

COMMUNIQUÉ

Indigenous Australians and the Constitution

Museum of Australian Democracy
at Old Parliament House, Canberra
15 to 17 March 2017

22ND NATIONAL SCHOOLS
CONSTITUTIONAL CONVENTION

22nd National Schools' Constitutional Convention

Background

The twenty-second National Schools' Constitutional Convention (NSCC) was held at the Museum of Australian Democracy at Old Parliament House in Canberra from 15-17 March 2017.

One hundred and nineteen students from Government, Independent and Catholic schools from across Australia, covering metropolitan and country areas attended. Approximately 50% of students were from Government schools, 20% were from Independent schools and 30% were from Catholic schools.

Students participate in State/Territory Constitutional Conventions where they are either selected or elected to attend the National Schools' Constitutional Convention.

The National Schools' Constitutional Convention seeks to promote understanding and informed discussion amongst young Australians about the Australian Constitution and system of government. Its three main aims are to:

1. provide an opportunity for senior secondary students to explore Constitutional issues
2. encourage those students who are informed and actively interested in the Australian system of government to pursue this interest
3. increase student awareness of key Constitutional matters.

The purpose of this particular Convention was to consider:

- the recommendations of the *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* report, and
- the politics and processes involved in Indigenous recognition in the Constitution.

Complementary Program

A program of institution visits and receptions was woven into the Convention to provide a context for the Convention discussions. The visits were to places that helped students visualise how the various levels of government are connected and included Parliament House, Old Parliament House, Government House and the High Court.

Student delegates attended a welcome reception at Parliament House hosted by Senator the Hon Nigel Scullion, Senator for Northern Territory, Minister for Indigenous Affairs, Leader of the Nationals in the Senate, officially representing the Hon Malcolm Turnbull MP, Prime Minister of Australia. Following the reception, student delegates visited the National Museum of Australia and the National Film and Sound Archives of Australia.

Convention Processes

Delegates attended the Museum of Australian Democracy at Old Parliament House and over two days engaged in discussions about steps that could be taken to progress a successful referendum on Indigenous constitutional recognition and how the Constitution could be amended to recognise Aboriginal and Torres Strait Islander Peoples. Using guiding principles and questions, the working groups' discussions were focused on extracts from the 2012 and 2015 reports.

Thursday 16 March 2017

Professor George Williams AO, Dean Faculty of Law, University of NSW presented an Opening Keynote address entitled '*History of Indigenous recognition: Joint select committee report and recommendations and options for constitutional change*'. Professor Williams' address covered how in the 1890s the Constitution was drafted; what has happened since then and what is currently being proposed to recognise Indigenous peoples in the Constitution. This address provided delegates with a background to, and an overview of, the issues associated with recognising Aboriginal and Torres Strait Islander Peoples in the Constitution. Professor Williams also briefly commented on the three options recommended in the 2015 report for addressing these issues and responded to delegates' questions.

The presentation and question session that followed provided a context for delegates' subsequent working group activities.

Working Group Session 1 – Delegates were divided into 10 working groups to discuss the four general principles adopted by the Expert Panel and Joint select committee. The 2012 Expert Panel's four principles that must be met in order for a successful referendum to occur were that each proposal must:

1. contribute to a more unified and reconciled nation
2. be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples
3. be capable of being supported by an overwhelming majority of Australians across the political and social spectrums, and
4. be technically and legally sound.

The groups were asked to consider the following general questions:

- What do you think was the Panel's rationale for adopting these principles?
- In what way did the Panel apply these principles to its consideration of options?
- How have the principles shaped the Panel's recommendations?
- What recommendations may have been excluded because of adherence to one or more of these principles?

2. How may constitutional change "be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples"?

Delegates commented that the constitutional change may "be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples":

- as extensive consultation with Indigenous peoples will have informed the drafting of the constitutional changes
- as respect for Aboriginal culture would be enshrined in the nation's most important document
- as the principles and options are highly likely to bridge the gap between Indigenous and non-Indigenous Australians
- if Indigenous peoples are directly involved in the promotional and education programs preceding the referendum.

3. Why is it important that any recommendations should be "capable of being supported by an overwhelming majority of Australians from across the political and social spectrums"?

Delegates commented that any recommendations should be "capable of being supported by an overwhelming majority of Australians from across the political and social spectrums" because:

- this will guarantee that the amended Constitution will be accepted by the Australian society
- a significant opposition could gain momentum over time and result in the changes being challenged in the future
- this will give the proposal the greatest chance of being supported and adopted
- this will result in a positive psychological benefit and establish societal conditions for even more constitutional reform.

4. What does it mean that recommendations should be "technically and legally sound"?

Delegates commented that to be "technically and legally sound" a recommendation will need to:

- accord with the current laws and not unintentionally create confusion about the law
- be hard to challenge or over-turn because of a lack of clarity
- contain no contradictions between the Constitutional amendments and possible new laws and the current laws
- be unambiguous in meaning so that misinterpretation is avoided
- have clear definitions of key words so their meaning is clear (as meanings of words can change over time)

Working Group Session 2 focused on the three options for changing the Constitution to recognise Aboriginal and Torres Strait Islander Peoples.

