of this submission are as follows:

*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.

24. The AHA expressly requires that Aboriginal cultural heritage should be owned by Aboriginal people with traditional and familial links to the area from which the Aboriginal cultural heritage is reasonably believed to have originated in the context of Aboriginal human remains and secret or sacred Aboriginal objects.  

25. This draws support from s 19(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 has been recognised by the human rights committee (the monitoring body of the ICCPR) as extending to protect the cultural rights of Aboriginal people. The right to maintain a distinctive relationship with the land in s 19(2)(d) was modelled in particular on Article 25 of the then draft UN Declaration.  

26. '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.  

27. Importantly, s 19 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.  

28. Through its decision-making function in the appointment of RAPs, the VAHC gives content and meaning to the cultural rights set out in s 19(2)(a)-(d) of the Charter.  

29. The VAHC sees traditional Aboriginal cultural heritage to be inextricably connected to traditional country. The RAP decisions made so far by the VAHC have sought to ensure consistency between traditional ownership and RAP

---

12 Section 12, *Aboriginal Heritage Act 2006* 
13 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 United Nations Draft Declaration on Indigenous Rights.  
responsibilities. The VAHC believes that this approach is consistent with the approach 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**

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

31. ‘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 such as fishing or hunting. Certain activities may be cultural even though they are undertaken for economic gain. Where that is the case they must be an essential element in the culture of a community.

32. Section 19(2)(d) of the Charter 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 drew support from Article 25 of the *United Nations Draft Declaration on Indigenous Rights*, which read:

33. 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

---

18 Article 25, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). This declaration was adopted by the Human Rights Council of the United Nations on 29 June 2006. The wording in the final Declaration is substantially the same. Australia along with Canada, New Zealand and the United States, originally voted against the Declaration when it was adopted by the General Assembly in September 2007, but signed the Declaration in April 2009.
resources and to uphold their responsibilities to future generations in this regard.

34. 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 which explain the nature of the relationship to the land of indigenous peoples, as follows:¹⁹

   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

35. 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 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.²⁰ This incorporates the individual and group aspects of cultural rights²¹ and focuses on recognition rather than strictly biological descent. This is consistent with Australian case law that emphasizes the role of self-identification and community recognition in determining indigenous identities and membership in Aboriginal groups.²²

36. The VAHC believes that s 19(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, the VAHC considers the content of the s 19(2) rights and those rights inform its decision-making process.

---

²⁰ See s 7(1) of the Aboriginal Heritage Act 2006.
Suggestions for reform

37. The objectives of the AHA emphasis 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 Victoria. This priority to traditional (group) interests and connection to country is paramount to recognition of Aboriginal culture in Victoria. The VAHC’s decision making is driven by these principles, which gives effect to the protection of culture anticipated by the s19(2) rights under the Charter.

38. The AHA also enables applicants with a historical or contemporary interest in Aboriginal cultural heritage relating to an area to apply to become a rap. However, a RAP applicant relying on historical or contemporary interests is also required by the AHA to demonstrate an expertise in managing and protecting that heritage.

39. The VAHC takes the view that the objectives of the AHA, combined with the approach to historical or contemporary interests taken by the AHA support the notion that traditional or familial links to country have a special importance when considering Aboriginal cultural heritage. The VAHC considers that the Charter could be improved by expressly recognising this.

40. This would be consistent with international law instruments. It is also consistent with the language of the Charter, which recognises the distinctive relationship that Aboriginal people have to the land and water with which they have a connection under traditional laws and customs. This is evident in the various Victorian legislative and policy initiatives discussed in this submission.

41. The recognition by the VAHC of Traditional Owner groups in the management of Aboriginal cultural heritage is a continuation of the policy shift initiated by the High Court since the Mabo decision. Aligning the cultural rights under the Charter with express priority recognition of Traditional Owners would make it

---


24 Section 19(2)(d), Aboriginal Heritage Act 2006.

25 Report of the Right People for Country project committee, page 15
consistent with international law as well as other legislative and policy drives and initiatives in the state of Victoria.

42. The VAHC agrees that the rights recognised by the Charter are important, and that recognition requires considering the rights each time a decision is made. The VAHC has amended its procedures to ensure that it considers the effects of its decision on the rights of applicants.

43. Council believes that regular auditing could encourage a deeper consideration of rights by decision makers when making decisions. In principle, Council supports mandatory regular auditing.

44. The VAHC acknowledges that there may be costs associated with the Charter such as a need for additional training and information, and additional procedural and/or legal steps for each decision. However, these costs have strengthened the Council’s functions in the long term and the VAHC therefore maintains that overall the benefits outweigh the costs.

45. The VAHC recommends that:

- public authorities subject to the Charter consider developing a policy document that explores the content of the cultural right recognised by s19 and the impact of the activities of that public authority on the rights of Aboriginal Victorians
- in the development and implementation of such policies the public authority consult with the Aboriginal community more broadly, and the VAHC specifically, in recognition of the specialist nature of the VAHC.

Council believes it would be useful for government policy to be assessed against the cultural right recognised by s19 beyond statements of compatibility and that this could be reflected in the process for mandatory reporting.