
SHAPING CHANGE:

THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES

EXPLORES THE PATH TOWARDS CONSTITUTIONAL REFORM

by Jody Broun

The Gillard Government's undertaking to hold a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander Australians between now and the next federal election in 2013 is undoubtedly a welcome development, as is the multi-party support for this initiative. But it cannot be denied that with this opportunity comes distinct challenges – for the nation as a whole and particularly for Aboriginal and Torres Strait Islander peoples. The first challenge is the fundamental question of whether Aboriginal and Torres Strait Islander people support this reform. The next is what 'recognition' might look like and what is entailed in garnering public support for it. Another critical question concerns what role the National Congress of Australia's First Peoples ('Congress') will play in this debate. This paper will address these critical questions and discuss the views of Congress Members and Delegates.

The Congress has heard from Members and Delegates and they have expressed strong support for constitutional recognition. As the national representative body for Aboriginal and Torres Strait Islander peoples, the Congress has a vital role to play both in the present consultation phase and beyond.

As is well known the Government has appointed an Expert Panel which has been conducting a national consultation and engagement program¹. The Panel will advise the Government of its recommendations on options for the specific nature of the constitutional reform by the end of this year. Along with my co-chair Les Malezer, I am an ex-officio member of that Expert Panel and I am proud to take part in its work. 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.

This 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.

If we reflect on the overwhelming 'yes' vote at the '67 referendum the potential for Australians to embrace this reform is clear. This potential was evident in the massive show of support for reconciliation demonstrated by the thousands of people who walked across the Sydney Harbour Bridge and other important landmarks around the country. In the same way, the historic apology by former Prime Minister Kevin Rudd was an important milestone for First Nation peoples and was recognised as such by the whole community. The proposed referendum is in the same category of historic national significance.

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.

GATHERING THE VIEWS OF CONGRESS MEMBERS ON CONSTITUTIONAL CHANGE

The Congress engaged the services of the Gilbert + Tobin Centre of Public Law and the Indigenous Law Centre, both at the Faculty of Law, University of New South Wales, to engage our membership on the issue of constitutional reform and also to run workshops on this issue for the Delegates at our inaugural meeting held on 7-9 June 2011: an event that is known as 'National Congress'. (The term 'Delegate' refers to the 120 Congress Members who nominate every two years to attend the annual National Congress meeting where they debate policy and vote for Chamber directors. The term 'Member' refers to *all* Congress Members).

Working to specifications provided by the Congress, the two Centres performed the following work:

Preparation of an Issues Paper for circulation to Delegates in advance of 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 this 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 and options that are canvassed by the Issues Paper are:

- changing or deleting the 'races power' in s 51(xxvi) of the Constitution;
- a prohibition on racial discrimination or a guarantee of equality;
- a new preamble recognising Aboriginal and Torres Strait Islander peoples;
- deleting s 25 of the Constitution, which contemplates racially discriminatory State voting laws;
- a provision to support agreement-making or a treaty between Indigenous peoples and the government;
- protection of unique First Peoples' rights, such as rights to culture, heritage and land; and
- 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. In these smaller groups, Delegates had ample time to debate the strengths and drawbacks of the different ways in which the Constitution might be reformed via the planned referendum, before engaging in a general discussion about the issues. 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 a 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 to learning the views of Members of the Congress has the benefit of enabling us to compare and contrast the responses of both groups – the Delegates and the membership 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 further information to be provided so that individuals feel they are able to make a more informed choice.

CONSTITUTIONAL REFORM – HOW IMPORTANT IS IT?

Overwhelmingly, both the Members and Delegates of the Congress responded that it was 'very important' that Aboriginal and Torres Strait Islander people 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 what may have been anticipated – the current referendum process presents an opportunity to Aboriginal and Torres Strait Islander people to achieve something on which they place a high value.

