



Victorian **Aboriginal Heritage** Council

Discussion Paper

Bringing Our Ancestors Home:

**Managing and returning Ancestral Remains
in Victoria since the commencement of the
*Aboriginal Heritage Act 2006***

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Published by the Victorian Aboriginal Heritage Council
1 Spring Street, GPO 2392
Melbourne, Victoria 3001

February 2013

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About the Victorian Aboriginal Heritage Council and this paper

This paper has been prepared by the Victorian Aboriginal Heritage Council (Council). The Council is an independent statutory body established under the *Aboriginal Heritage Act 2006* (the AH Act). Its vision is a community that respects Aboriginal cultural heritage and the cultural responsibilities of Traditional Owners.

The Council's role includes providing the Minister for Aboriginal Affairs (the Minister) with advice about the protection and management of Aboriginal cultural heritage. Within this broader context, the Council has a specific role in providing advice to both the Office of Aboriginal Affairs Victoria (OAAV) and the Museum Board of Victoria (Museum Victoria) regarding the return of Ancestral Remains. As well as these advisory responsibilities, Council also develops measures to promote understanding and awareness of Aboriginal cultural heritage.

The Council is seeking submissions in response to this paper as part of developing advice for the Minister and to shape measures that can increase understanding of the unique importance of Ancestral Remains.

The closing date for submissions is **Monday 15 April 2013** and submissions received will be made publicly available. If you do not want your submission or your name made publicly available, this should be clearly stated in the submission. Information about how to make submissions is included at the end of this discussion paper.

The need to consider managing and returning Ancestral Remains is a current reminder of the effects of policies that resulted in the remains of Ancestors being stolen.

During and after colonial-invasion, Koorie graves and cemeteries were desecrated in the name of curiosity, science and research. Our Ancestors were removed from their land where they had been placed with care and ceremony, to be housed in metal boxes and cabinets as specimens of research or as curios by individuals, families and institutions.¹

Every care has been taken to discuss the issues included in this paper as sensitively as possible. However, it must be acknowledged that even while taking this care, there is deep sorrow and pain involved, especially for Aboriginal and Torres Strait Islander people.

¹ Shannon Faulkhead and Jim Berg (2010) *Power and the Passion: Our Ancestors Return Home*, Koorie Heritage Trust Inc, Melbourne at p xi

Acronyms and abbreviations

| Shortened form | In full |
|-----------------|--|
| Council | Victorian Aboriginal Heritage Council |
| The AH Act | <i>Aboriginal Heritage Act 2006</i> |
| Museum Victoria | Museum Board of Victoria |
| OAAV | Office of Aboriginal Affairs Victoria |
| RAPs | Registered Aboriginal Parties |
| DSE | Department of Sustainability and Environment |
| PV | Parks Victoria |
| DPCD | Department of Planning and Community Development |
| CCOV | Coroners Court of Victoria |



Introduction

Returning Ancestral Remains to Country is a critical responsibility for Traditional Owners. Cultural duties run deep for Traditional Owners and the duty to return Ancestors home is among the deepest of these duties.² Since being established, Council has worked with key stakeholders to gather information about the management and return of Ancestral Remains.

In December 2011, Council initiated research of its own to learn more about how Ancestral Remains are managed and returned in Victoria. In scoping the task, Council identified the return of Ancestral Remains currently in Victoria as a priority because the AH Act is currently being reviewed. This paper therefore does not discuss the issues associated with bringing home Ancestral Remains currently outside Victoria, whether they are in other parts of Australia or other parts of the world. Council recognises the importance of returning Ancestors from other places and intends to do more work in the future to examine this.

The research was completed through gathering and analysing information from a range of sources. This included reviewing documents relating to Ancestral Remains, closely examining the provisions of the AH Act, talking to stakeholders and reflecting on the Council's own experiences as Traditional Owners. The research has informed the contents of this discussion paper.

