



NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

Message from Congress Co-Chairs

The Congress accepted last year to be ex-officio members of the Prime Minister's Expert Panel on Constitutional recognition of our peoples.

The following statement was provided to the September 2011 meeting of the Expert Panel to reflect the views of our Members at this point in time and at this point in the national conversation.

In providing a view to the Panel, we endeavored to keep faith with our Members – the majority of whom said they wanted change in both the body and preamble of the Constitution.

The Congress recognises the diversity of views among First Peoples and Congress Members on this important topic.

While a large majority of Members support the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, the form that recognition will take is critically important.

It is essential that any change to the Constitution does not prevent future action that First Peoples may seek to pursue in regard to our legal rights.

When the Panel releases its final report and the Government has responded, we will seek the views of our Members once again.

There are a number of stages still to go in this process before a referendum can be put to the Australian people. The Congress and our Members are a critical part of this defining moment in history and as the debate continues and progresses, we will keep you informed as we re-examine our views and refine them.

In Unity

Jody Broun

Les Malezer

Co-Chairs

STATEMENT
TO THE EXPERT PANEL
ON
CONSTITUTIONAL RECOGNITION
OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES



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7 September 2011

PURPOSE OF THIS PAPER

This paper has been prepared by the National Congress of Australia's First Peoples ('Congress') as input to the deliberations of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples.

It draws on the views of Congress Members and Delegates to articulate the position that the Congress will present in the current debate primarily within the Expert Panel. Following the Panel's report to Government and once the exact form of constitutional recognition proposed for a referendum is known, the Congress will conduct further analysis of Member views to refine and reassess a position.

INTRODUCTION

The National Congress of Australia's First Peoples ('the Congress') has been established to represent the interests of Aboriginal and Torres Strait Islander peoples at a national level. The Congress has more than 2600 individual members and 120 peak bodies and organisational members, collectively representing several thousand of their constituents across Australia.

Membership is spread across States, Territories, gender and age, and is a reasonably comparative sample of the Aboriginal and Torres Strait Islander population.

An initial survey of members highlighted constitutional recognition as a high priority with almost 90% of respondents signifying support for the various ideas for recognition. Members also envisage a significant role for the Congress in the debate leading to a referendum and the campaign to support change.

This is not surprising given the decades long call for constitutional recognition internal and external to the Aboriginal and Torres Strait Islander population, from academics, organisations and representative bodies. Much of the past contemplation of this matter has been in the context of broader political debate on rights and recognition of First Peoples.

The Aboriginal and Torres Strait Islander Commission in the Social Justice Report of 1995 *Recognition, Rights and Reform* called for a review of the Constitution exactly for this purpose, the report resulted from national consultations with the Aboriginal and Torres Strait Islander people and presented the constitutional reform in the context of integrally related issues such as sovereignty, self determination and autonomy and the forms of political representation of the First Peoples.

The 2001 report of the Council for Aboriginal Reconciliation also strongly recommended reform of the Constitution, and placed this in the context that all parliaments and local governments should not only pass formal motions of support for reconciliation, but that basic principles should be enshrined in appropriate legislation.

The Government's undertaking therefore, to hold a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples between now and the next federal election in 2013 is timely and welcome. This is particularly so given there is multi-party support for the proposition, a necessary condition for constitutional success.

The proposed referendum represents an historic opportunity for Australia's founding documents to accurately reflect Aboriginal and Torres Strait Islander peoples' custodianship, to eliminate discriminatory provisions and recognise the rights of First Nation peoples.

But it cannot be denied that with this opportunity come distinct challenges – for the nation as a whole and most particularly for Aboriginal and Torres Strait Islander peoples. Not least of these challenges is ensuring the views of Aboriginal and Torres Strait Islander peoples are properly represented, but also garnering the support of Australians generally, for the shape that the constitutional reform ultimately takes.

Recognition of Aboriginal and Torres Strait Islander peoples has potential benefits beyond the sense of inclusion and well-being as noted in the submission by the Australian and New Zealand College of Psychiatrists but for the nation as a whole contributing to national identity, reconciliation and international reputation.

The Congress is strongly aware of these challenges and seeks to make a valuable contribution to the form of a successful referendum.

BACKGROUND

The Government has appointed an Expert Panel which has been conducting a national consultation and engagement program.¹ The Panel will advise the Government of its recommendations on options for the specific nature of the constitutional reform by the end of 2011. The Co-Chairs of the Congress are ex-officio members of the Expert Panel and have been involved in a number of the consultations that have been held across the country. An interesting point to note is that the views expressed by Aboriginal and Torres Strait Islander peoples in the consultations have been largely consistent with views conveyed by Members of the Congress.

