



Uniting Aboriginal and
Islander Christian Congress



Uniting**Justice**
AUSTRALIA

JANUARY 2015

Submission to the Joint Select Committee on
Constitutional Recognition of Aboriginal and
Torres Strait Islander Peoples

Comments on the Interim and Progress Reports



UnitingJustice Australia is a
unit of the Uniting Church in
Australia Assembly

1. List of recommendations

- The importance of the consultative processes and outcomes of the Expert Panel on Constitutional Recognition of Indigenous Australians must be recognized.
- Section 51(xxvi) should be repealed thereby removing reference to making laws with respect to race and Section 51A as suggested by the Expert Panel should be added.
- Constitutional recognition of the languages of Aboriginal and Torres Strait Islander peoples as the original languages of our modern nation should be included.
- The referendum should be held no later than the 2016 election and preferably by the end of 2015.

2. Introduction

We welcome the opportunity to contribute these comments on progress towards a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander Australians. In particular we respond to the Progress Report of the Joint Select Committee, produced in October 2014, with reference to the Interim Report produced in July 2014. This submission reflects views and relationships developed over years of extensive discussion and reflection within the Uniting Church throughout its life as an organisation and a community. It takes into account the process of consultation within the Uniting Church around the processes and recommendations of the Expert Panel on Constitutional Recognition of Indigenous Peoples in 2012, and is made in line with the statements of the Uniting Church in Australia Assembly (the national council) resulting from these processes.

In a general sense, with the guidance and leadership of the Uniting Aboriginal and Islander Christian Congress (UAICC), this submission seeks to share our relevant organisational and community experience of constitutional change, including our response to confronting our complicity in the paternal and racist policies towards Aboriginal and Torres Strait Islander peoples. We note that this complicity has led to cultural, spiritual and physical dislocation, dispossession and intergenerational trauma. Our organisational experience is in many ways bound to broader national and cultural experience, and we seek to share our learnings from this process with the Committee, particularly in relation to the symbolic importance of our own constitutional change to our community.

More particularly, this submission addresses several statements and proposals of the Joint Select Committee in relation to the Recommendations of the Expert Panel on Constitutional Recognition of Indigenous Australians, made in January 2012. Following an extensive process of consultation and leadership

from the UAICC, the Uniting Church Assembly adopted a resolution specifically endorsing the findings of the Expert Panel. As such we cannot endorse proposals that step back from the spirit of the recommendations of the Expert Panel. Indeed, the Assembly will always be guided by the UAICC when forming resolutions on matters relating to Aboriginal and Torres Strait Islander peoples.

3. Our organisational history

The Uniting Church in Australia formed in 1977, a union of three churches: the Congregational Union of Australia, the Methodist Church of Australasia and the Presbyterian Church of Australia. Each of these faith communities brought with it a unique history in Australasia. We acknowledge that our organisational histories include complicity in institutional racism and practices which furthered the injustice of the Stolen Generations and the ongoing ramifications for our internal relationships.

Today the Uniting Church is a Christian denomination of over 2000 congregations and one million Australians, delivering community services to over two million people across 1300 sites. The Assembly is the national council of the Church, and the UAICC, formed in 1985, is the body of the Church whose 10,000 to 15,000 members are part of Aboriginal and Torres Strait Islander communities across Australia. The Uniting Church has been committed to work in partnership with Aboriginal and Torres Strait Islander peoples in the development of ministry, education, justice, policy and practice, and care and welfare activity.

In 1994, the National Assembly entered into a relationship of 'covenant' with the UAICC, a particular commitment to walk together on a journey of reconciliation. The President of the Assembly formally apologised to the President of the UAICC for and acknowledged the institutional role of its parent churches in Australia's racist policies towards Aboriginal and Torres Strait Islander peoples, stating:

We regret that our churches cooperated with governments in implementing racist and paternalistic policies. By providing foster-homes for Aboriginal children, our churches in reality lent their support to the government practice of taking children from their mothers and families, causing great suffering and loss of cultural identity. Our churches cooperated with governments in moving people away from their land and resettling them in other places without their agreement.¹

¹ *Covenanting Statement of the 7th National Assembly of the Uniting Church in Australia, July 1994, <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/492-covenanting-statement>*

We acknowledge that our organisational histories include complicity in institutional racism and practices which furthered the injustice of the Stolen Generations.

