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COMMENT

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Why wait until it's too late? A precautionary tale for Indigenous cultural heritage protection in Australia

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Introduction

Australian Indigenous cultural heritage laws have not been written by First Nations people. Consequently, there are several pit-falls related to sustainable development and natural resource management evident in the non-coordinated approach to the management of Indigenous cultural heritage through various statutes across jurisdictions in Australia. While there are strengths in values-based heritage management approaches, I agree with McConnell et al. that rights-based approaches based in Indigenous Law/lore are required to strengthen the protection of Indigenous cultural heritage. Here I consider three issues for precautionary and rights-based approaches in formulating national cultural heritage legislation and emphasise the importance of education in a way forward.

Consultation vs decision-making

In current heritage law, *consultation* with First Nations people is not decision-making by First Nations people. The first issue for law reform at a national level lies in the centrality of First Nations decision-making in heritage protection, planning and development.

National *Ask First* guidelines (Australian Heritage Commission 2002) are based on the precautionary principle. *Ask First* gap analyses showed States were not performing consultation to required standards (Collett and Pocock 2012). At its worst, consultation is merely a 'tokenistic gesture' but, when done well, it can fulfil its purpose and provide a pathway for First Nations to participate in recording of, and decision-making about, cultural values (Lingard 2012). Alarmingly however, as the Wilyakali people of NSW have experienced, even when comprehensive consultation establishes high cultural significance, emphasis is still placed on tangible or scientific value by non-Indigenous decision-makers, meaning heritage is legally desecrated through development approval processes (Martin et al. 2024). Best heritage practice does not hold one value above another (Pocock et al. 2015).

Only in the Northern Territory and Victoria do laws afford First Nations people rights and decision-making powers over their cultural heritage. In this regard, national heritage laws are subordinate to State laws and add complexity to case law, such as Victorian cases *Clark* and *Onus* concerning the Djab Wurrung sacred trees. These cases demonstrate that while decision-making powers exist in Victoria, issues remain for inclusive consultation (Groch 2020).

While First Nations people are involved in assessments of cultural significance through consultation, relevant communities do not author cultural heritage management plans and, importantly, do not make recommendations to clients/sponsors and ministers. Recommendations for Indigenous cultural heritage management should be written in accordance with First Nations traditions. Greater access for First Nations people to train at vocational and tertiary levels to author such recommendations is urgently required to remedy this deficit.

Reaction vs action

No current heritage legislation in Australia actively promotes or celebrates the protection of Indigenous cultural heritage; it is all *reactive* and provides processes for the destruction of heritage prior to development. Sometimes heritage survey is the first opportunity First Nations people have had to re-connect to their cultural heritage in decades or centuries, making its destruction even more cruel.

National and World Heritage registers oblige governments to maintain, protect and celebrate heritage.

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Yet many barriers exist for listing Indigenous cultural heritage, tangible and intangible. A provision under new national law could establish and maintain national infrastructure for First Nations to manage heritage registers at local, State and national levels which might facilitate active listings for protection and everyday enjoyment of Indigenous cultural heritage (increasing its social value).

Minimum standards vs best practice

National heritage legislation should set out *minimum standards* consistent with international law and must be co-designed with First Nations Peoples.

Shifting to a rights-values approach, we must accept that the *Burra Charter* (Australia ICOMOS 2013), considered best practice internationally, qualifies as a minimum standard. Currently, however, the minimum standards set out in laws for cultural heritage protection and management do not equate to best heritage practice.

Best practice for First Nations people is not, actually, rights-driven; protecting cultural heritage in Indigenous Law/lore is a *responsibility*. This must be acknowledged in formulating legal definitions and in establishing how subsequent determinations are made in Australian law. 'Koori culture is not a commodity. It must be interpreted in an educative fashion by those who live it—Koori people' (Birch 1992).

Importantly, heritage professionals should, as many of us do, go beyond minimum requirements in our pursuit of best practice. Education, training and research are required to grow and develop best practice throughout our careers; the incorporation of Indigenous knowledges and Law/lore into this learning is crucial (Langton and Corn 2023). First Nations-led research has gained momentum in archaeology, but more is needed to see vocational education and training strengthened alongside the promotion and celebration of cultural heritage (Birch 1992).

Education: An immediate way forward

Concerningly, 'Archaeologist' is on the Australian skills shortage list. For national law reform to achieve best practice cultural heritage protection in accordance with Indigenous rights and self-determination, greater access to education, training and accreditation in subjects including Australian archaeology, heritage and related subjects is required for First Nations people to protect and manage their own cultural heritage and build leadership (Langton and Corn 2023: 169). Indigenous Law and ways of knowing must be incorporated into heritage subjects so that non-Indigenous heritage practitioners can also achieve best practice (Martin et al. 2024; Langton et al. 2024:9). Australia's Group of Eight Universities should make this a key priority in their reconciliation strategies.

Patience is a virtue, but waiting for national cultural heritage reform to be the answer to these issues may be a disastrous mistake. More education is needed now so First Nations people may fulfil their responsibilities to care for their own cultural heritage.

Disclosure statement

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