² Ibid at p. xx

Managing and returning Ancestral Remains in Victoria

For Traditional Owners, fulfilling responsibilities to Ancestors means we must look after the places where they are buried and we must return those who are not on Country as quickly and respectfully as possible. This means considering grave goods and other materials associated with burial with the same respect as the Ancestral Remains themselves. The Council's goal is to develop a legislative and policy framework in Victoria that is most likely to ensure this kind of respectful management and return of Ancestral Remains.

International and Victorian laws address the management and return of Ancestral Remains. Internationally, Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples recognises the rights of all Indigenous peoples to the repatriation of their Ancestral Remains and requires signatory States to “seek to enable the access and repatriation of... Ancestral Remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned”.³ In Victoria, the *Constitution Act 1975*, the *Charter of Human Rights and Responsibilities Act 2006* and the objectives of the AH Act all recognise the unique cultural rights of Aboriginal people generally and of Traditional Owners in particular.

Most of the legislative provisions specifically dealing with the management and return of Ancestral Remains are found in Part 2 of the AH Act.⁴ The provisions of other Acts can also be important. For example, the AH Act states that nothing in the AH Act will affect the operation of the *Coroners Act 1985*, which was subsequently replaced by the *Coroners Act 2008* (Coroners Act). However, there are no provisions within the Coroners Act that deal with Ancestral Remains. Similarly, the AH Act describes the role of the Museum Board of Victoria (Museum Victoria) in various ways using terms such as “safekeeping” and “custody” but does not make any consequent amendments to the *Museums Act 1983*.

3 Article 12 of the United Nations Declaration of the Rights of Indigenous Peoples may be found at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

4 The *Aboriginal Heritage Act 2006* can be found at <http://www.legislation.vic.gov.au/>

Issues arising from the current framework

Responsibilities and functions are spread among a range of people and agencies. These are summarised in the table below, along with some of the issues identified.

| Agency or group involved | Roles and responsibilities | Issues and comments |
|---|--|---|
| Traditional Owners | Described as owners of Ancestral Remains by the AH Act but roles not clearly defined. | Nothing in place that provides systematic and comprehensive support to Traditional Owners. |
| Registered Aboriginal Parties | Legislative role to advise the Minister regarding, and to negotiate, the repatriation of Aboriginal cultural heritage that relates to the area for which the party is registered, including Ancestral Remains. | Nothing in place that provides systematic and comprehensive support to RAPs to fulfil this role. |
| Victorian Aboriginal Heritage Council | Legislative roles to provide advice to the Minister, Secretary and Museum Victoria, and to develop measures to promote understanding and awareness of Aboriginal cultural heritage in Victoria. | Information about the management and return of Ancestral Remains is not always provided to the Council. Council has limited resources available to it for the development of measures to promote understanding and awareness of Aboriginal cultural heritage in Victoria. |
| OAAV, Department of Planning and Community Development | Responsible for receiving reports of Ancestral Remains and arranging appropriate return, for taking all reasonable steps to ensure the protection of Aboriginal cultural heritage, for enforcement of the AH Act and for promoting public awareness and understanding of Aboriginal cultural heritage in Victoria. | Opportunities exist to develop better co-ordinated and resourced approaches to fulfilling OAAV's legislative functions. OAAV is currently undertaking a review of the AH Act. |
| Coroners Court of Victoria | Specialist Court which has responsibility under the <i>Coroners Act 2008</i> to investigate all reportable deaths. | No specific provisions in the <i>Coroners Act 2008</i> dealing with Ancestral Remains. Opportunities exist to better align CCOV's responsibilities with respect to reports of Ancestral Remains. |