Following this important step, negotiations ensued which involved the provision of further financial reparations, a process which had begun in 1988. This was accompanied by a renewed commitment to undertake significant work in key areas of national policy in support of the UAICC including working toward reconciliation, support for land rights, and campaigning for an apology for the Stolen Generations. In the year 2000, the 9th Assembly called on the Commonwealth Government to provide constitutional acknowledgement for Indigenous Australians as the 'First Peoples' of Australia and to remove racist provisions in its constitution, the process upon which the Committee is now embarked².

In 2009, the Assembly, renewing its commitment to seek genuine partnership with the UAICC, adopted significant amendments to the Preamble of the Uniting Church in Australia Constitution (included as an Appendix)³ that acknowledge the fundamental relationship between Aboriginal peoples and their land. The Preamble also notes the benefit conveyed to 'Second Peoples' by the invasion and dispossession of Aboriginal and Torres Strait Islander peoples' lands. It commits the Church to developing more just, inclusive and equal institutional and interpersonal relationships, recognising the difficult history of Australia surrounding and proceeding from these facts.

The amended Preamble was an important step in calling the Uniting Church to account for the way in which its members are fulfilling their covenantal responsibility to Aboriginal and Torres Strait Islander peoples. These statements, now embedded in our constitution, are a necessary recognition of the place that the Church's commitment to reconciliation holds and will continue to hold in its national life as a community of faith in action. These words offer recognition to Aboriginal and Torres Strait Islander people both within our church and in our institutional relationships with communities where we provide care and advocacy support, and provide an institutional basis for relationships of trust and reconciliation. They are much more than simply the underpinnings of our structure of governance.

4. Response to the expert panel's recommendations

We ask that the Joint Select Committee recognise the importance of the consultative processes and outcomes of the Expert Panel on Constitutional Recognition of Indigenous Australians in the life of many organisations and people. The recommendations of the Expert Panel took into account careful and considered submissions, including our own, which were

² The full resolution is available at <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/488-covenanting>

³ The resolutions other than the revision of the Church's Preamble to the Constitution can be found at <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/487-matters-affecting-indigenous-peoples>

We believe that the acknowledgement in the Australian Constitution of the special place of Aboriginal and Torres Strait Islander peoples as the first peoples of this land will have a significant symbolic and practical effect in the process of reconciliation.

the result of months and years of consultation and discussion.

The Uniting Church Assembly's response⁴ accepted that the time and effort put into the Expert Panel's process produced an important and considered set of recommendations for constitutional change. Our response took into account our own experience that Constitutional change is an important symbolic event, separate to but in addition to its legal significance, and that it can serve to 're-set' the reconciliation process, having had a significant effect on the relationship between indigenous and non-indigenous members of the Church.

The Uniting Church's response to the Expert Panel's recommendations was the result of an extensive internal process of consultation and discussion. This culminated in the recognition and endorsement of the key recommendations contained in the Panel's report of January 2012, by the 13th Assembly. The Assembly resolved to

*welcome the support of Australia's major political parties for the constitutional recognition of Australia's First Peoples and the commitment of the Federal Government to proceed towards a referendum to acknowledge in the Australian Constitution the special place of Australia's First Peoples.*⁵

At the same time, the Assembly called on its councils and agencies to be actively involved in the education campaign around this important process, "reflecting on and sharing our own story of constitutional change as a positive contribution to the public conversation", an injunction honoured by this submission.

The UAICC's leadership and guidance to the Church on this matter was recognised, with the Assembly also calling on its councils, boards, agencies and members to support the UAICC's views on the final proposals for change to be taken to national referendum. Importantly, it noted that "a less than satisfactory proposal may not be supported by the UAICC", whose leadership on this issue is paramount.

