
NSW CULTURAL HERITAGE REFORM: DOES THE PROPOSED MODEL REFLECT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES?

by Janet Hunt

INTRODUCTION

Reform of the cultural heritage system in New South Wales ('NSW') is well overdue. The National Parks and Wildlife Service has had formal responsibility for Aboriginal cultural heritage since the *National Parks and Wildlife Act 1974* (NSW). Yet over 30 years ago, in 1980, a Parliamentary Select Committee report recommended a stand-alone Aboriginal Heritage Commission be established. This view was reiterated in 1989 in a report of the Ministerial Task Force on Aboriginal Heritage and Culture.¹ But since then nothing more than a cultural heritage advisory body has been created, and although its members have no doubt worked hard to protect Aboriginal cultural heritage, the whole system needs fundamental change. In the meantime, destruction of Aboriginal cultural heritage in NSW has proceeded apace and calls for reform have amplified in recent years.

In 2010, both major parties undertook to address reform of the Aboriginal cultural heritage system if returned to government in NSW in March 2011. In fact Labor began the reform process before leaving office, but in late March 2011 a Liberal government was elected and recommenced the reform process in October that year. In October 2013, following a first round of consultation with Aboriginal people, and the establishment of an Aboriginal Cultural Heritage Reform Working Party which reported at the end of 2012,² the NSW Government released a proposed model for reforming the Aboriginal cultural heritage system in NSW. A further rather limited round of consultations, and opportunity for other forms of feedback, is now underway and closes in mid-February 2014.

This article explores the extent to which this proposed model would meet the human rights standards outlined by the *United Nations Declaration on the Rights of Indigenous People* ('UNDRIP')³ in some important respects. The Commonwealth Government, after consultation with all states and territories, indicated qualified support for the UNDRIP in April 2009. Of course the UNDRIP is not a legally binding instrument, but represents principles states support, and like other UN 'soft law' one assumes it is likely to influence domestic law and policy over time. The Australian

Government made clear at the time that Australian laws relating to land rights and native title were not altered by its support of the UNDRIP. However, one would hope that *new* legislation, particularly in such a distinctive area as cultural heritage, might take the UNDRIP into account and attempt to comply with its principles, despite concerns about specific aspects of the UNDRIP expressed at the time.⁴

There are numerous clauses in the UNDRIP which bear on the development of cultural heritage legislation—for example, articles 25-28 outline rights to lands, waters and resources; articles 19-20 deal with states cooperating with Indigenous peoples 'through their own representative institutions in order to obtain their free, prior and informed consent' in relation to laws or measures that may affect them and Indigenous peoples' right to form their own 'political, economic and social systems or institutions'; articles 9 and 33 refer to the right to identity and membership of an Indigenous group. Space does not permit analysis of the legislation in terms of the detail of each of these clauses. Rather, this article will focus on clauses 31: rights in relation to cultural heritage and 18: rights to participate in decision making, which are central to future cultural heritage arrangements in NSW (though they should of course be interpreted in the context of the UNDRIP as a whole).

While there are some issues relating to the process of the reform which may not comply with the rights of Indigenous peoples set out in the UNDRIP, the focus of this article is on the processes and structures proposed in the model and how these would comply with the rights of Indigenous people. It is clear that the proposed model reflects some of the ideas expressed or supported by Aboriginal people in the earlier consultation round, such as a broader definition of Aboriginal cultural heritage which reflects tangible and intangible cultural values not simply objects and places, and the desire to have stand-alone Aboriginal cultural heritage legislation. Yet there remain some real concerns about how the proposed model meets the requirement in the UNDRIP that Aboriginal people have the right to 'maintain, control, protect and develop their cultural heritage'⁵ as well as the right to 'participate in

decision making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁶ This article also discusses some of the complications evident in NSW, due to historical dispossession and displacement, as well as the complex existing legislative context, in meeting those standards across the state.

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THE PROPOSED MODEL AT STATE LEVEL

The proposal involves the Minister for Heritage, supported by a division within the Office of Environment and Heritage, taking responsibility for managing the new legislation. The Office would be advised at the state level by an Aboriginal Cultural Heritage Advisory Committee ('ACHAC'), comprising of Aboriginal people with 'relevant skills, knowledge of planning and legislation and experience in Aboriginal cultural heritage matters.'⁷ This will be very similar to the existing ACHAC, but with more strategic roles added. This group is currently developed through expressions of interest from Aboriginal people, with committee members then selected by the Minister. This differs significantly from the recommendation of the independent Aboriginal Culture and Heritage Reform Working Party for an independent statutory Aboriginal Cultural Heritage Commission comprised of Aboriginal people.⁸ Thus at the state level, neither of the two requirements of the UNDRIP are met in the government's proposals. The statewide body proposed is not selected by Aboriginal people themselves through their own procedures, nor do they have control over cultural heritage, as they are only in an advisory capacity to the government. A statutory authority would give Aboriginal people far greater decision-making powers over their cultural heritage.