A critical role for the Congress is to engage with our Members and Aboriginal and Torres Strait Islander communities so that they are informed and active participants in this debate. In accordance with its strong ethos as a body that engages with and represents the views of its members, the Congress recently conducted an exercise aimed at discovering which forms of constitutional change Aboriginal and Torres Strait Islander Australians support. The process that was implemented also had an important educative dimension, which is crucial not just to the refining of policy positions, but also to the empowerment of our community to act as effective advocates for change in the broader community.

The Gilbert + Tobin Centre of Public Law and the Indigenous Law Centre, both at the Faculty of Law, University of New South Wales have contributed to building an understanding of the issues and gathering the views of members and delegates to form the basis of this position paper.

¹ Minister for Family Housing, Community Service and Indigenous Affairs (FaHCSIA) *Expert Panel on Constitutional Recognition of Indigenous Australians appointed* (23 December 2010) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/expert_panel_indig_23122010.aspx>.

Specifically this has involved:

- Preparation of an Issues Paper to help inform the Delegate discussions at the inaugural National Congress meeting. The Issues Paper explains the current position of First Peoples under the Australian Constitution, the value of changing it and the formal process by which it is done. It provides clear and accessible information on the main ideas that have been raised in public debate about how the Constitution might be amended so as to recognise Aboriginal and Torres Strait Islander people. The ideas canvassed by the Issues Paper are:
 - changing or deleting the “racism power” in section 51(xxvi) of the Constitution;
 - a new provision to prohibit racial discrimination or guarantee of equality;
 - a new preamble recognising Aboriginal and Torres Strait Islander peoples;
 - deleting section 25 of the Constitution, which contemplates racially discriminatory State voting laws;
 - a new provision to support agreement-making or a treaty between First Peoples and the government;
 - a new provision to protect First Peoples’ unique rights, such as rights to culture, heritage and land; and
 - a new provision for reserved seats in the Federal Parliament for Aboriginal and Torres Strait Islander people.
- At the National Congress, Delegates participated in a workshop on constitutional reform. The purpose of the workshop was to build understanding about the issues and options for constitutional change in the interests of Australia’s First Peoples. The workshop involved a combination of presentations by experts in the field from both Centres and facilitated group discussions. At the conclusion of the workshop, Delegates completed a detailed survey to gauge their views on whether constitutional reform was important and what form it should take.
- The two Centres also contributed a number of questions to an online survey of the Congress’s broader membership that was prepared by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). These questions have a close relationship to those on which Delegates were polled at the inaugural meeting, but were pitched at a more general level given that Members did not have the benefit of reading the Issues Paper or discussing the options prior to their completion of the survey.

This two-pronged approach has the benefit of enabling us to compare and contrast the responses of the Delegates and the Members more generally. This is extremely useful in identifying where there is already broad consensus in this complex area. It also highlights those issues where there is perhaps a need for more information to be provided so that individuals feel they are able to make a more informed choice.

CONGRESS VIEWS

Support for Constitutional Recognition

Overwhelmingly, both the Members and Delegates of the Congress responded that it was 'very important' that Aboriginal and Torres Strait Islander peoples be recognised in the Constitution. Of the 100 Delegates who completed this survey question, only two differed by saying that constitutional recognition was just 'somewhat important'. Of the 466 online respondents, 88.6% selected 'very important' to describe how they felt about the need for change, with a further 6.7% saying that recognition was 'somewhat important'. A small percentage of respondents said reform was either 'not very' (2.1%) or 'not at all' (1.3%) important, while 1.3% were 'not sure'.

The strong correlation of the result on this question across both surveys confirms that the current referendum process presents an opportunity for Aboriginal and Torres Strait Islander peoples to achieve something on which they place a high value.

The Preamble

So far much of the political and public debate appears to have been focussed upon the insertion of a preamble to the Constitution, that will give appropriate recognition to Aboriginal and Torres Strait Islander peoples as Australia's 'First Peoples'. Perhaps unsurprisingly, there was a very high level of support (almost 92%) for such a move when Delegates were asked to indicate support or opposition to the various options for reform. However, an even higher number of Delegates supported an amendment which would prohibit racial discrimination or provide a guarantee of equality (97%) and a clause which would protect the unique rights that First Peoples possess, such as rights to culture, heritage and land (95%).