Issues arising from the current framework

continued

| Agency or group involved | Roles and responsibilities | Issues and comments |
|---|---|---|
| <p>Victoria Police</p> | <p>Responsible for investigating reports of all suspected human remains.</p> | <p>Currently seeking to review and develop policies and processes that will result in appropriate guidance regarding Ancestral Remains, including relevant training programs for Victoria Police's sworn and unsworn staff members.</p> |
| <p>Museum Victoria</p> | <p>Responsible for safekeeping of Ancestral Remains under circumstances set out in the AH Act, for responding to requests for return of Ancestral Remains forming part of Museum Victoria's collection prior to the commencement of the AH Act, and for maintaining and managing holdings of Aboriginal cultural heritage in accordance with the <i>Museums Act 1983</i>.</p> | <p>Museum Victoria has policies and procedures in place to guide its return of Ancestral Remains, which prioritise return to Victorian Traditional Owners. Submission to the review of the AH Act identifies issues and proposes potential reforms to assist in the speedy and appropriate return of Ancestral Remains to Traditional Owners.</p> |
| <p>Federal Office for the Arts</p> | <p>Provides funding for the repatriation of Ancestral Remains currently forming part of Museum Victoria's collection.</p> | <p>Small amounts of funding are made available on application to Museum Victoria. Funds are able to be used for specific purposes such as research to establish provenance of Ancestral Remains, ceremonial and practical costs of reburial, etc. Additional funds recently provided for liaison and consultation with Traditional Owners.</p> |

| Agency or group involved | Roles and responsibilities | Issues and comments |
|--|---|---|
| Land managers including DSE and PV | Responsible for reporting discovery of Ancestral Remains and for not harming Aboriginal heritage places, including burial places. | DSE is currently developing guidelines to assist land managers to respond to requests from Traditional Owners for assistance with reburial of Ancestral Remains. |
| Department of Health | Administers the provisions of the <i>Cemeteries and Crematoria Act 2003</i> . | Cemeteries such as Weroona and Framlingham are currently defined as private cemeteries. These cemeteries are not generally eligible for the same funding and support as public cemeteries and permission must be granted under s121 to allow burials at these cemeteries. |
| Other entities (universities, other museums and other institutions) | Responsible to report and return Ancestral Remains in accordance with provisions of AH Act. | Unclear whether all entities have complied with their obligations under AH Act. |



Issues arising from the current framework continued

The principles included in the AH Act incorporate ideas of “ownership” in the provisions dealing with Ancestral Remains. The principle around ownership was intended to “redress the past treatment of these forms of heritage as curios, commodities and objects for scientific research.”⁵ Nevertheless, it can be problematic to use non-Aboriginal ideas of ownership in relation to Ancestral Remains. Further complexities are introduced when ownership rights are given to individuals, rather than rights and responsibilities being understood as belonging to a Traditional Owner group.

The AH Act is intended to deal with the management and protection of burial sites and the management and return of Ancestral Remains no longer within their original burial places. However, Council believes the provisions are confusing, occasionally inconsistent and difficult to interpret.

Other problems are caused because, although the AH Act gives protection to burial sites as Aboriginal places, there is no co-ordinated and resourced program for the appropriate management of these places. This lack of resources also affects cemeteries such as the Framlingham Cemetery and Weroona Cemetery. These and others are classed as private cemeteries under the *Cemeteries and Crematoria Act 2003*, administered by the Victorian Department of Health.

Obligations to keep proper records and reports are shared between government agencies but not co-ordinated. There is no mechanism for these agencies to provide a public account of how they are fulfilling their responsibilities with respect to the management and return of Ancestral Remains. It is also impossible to answer with any accuracy a number of very important questions such as how many Ancestral Remains are yet to be returned to Country and how long it takes for Ancestral Remains to be returned. Difficulties in obtaining information, the lack of scrutiny and consequent uncertainty result in further grief and hardship for Traditional Owners.

Important responsibilities for the management and return of Ancestral Remains are given to the Secretary of the Department of Planning and Community Development (the Secretary). The Secretary’s responsibilities are administered under delegated authority by OAAV. These include the responsibility to consult with the relevant Traditional Owners in relation to the management and return of Ancestral Remains. Since the commencement of the AH Act, the role of OAAV and the role of Museum Victoria have on occasions become confused.