RECOGNITION IN THE PREAMBLE

So far much of the political and public debate appears to have been focussed upon the insertion of words into the existing preamble to the Constitution, or a new preamble altogether, that will give appropriate recognition to Aboriginal and Torres Strait Islanders 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, in the same question, an even higher number of Delegates supported amendment which would prohibit racial discrimination or provide a guarantee of racial 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 racial equality (29.2%) to preamble reform (15.6%). A clause protecting First Peoples' rights was also much more strongly supported (26%) than a new preamble.

I should point 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 Australians, 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.

As for how the preamble might actually be altered 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 are shown below in Table 1.

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 text 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'.

THE FUTURE OF THE 'RACES POWER'

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 guarantee of anti-discrimination or a clause protecting the 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). 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 (see the *Canadian Constitution 1982*).

However, it was possible to learn more about opinion regarding the future of the power that the Commonwealth

TABLE 1: FOUR PHRASES FOR CONSIDERATION

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)

has in s 51(xxvi) of the Constitution 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 constituted. There was also little enthusiasm amongst Delegates (only 5.1%) for replacing the ‘races power’ with a new power to make laws only about Aboriginal and Torres Strait Islander people absent any added protection. While a rather higher 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 Islanders (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 consideration and debate as the referendum proposal takes greater shape.

EDUCATION AND PRAGMATISM

Both surveys conducted by the Congress as part of this exercise asked respondents to assess their own knowledge of the issues and to indicate whether more needed to be done to develop their own understanding of the area. In particular, both groups were asked whether they ‘knew enough’, ‘needed a little more information’ or ‘needed a lot more information’ about the following:

- the process for changing the Constitution;
- how Aboriginal and Torres Strait Islander peoples can be recognised in the Constitution; and
- how Aboriginal and Torres Strait Islander peoples can participate in the debate about constitutional recognition.

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. Consider the respective percentages of the responses given to this question by the 466 National Congress Members who completed the online survey show below in Table 2.

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 certainly committed to assisting our members in this regard and playing a lead role in the public debate.

However, education about the options for reform is just one of the challenges as we move forward. Judgment is also clearly required. 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 to craft proposals that would enjoy good prospects of success and be easy to communicate to the broader community as desirable

TABLE 2: KNOWLEDGE OF THE PROCESS

Issue	Know enough (%)	Little more info (%)	A lot more info (%)
The process for changing the Constitution	26.2	45.7	28.1
How Aboriginal and Torres Strait Islander peoples can be recognised in the Constitution	23	46.1	30.3
How Aboriginal and Torres Strait Islander peoples can participate in the debate about constitutional recognition	18.7	45.7	35.6
(N)			(466)

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.

CONCLUSION

The intensity of delegate participation during the workshop and the high completion rate of both surveys reflect the fact 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.

I anticipate that 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 among the Australian community as a whole. It is likely that the Congress will be called upon to play a role in determining the level of support in the Aboriginal and Torres Strait Islander community for the proposal put forward by Government. This is a critical piece of work and there are a number of ways to tackle it. It has been suggested that the views of First Nation peoples could be confirmed through a plebiscite or a constitutional convention could be held to allow debate and discussion. A key institution to include in this process is Aboriginal and Torres Strait Islander land councils and their elected representatives. Of course, the Congress will need to continue to engage with our Members. 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 perspectives are properly considered and that Aboriginal and Torres Strait Islander people are engaged in the debate and ultimately prepared to endorse the proposal that goes to the Australian people.

The Congress will be working with our Members closely on these issues, deepening our understanding about the range of options for reform and helping to refine the proposal that will eventually be put to the Australian electorate.

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- 1 Minister for Family Housing, Community Service and Indigenous Affairs (FaHCSIA) *Expert Panel on Constitutional Recognition of Indigenous Australians appointed* (23 Decmeber 2010) <http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/expert_panel_indig_23122010.aspx>.
- 2 See *Constitution Act* (NSW) 1902 s 2.

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