The picture becomes clearer when we consider the results of a later question that asked Delegates to indicate which of the potential reforms would attract their support as their 'first choice'. The two amendments that attracted greater support than changing the preamble in the preceding question did so once again. But while all three were the most favoured of the seven available options (which mirrored those discussed in the Issues Paper, as set out above), almost double the number of respondents said that they would prefer the addition of a constitutional prohibition of racial discrimination or guarantee of equality (29.2%), than preambular reform (15.6%). A clause protecting First Peoples' rights was also much more strongly supported (26%) than a new preamble.

It should be pointed out that there is a level of artifice in the design of this question since, of course, there is no reason why a bundle of constitutional reform proposals cannot be presented to the Australian electorate for approval. Aboriginal and Torres Strait Islander peoples, and the community as a whole, do not need to select one option at the expense of others. However, the responses usefully highlight what is important to Delegates and make it apparent that there is a desire for more than symbolic change and for substantive rights or protections.

As for how the preamble might be worded so as to recognise Australia's First Peoples, both delegates and the broader membership were offered four phrases for their consideration. The results of both surveys were as follows:

Phrase	Membership	Delegates
Recognition of 'a spiritual, social, cultural and economic relationship with traditional lands and waters'	43.3%	53.7%
Recognition of 'original custodians of the land'	30.1%	14.7%
Recognition of 'prior ownership of traditional lands and waters'	6.9%	3.2%
Recognition of 'ownership of traditional lands and waters'	19.6%	28.4%
(N)	(448)	(95)

For both survey groups, recognition of “a spiritual, social, cultural and economic relationship with traditional lands and waters” (which is the wording added to the New South Wales Constitution in 2010 to acknowledge First Peoples²) was the most popular first choice. Of the 448 members who completed this question in the online survey, 194 (43.3%) selected it as their first choice, while support for this option was even stronger amongst the delegates (53.7%).

Intriguingly, there was a distinct difference between the two groups as to the next most preferred wording for a new preamble. While 30.1% of the broader membership favoured recognition of First Peoples as the “original custodians of the land” as their first choice, only 14.7% of the delegates did so. Instead, the second most popular option for delegates was recognition of “ownership of traditional lands and waters”, with 28.5% selecting that phrase for inclusion in the preamble. Ultimately, apart from the fact that recognition of ‘prior ownership’ was distinctly unappealing to both groups, these results suggest that there is a long way to go on formulating new text for the preamble that attracts overwhelming support. The question itself offers only four, fairly simple, options in this regard, and there are obviously many other ways in which the recognition might be expressed. Delegates were able to add comments to their survey questionnaires and this qualitative data tended to reflect the view that the preamble should acknowledge, as one Delegate wrote, the “mix of ownership and recognition of the spiritual, social, cultural and economic relationship we have as a result of that ownership”.

Members and Delegates were not specifically asked about recognition in the body of the Constitution, nor about the inclusion of values in a preamble and as such this paper does not explore those ideas. However, these ideas must be considered in the context of enhancing or distracting from the aim of recognition and protection of the rights of Aboriginal and Torres Strait Islanders peoples through any constitutional changes.

Insertion of a preamble that recognises ownership or custodianship of lands and waters and the spiritual, social, cultural and economic relationship between those lands and waters and the First Nations Peoples, and the unique rights of First Nations Peoples to maintain culture, language and heritage, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

² See *Constitution Act (NSW) 1902* s2.

Prohibition of discrimination and guarantee of equality

As noted earlier, the two constitutional reforms for which there appeared very strong support, exceeding even that of changing the preamble, were the addition of a prohibition on racial discrimination or guarantee of equality, or a clause protecting rights of Aboriginal and Torres Strait Islander peoples (to land, culture and heritage). While, in the survey responses of Delegates, the first of these was slightly ahead of protecting First Peoples' rights, the latter was by far the most strongly supported option amongst members generally (77.9% as compared to 58.4% supporting prohibition on racial discrimination or a guarantee of equality).

The idea of a protective clause is clearly a complex one which requires far more work on the detail as to what it might contain, influenced perhaps by overseas models (e.g. section 15 of the *Canadian Constitution 1982*). The Congress acknowledges that both surveys did not ask respondents to distinguish between a prohibition of racial discrimination or a general guarantee of equality, nor did it adequately explain the difference between the two. A number of Delegates at the National Congress were however aware of this distinction and noted that a general guarantee of equality covering minor rights over and above race was a double edged sword because although it may be more likely to obtain popular ownership from the wider Australian public, it would also attract lobby groups opposed to equality for some minority groups and thereby complicate the question.