The AH Act distinguishes between the responsibilities of Museum Victoria and the responsibilities of other entities in how they should deal with Ancestral Remains in their possession. The entities are listed in the AH Act as universities, other museums or other institutions but are not otherwise defined. Although the AH Act imposes obligations to report Ancestral Remains to OAAV, five years after its commencement it is still not possible to say with certainty that all Ancestral Remains in the possession of non-Traditional Owners are known to OAAV.

⁵ From the *Aboriginal Heritage Bill, Explanatory Memorandum* at p 5. A copy of this document may be accessed at www.legislation.vic.gov.au/domino/web_notes/.../551341exi2.doc

Public land managers such as the Department of Sustainability and Environment (DSE) and Parks Victoria (PV) also have responsibilities under the AH Act. These include the responsibility to report Ancestral Remains and burial places, and responsibility not to harm Aboriginal cultural heritage, clearly including burial places and Ancestral Remains. In addition, Traditional Owners will sometimes seek to work with managers of public land to arrange reburial of their Ancestors. DSE and PV are currently developing guidelines to help land managers respond to such requests for assistance from Traditional Owners.

The role of the Council is limited to providing advice to the Minister, Secretary and Museum Victoria. There are no mechanisms in place requiring information to always be shared with the Council by other agencies involved in the management and return of Ancestral Remains. Consequently, Council has been unable to report on matters such as the total number of Ancestral Remains held by non-Traditional Owners or to monitor the length of time involved in returning Ancestral Remains to Traditional Owners. There are other advisory structures relevant to the management and return of Ancestral Remains, such as Museum Victoria's Aboriginal Heritage Advisory Committee and the Federal Advisory Committee for Indigenous Repatriation. There is no legislative or policy framework in place to co-ordinate the work of the Council and these committees.

The rights of Traditional Owner groups, including RAPs, are not clearly spelt out in the AH Act. Further, support for Traditional Owners in relation to the return and reburial of Ancestral Remains is extremely limited. Some funding is provided by the Federal Government's Office for the Arts to Museum Victoria. This funding can be used by Museum Victoria to assist in returning to Traditional Owners Ancestral Remains that are part of its collection including covering ceremonial costs and practical costs of reburial.

The intention to make the AH Act a mechanism for redressing the past treatment of Ancestral Remains has not been adequately matched by efforts to change attitudes in Victoria. Yet developing better understanding and appreciation in the broader Victorian community is one factor that could build commitment to ensuring all Ancestral remains are respectfully managed.

Respectful management also involves providing appropriate support and assistance to everyone who has responsibilities in what are deeply sensitive matters. Obviously, this starts with Traditional Owners but it is relevant to everyone who feels the impact of the work, including Aboriginal members of staff at the various agencies with responsibilities in respect of Ancestral Remains.

In summary, roles and responsibilities in relation to the management and return of Ancestral Remains are not well understood and poorly co-ordinated. There are few mechanisms in place to allow information to be compiled and made available in a manner that would encourage appropriate scrutiny. There is nothing in place that provides adequate levels of systematic and comprehensive support and resources to Traditional Owner groups, including RAPs, to work through all the issues associated with the return of Ancestral Remains. There is also no program dedicated to helping to manage burial places. No mechanisms exist to ensure and enable the timely reburial of Ancestral Remains after they are returned to Traditional Owner groups.

Options for reform

In initiating research into what has been happening since the commencement of the AH Act, the Council hoped to achieve the following objectives:

- a) Develop a comprehensive account of the return of Ancestral Remains currently in Victoria
- b) Investigate the implementation and operation of the *Aboriginal Heritage Act 2006* in respect of Ancestral Remains, particularly Part 2 of the AH Act
- c) Identify opportunities to reform and strengthen the current processes for protection and return of Ancestral Remains in Victoria.