The three options for constitutional change are outlined below.

Option 1: Proposed new sections 51A and 116A

51A Recognition of Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander Peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander Peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander Peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander Peoples.

116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

Option 2: Proposed new section 80A

Section 80A

(1) **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander Peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander Peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander Peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

The Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander Peoples, but so as not to discriminate against them.

Option 1: Negatives

Working groups considered that this proposal:

- is too broad
- has redundant clauses that are already covered in the *Racial Discrimination Act*.

Option 2: Positives

Working groups considered that this proposal:

- specifically protects Aboriginal and Torres Strait Islander Peoples from discrimination
- is realistic and achievable
- is legally and technically sound
- is clear in meaning.

Option 2: Negatives

Working groups considered that this proposal:

- is too restrictive in breadth when addressing racial discrimination
- has a lower chance of being endorsed
- does not oblige States to be non-discriminatory
- may have loopholes that result in negative policies
- is too broad in the use of 'special laws' and does not clarify whether they can be positive or negative.

Option 3: Positives

Working groups considered that this proposal:

- specifically protects Aboriginal and Torres Strait Islander Peoples from discrimination
- is realistic and achievable
- is more focused than the other two options
- requires States to be non-discriminatory
- is legally and technically sound
- is clear in meaning
- limits the capacity of the Commonwealth, States and Territories constitutionally to discriminate.

Option 3: Negatives

Working groups considered that this proposal:

- is too vaguely expressed
- has a lower chance of being endorsed
- is too conservative.

Question 1: Do you agree that section 25 should be repealed?

The general view was that Section 25 should be repealed because:

- it is outdated
- has the power to be abused
- it is fundamentally racist.

Question 2: Do you agree with the repeal of section 51(xxvi) and the retention of a person's power so that the Commonwealth Government may legislate for Aboriginal and Torres Strait Islander Peoples as per the 1967 referendum result (Recommendation 4)?

The general view was that:

- section 51(xxvi) should be repealed because of its ambiguity with regard to race; its original intention to allow for the creation of racially discriminatory laws; and its lack of protection for racial minorities
- person's power should be retained – however, there was concern that as the terms 'positive discrimination' and 'special laws' are hard to define they could be interpreted differently depending on one's social and political perspectives and that an Aboriginal Advisory Board should be established to advise on proposals for positive discrimination.

Question 3: Do you agree that the *Human Rights (Parliamentary Scrutiny) Act 2011* should be amended to include the United Nations Declaration on the Rights of Indigenous Peoples (Recommendation 6)?

The general view was that:

- the *Human Rights Act* should be amended to broaden its scope; further protect Indigenous peoples' rights; create international obligations for compliance; and bring Australia in line with more progressive nations.

Question 4: What might the parliamentary process be that would oversee a successful referendum?

Delegates' suggestions included:

- the referendum needs to receive strong multi-partisan support across the various representative groups in Parliament
- the importance of leveraging off the 50th anniversary of the 1967 referendum and Parliament talking up how this significant milestone in Australia's history could be enhanced by citizens giving their support for the constitutional recognition of Indigenous peoples

- Local councils should be required to hold community meetings so opportunities are presented to raise and address any concerns about constitutional change.

Most groups emphasised the importance of education and discussion – not only within schools but within the community and families.

The report back session for Working Group Session 3 was followed by a soap box session. The soap box session enabled students to make a concise statement to the whole group about their thoughts on the steps that could be taken to progress a successful referendum on Indigenous constitutional recognition.

Following the soap box session, Megan McCrone, Senior Education Officer at the Australian Electoral Commission outlined the grounds upon which a change can be made to the Australian Constitution and how a referendum is conducted. Delegates then participated in a mock referendum.

The referendum ballot paper contained the following proposal:

- A Proposed Law: To alter the Constitution as per Option 1.

Delegates were asked to write 'YES' or 'NO' in response to the question 'Do you approve of this proposed alteration?'. One hundred and eighteen formal votes and one informal vote were cast for the ballot. The referendum to alter the Constitution as per Option 1 was successful. The detailed results of the mock referendum were as follows.

National Tally Board	Formal YES	Formal NO	Is the majority in favour?		
New South Wales	21	9	Yes	Is there a majority of voters in the majority of States in favour of the alteration?	Yes
Victoria	19	5	Yes		
Queensland	18	4	Yes		
Western Australia	14	1	Yes		
South Australia	10	2	Yes		
Tasmania	5	0	Yes		
Australian Capital Territory	2	3			
Northern Territory	2	3			
NATIONAL TOTAL	91	27	Is there a majority of voters nationally in favour of the alteration?	Yes	
HAS A DOUBLE MAJORITY BEEN ACHIEVED?				Yes	
HAS THE AUSTRALIAN CONSTITUTION BEEN ALTERED?				Yes	