The Congress surveys also did not go into detail about how a clause protecting the rights of Aboriginal and Torres Strait Islander peoples to land, culture and heritage might be phrased or what implications such a provision would have. However, the fact that these options garnered such high support from Delegates and Members indicates once again that there is a strong preference to substantive rights and protections rather than only recognition.

The inclusion of a new clause prohibiting discrimination and guaranteeing equality as a critical element of any Constitutional reform recognising Aboriginal and Torres Strait Islander peoples, but that further consultation and consideration be given to whether this is limited to race only or cover other forms of discrimination.

Section 51 (xxvi)

It was possible to learn more about opinion regarding the future of the power that the Commonwealth has in section 51(xxvi) to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". Delegates at the National Congress spent a lot of time considering this part of the Constitution and the unintended consequences for its scope after amendment by the successful 1967 referendum. When surveyed about the future of the power moving forward, it is notable that not a single Delegate supported leaving the races power as it is presently. There was also little enthusiasm amongst Delegates (only 5.1%) for replacing the 'races power' with a new power to make laws only for Aboriginal and Torres Strait Islander people absent of any added protection. While a proportion of responses (17.4%) supported simple deletion of the power, the vast majority favoured either replacing it with a new power to make laws about Aboriginal and Torres Strait Islander peoples which was accompanied by a clear limit on that power such as a prohibition on racial discrimination (40.8%) or amendment of the existing power so as to limit it to the creation of laws only for the benefit of Aboriginal and Torres Strait Islander peoples (36.7%). There is clearly a common sentiment behind these last two approaches and teasing out the merits and risks of each is something that requires far more consultation, consideration and debate as the referendum proposal takes greater shape.

Amendment of the “races power” (section 51 (xxvi)) so that the Commonwealth Government still has the ability to legislate with regards to Aboriginal and Torres Strait Islander peoples, but not in a way that discriminates and only in ways that are beneficial. This may involve amending the “races power” **and** inserting a new clause prohibiting discrimination and guaranteeing equality in another part of the Constitution or such amendment that achieves this intent. Further consultation, debate and advice will be needed in order to arrive at the exact wording of amendment or of additional clause/s.

Section 25

Section 25 of the Constitution is a provision which penalises States for not allowing people of one race to vote in elections. Although the section is arguably redundant, the very fact that it remains in the Constitution allows States to discriminate on the grounds of race. Although the removal of this provision received fairly wide spread support from Delegates reporting back at the workshops (90%), Members and Delegates surveyed considered deletion of the section somewhat less important (5.2% nominated this as their first choice) than other ideas. Once again, this is further evidence of the desires from Members and Delegates for substantive change rather than symbolism.

Notwithstanding this it is considered redundant in a modern Constitution and should be straight forward to delete.

Deletion of section 25.

Agreement making

In the survey of Members Constitutional protection of any future agreement or treaty received the lowest level of support of the ideas, however the majority of Members still indicated that it was important to them (56.0%). At the Delegates workshop there were several references to the proposal to give constitutional support for agreement-making, both in terms of the positives to be gained and the risks in including it in a package of proposals. Some Delegates noted that such a provision is not legally necessary. Whilst further consultation and consideration of such a power is still needed, it is clear that such a provision was not the highest priority for Congress Members and Delegates.

Designated seats in Parliament

While the proposition of reserved seats in Federal Parliament for Aboriginal and Torres Strait Islander peoples received more than 50% support in the survey of Members it gained significantly less support from the Delegates and the highest level of negative response. It may be that this particular proposition requires much more development to be fully supported or understood within the context of political representation and/or status of Aboriginal and Torres Strait Islander peoples.

CHALLENGES

Gauging the level of support of Aboriginal and Torres Strait Islander peoples

A principle of the Expert Panel is that any recommendations must accord with the wishes and have the support of Aboriginal and Torres Strait Islander peoples. Once the Expert Panel concludes its report and makes its recommendations to the Government, the debate will enter a new phase and gain traction both within our Aboriginal and Torres Strait Islander communities and amongst the Australian community as a whole. The Congress will be called upon to play a role in determining the level of support in the Aboriginal and Torres Strait Islander communities for the recommendations of the Expert Panel and for any proposal put forward by Government.

Clearly at this stage the Congress is not the only voice that must be heard in this debate and it is critical that the views of First Peoples are properly considered and represented. A number of methods could be employed to ensure this occurs which include: conduct of a plebiscite for First Peoples; a constitutional convention could be held to allow debate and discussion and gauge the level of support; and utilising the network of Aboriginal and Torres Strait Islander organisations including Land Councils and their elected representatives.