The research completed so far has established it is not possible to provide a comprehensive account of the return of Ancestral Remains in Victoria. This is because of the flaws in the current system affecting matters such as reports, record keeping, and the co-ordination of roles and responsibilities. These problems make it impossible to answer key questions such as the total numbers of Ancestral Remains yet to be returned to Country or the length of time taken to return Ancestral Remains. Reform is needed to address this unacceptable situation.

The AH Act is presently under review and some of the submissions received through the review directly addressed the management and return of Ancestral Remains. The submissions and a summary of the submissions received can be found at <http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006>. The *Summary of Submissions and Consultation: Review of the Aboriginal Heritage Act 2006* includes some comments received relating to Ancestral Remains but notes it as an area requiring further investigation.⁶

As well as legislative reform to the AH Act, there may be a need to make consequent changes to other pieces of legislation. This could potentially involve including specific provisions regarding Ancestral Remains in the Coroners Act, reconsidering the classification of Aboriginal cemeteries as private cemeteries under the *Cemeteries and Crematoria Act 2003* as well as changing the *Museums Act 1983*.

Aside from legal reforms, policies and programs must be developed that will strengthen the protection and return of Ancestral Remains currently in Victoria. Changes to policies and programs need to begin by delivering enhanced support and resources for Traditional Owners, including RAPs, in relation to the management and return of our Ancestors. New policies and procedures are also needed to create better co-ordination and accountability for all involved in this most important task of according respectful treatment and dignity to all of our Ancestors.

⁶ Department of Planning and Community Development (2012) *Summary of Submissions and Consultation: Review of the Aboriginal Heritage Act 2006* at p.30. A copy of this document may be accessed at http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/98172/AHA-Summary-of-Submissions-and-Consultation-web-.pdf

Making submissions in response to this paper

You are invited to contribute your ideas about changing current processes. Council is especially interested in responses to the questions listed below but you should feel free to address any matters of specific concern to you.

Submissions will be made publicly available. If you do not want your submission or your name made publicly available, this should be clearly stated in the submission. Please send your submissions to the Council at vahc@dpcd.vic.gov.au or to the Victorian Aboriginal Heritage Council, GPO Box 2392 Melbourne 3001 by **Monday 15 April 2013**.



Questions for consideration

1. Do you think it is appropriate to use the term “ownership” in relation to Ancestral Remains? If not, what do you think might be a better way of referring to the rights and responsibilities of Traditional Owners? For example, would custodian be a better term?
2. Do you think the current provisions of the *Aboriginal Heritage Act 2006* correctly describe the role that Traditional Owner groups, including RAPs, should have in relation to the management and return of Ancestral Remains? If not, what do you think should be changed or added?
3. What do you think Traditional Owner groups need to assist them to fulfil the role you believe they should have in relation to the management and return of Ancestral Remains? For example do you think there is a need for groups to have clearer legal authority? Do you think the need is more about resources and support?
4. Do you think the Council’s role in relation to the management and return of Ancestral Remains should change? If so, what do you think this role should be? For example, should the Council have powers to investigate how Ancestral Remains are being dealt with in Victoria? Do you think the Council should be able to produce reports compiling information from all relevant parties about the discovery and return of Ancestral Remains?

>

> **Questions for consideration**

5. Do you think the roles of some of the other agencies involved in the management and return of Ancestral Remains need to change or to be made clearer? If so, what do you think these roles should be?
6. What do you think could be done to improve co-ordination between all involved in the management and return of Ancestral Remains? Do you think all parties involved should sign up to some agreed principles to guide them to fulfil their responsibilities?
7. What measures do you believe would help to develop understanding of the importance of Ancestral Remains across the whole Victorian community? For example, do you think it could be appropriate to publish stories about Traditional Owner groups' experiences of the return of Ancestral Remains, with the consent and permission of the groups?
8. What kinds of training, skills and experience do you think are necessary for agencies that have responsibilities in relation to the management and return of Ancestral Remains? How should training be delivered and by whom?
9. Do you have any other suggestions and comments you would like to make about the management and return of Ancestral Remains?