THE PROPOSED MODEL AT LOCAL LEVEL

At the next level down the model proposes local Aboriginal Cultural Heritage Committees ('ACHCs') which 'will comprise up to 10 nominated identified people with connection to Country, who have knowledge and understanding of the cultural heritage practices and priorities for their Country.'⁹ These people must demonstrate 'that they meet the membership criteria and are nominated as a

representative of a group with cultural connections to the area.'¹⁰ This selection process will be managed by the Heritage Division of the Government, advised by the ACHAC, and nominees will be approved by the Minister. The criteria for membership of the local ACHCs are that membership must be drawn from:

- Aboriginal Owners as per section 170 of the *Aboriginal Land Rights Act 1983* (NSW) ('ALR Act')
- Native title holders as per the *Native Title Act 1993* (Cth)
- Representatives of registered native title claimants
- Representatives of Indigenous Land-Use Agreements ('ILUAs'); and
- Representatives of Elders and family groups with cultural authority.¹¹

The document also states that members of local ACHCs 'must have the ability to represent local Aboriginal cultural heritage interests and demonstrate an understanding of heritage management, planning and environmental processes', thus suggesting a level of professionalisation that might be required before the Minister could or would approve their membership. This seems to be a requirement that breaches the rights of Indigenous people as expressed in the UNDRIP, that is, to select their own representatives, presumably based on their own criteria, along with the specificity of numbers on these committees. Aboriginal cultural arrangements may not accord easily with such numerical specification, as representation from different clan or family groupings may be required to cover different areas of Country, and to meet cultural requirements. Numbers may be smaller or larger depending on the cultural context. It would also seem most relevant if the boundaries of decision-making bodies reflected the cultural boundaries of the relevant Aboriginal nations or peoples; however the four main options for administrative boundaries reflect Aboriginal land council boundaries (local or regional); or local council or local land service body boundaries. Whilst an 'alternative option' is offered if none of these four are deemed to be 'viable', the strongest likelihood is that one or other of the land council options will be selected. Whilst this will build on existing practice, and some current Aboriginal administrative capacity, in most cases it will fail the 'cultural boundary' test.¹²

One approach which could apply to NSW is that being undertaken by the 'Right People for Country' project in Victoria. This project:

Supports Traditional Owner groups to reach durable agreements about boundary and group composition issues. These agreements can help Traditional Owner groups to become Registered Aboriginal Parties under the Aboriginal Heritage Act 2006 and negotiate settlements with the Victorian Government under the Traditional Owner Settlement Act 2010 and Native Title Act 1993. The Right People for Country project moves away from governments and courts making decisions

for Traditional Owners and provides support to Traditional Owners to reach their own agreements.¹³

Thus this project facilitates processes which apply to cultural heritage decision-making that are more in line with the UNDRIP's principles than current proposals in NSW.

The membership criteria of ACHCs, at least in terms of whom the membership should be drawn from, appear to be on the right track. There is a clear distinction between residents and persons with cultural authority, with the latter being favoured for this purpose. However, since much of NSW has little native title currently

recognised (although there are more areas with registered native title claimants), and only a handful of ILUAs, the relevant criterion will be the last one: 'Representatives of Elders and family groups with cultural authority'. The definition of Aboriginal Owners, which currently resides with the Registrar of the *Land Rights Act 1983* (NSW) rather than Aboriginal people themselves, as required by the UNDRIP, is currently limited to those small areas of the State where five National Parks have been returned to Aboriginal ownership and subsequently leased back to the State.¹⁴ Unfortunately, in relation to the last criterion, in many parts of NSW the issue of who has 'cultural authority' remains contested, and the wording of the criterion is particularly ambiguous. It is also suggested that these

Matrineal Landscape

Bronwyn Bancroft
A Woman's World
1500mm x 1700mm
Acrylic on canvass



ACHCs will identify who speaks for Country—but it is unclear what their responsibilities will be in relation to these culturally significant people if they are not actual members of the ACHCs.

CONCLUSION

There is a great deal more in the detail of the proposed reforms which may or may not comply with the rights of Aboriginal people enshrined in the UNDRIP, but this article has attempted to identify the most obvious ones, and those which are most significant. We still seem some way off the 1980 recommendation for an independent Aboriginal Heritage Commission. In the 21st century that should be the outcome of reform, and such a body should have majority Aboriginal membership chosen by Aboriginal people, if the new legislation is to comply with the UNDRIP's statement that Aboriginal people have the right to 'maintain, control, protect and develop their cultural heritage.'

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- 1 Michael K Organ, 'A Conspiracy of Silence – The NSW National Parks and Wildlife Service and Aboriginal Cultural Heritage Sites' (1994) 67 *Aboriginal Law Bulletin* 4.
- 2 Office of Environment and Heritage (NSW), Aboriginal Culture and Heritage Reform Working Party, 'Reforming the Aboriginal Cultural Heritage System in NSW: Draft Recommendations to the NSW Government' (Discussion Paper, 2013).
- 3 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('UNDRIP').
- 4 Australia was one of four nations that voted against the UNDRIP in 2007 in the UN General Assembly. In explaining its position at that time it expressed concerns about provisions in the UNDRIP relating to land and resources, self-government and free, prior and informed consent.
- 5 *UNDRIP*, UN Doc A/RES/61/295, art 31.
- 6 *Ibid* art 18.
- 7 Office of Environment and Heritage, New South Wales Government, 'Reforming the Aboriginal Cultural Heritage System in NSW: A NSW Government Model in Response to the ACH Reform Working Party's Recommendations and Public Consultation' (2013) 12.
- 8 *Ibid* 10–11.
- 9 *Ibid* 14.
- 10 *Ibid* 15.
- 11 *Ibid* 16.
- 12 It should be noted that at least in regard to the Murray Darling Basin Authority, culturally-defined nation groupings operate across parts of NSW already. These groupings are Indigenous-defined 'nations' of Indigenous people who respect each other's 'country' and cooperate together respectfully across a wide area of South Australia, New South Wales and southern Queensland.

Pods

Bronwyn Bancroft
950mm x 730mm, Acrylic on canvas