It may in fact be best to adopt a combination of these strategies in order to ensure that Aboriginal and Torres Strait Islander people's diverse perspectives are properly considered. Congress does not support a plebiscite as it will not necessarily represent an informed view, would present significant logistical issues and be potentially divisive.

Informing and Educating Aboriginal and Torres Strait Islander peoples

It was certainly encouraging that a notable proportion of both Delegates (around a third of those surveyed) and the Membership generally (around a quarter of those surveyed) indicated that they had a good grasp of all three issues. It was unsurprising, given their exposure to the Issues Paper and participation in the workshop on constitutional reform, that the Delegates indicated a higher level of understanding. But even so, the results of both surveys indicate a desire for more knowledge with between 60-81% of respondents, depending on the specific topic, saying they would like either a 'little more' or a 'lot more' information. This is a clear majority in both groups who feel they need more information about all aspects of the referendum to constitutionally recognise Aboriginal and Torres Strait Islander peoples.

These results, as well as those in response to more specific questions that we asked our members about what they wanted from the Congress as the referendum process continues to progress, send an incontrovertible signal that greater efforts to engage and inform Aboriginal and Torres Strait Islander peoples about what is at stake and what needs to be done must be made. At the Congress we are committed to assisting our Members in this regard and playing a lead role in the public debate.

All reasonable resource implications to ensure fully informed engagement of the Aboriginal and Torres Strait Islander peoples and communities must be met by Government within the budget for a referendum including any additional resource needs identified in an expanded role for the Congress.

Garnering the support of the broader Australian community

There are clearly challenges in achieving public support for constitutional reform to recognise Aboriginal and Torres Strait Islander peoples, not least of which is a lack of understanding about the Constitution and specific referendum issues.

These include the short timeframe to gain public support if we are to take advantage of the current political environment supportive of change, engaging 'middle' Australia, responding to a perception of 'special treatment' and negative media coverage.

It will be important to articulate how this contributes to national identity, reconciliation and a modern Constitution.

Members and Delegates of the Congress saw the Congress taking a lead role in any public campaign, both with the broader Australian community and specifically in the Aboriginal and Torres Strait Islander peoples and communities, with strategies that included public education with key messages and partnerships with key non-Government organisations.

Critical to a successful referendum will be public support and awareness raising through simple clear messages as to why constitutional recognition of Aboriginal and Torres Strait Islander peoples is important and what it offers all Australians and the nation in terms of unity and respect for all.

CONCLUSION

The intensity of Delegate participation during the workshop and the high completion rate of both surveys reflect that the Members and Delegates of the Congress are very engaged with the question of constitutional reform. They have overwhelmingly indicated that it is of great importance to them and demonstrated a solid understanding of the essential aspects of the current debate about reform options. As presented here, some clear signs about what Aboriginal and Torres Strait Islander peoples are looking to achieve out of 'constitutional recognition' are already discernible.

In respecting and representing the views of Members and Delegates, and understanding the steps between the work of the Expert Panel, consideration and decisions of Government and a final referendum, the Congress has a current position that clearly supports constitutional recognition and protection of the rights of First Peoples.

There are risks in the Congress taking a lead role in the debate and any future steps toward a referendum on constitutional recognition, but we are supported by the strong views of our Members and the role they want the Congress to take in promoting a position. This position necessarily needs to be reconsidered and refined at each of the stage of the process, balancing Members views, risks and pragmatism.

In both the discussions held amongst Delegates at the constitutional reform workshop and through many of the qualitative comments received on the surveys, there were repeated indications as to the importance of pragmatism as a consideration in the selection of options for constitutional reform. Delegates were keenly aware of the need for proposals that would enjoy good prospects of success and be easy to communicate to the broader community as desirable forms of change worth supporting.

It is not enough simply to understand the various options. We must also be able to assess them strategically in order to develop a proposal that has the optimum chance of success. Also requiring consideration is how 'success' is defined and whether there is a risk of losing anything in the process. That is a question that the Congress will continue to work through with our Members and Delegates.

In order to guide the continuing Congress debate, input and decisions about the support for the form of constitutional recognition recommended by the Expert Panel, and in the future the form supported by Government, the following criteria will be applied:

- Consistency with the intent of the Declaration on the Rights of Indigenous Peoples
- Contribution to unity
- Pragmatism in relation to potential success
- Potential for protection and promotion of inherent rights
- Contribution to positive change for our people
- Prevention against unintentional consequences

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The report from the Indigenous Law Centre and the Gilbert & Tobin Centre of Public Law is in the National Congress 2011 Report, "[Building our Foundations](#)" which available on the Congress [website](#).