We believe that the acknowledgement in the Australian Constitution of the special place of Aboriginal and Torres Strait Islander peoples as the first peoples of this land will have a significant symbolic and practical effect in the process of reconciliation. The impact will go beyond the legal underpinnings of policymaking, to the heart of the reconciliation process as we express as a nation our understanding of the historically violent relationship between the European laws of this nation and Aboriginal and Torres Strait Islander peoples.

⁴ available at <http://www.unitingjustice.org.au/justice-for-indigenous-australians/submissions/item/721-submission-to-the-expert-panel-on-indigenous-constitutional-recognition>

⁵ Resolution available at <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/970-recognition-of-indigenous-peoples-in-the-australian-constitution>

As a diverse community of faith we are supportive of laws that remove discriminatory provisions.

5. Response to the joint committee's interim report and progress report

In light of the above history and comments, we support the wholesale adoption of the recommendations of the Expert Panel. Given the extensive nature of our internal consultation and our concrete endorsement of these recommendations, we support and endorse constitutional change in line with these recommendations.

We welcome and support Recommendations 1 and 2 outlined in the Progress Report of the Joint Select Committee on Constitutional Recognition. It is important that Parliament sets aside a full day to debate the recommendations of the Committee. We would encourage all parliamentarians to engage in genuine dialogue with their Aboriginal and Torres Strait Islander constituents before such a debate. We support the repeal of Section 25 of the constitution (which relates to disqualification from voting of certain race groups).

However, we note that there are several areas where the Joint Select Committee's comments indicate a step back from the spirit of the recommendations of the Expert Panel.

Advancement vs anti-discrimination

We support the repeal of Section 51(xxvi) which would remove reference to making laws with respect to race and welcome the addition of section 51A as suggested by the Expert Panel. However, we note a move within the reports of the Joint Select Committee to step back from the inclusion of preambular language in the proposed Section 51A, specifically the statement "acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander Peoples". We note the Joint Select Committee's consideration of the merits of replacing this explicit statement with a requirement that laws secure the advancement of Aboriginal peoples with an anti-discrimination clause, and also of a proposed alternative removing the preambular language altogether from within the clause and relegating it to an actual preamble.

As a diverse community of faith we are supportive of laws that remove discriminatory provisions, and we believe that the inclusion of an appropriate constitutional anti-discrimination clause has been shown to have broad community support. However our questions are around the substitution of the explicit and positive statement supporting the advancement of Aboriginal peoples with a more neutral anti-discrimination clause, rather than the complementary inclusion of both statements.

We support constitutional recognition of the languages of Aboriginal and Torres Strait Islander peoples as the original languages of our modern nation.

The drafters of this submission are not professional experts in constitutional law. However, in our lay interpretation, there is significant disadvantage in removing an explicit requirement that laws made under this power be tested against the need to secure the advancement of Aboriginal and Torres Strait Islander peoples, in favour of an anti-discrimination test. We recognise that the often violent history of this nation has created conditions of disadvantage and trauma for Aboriginal and Torres Strait Islander peoples. We also argue that the preambular language recommended by the Expert Panel is worded so as to be understood by lay people, that is, by people without legal qualification, as a positive statement recognising the impact of this history of violence, and the need to secure the advancement of Aboriginal and Torres Strait Islander peoples. The drafters of this submission cannot see that the Joint Committee has addressed a need to step back from this explicit language in terms that this submission can support.

In particular, we note that the Committee has received evidence from Professors Dixon and Williams. These constitutional law experts regard the inclusion of such language as introducing the potential for a High Court interpretation allowing the authorisation of “measures designed to redress inequality and achieve more forward-looking goals such as economic empowerment”⁶. We support the inclusion of language that would enable new laws to be made supporting creative, inclusive and potentially as-yet-unconsidered ways of securing the advancement of Aboriginal and Torres Strait Islander peoples. We question whether an anti-discrimination clause could have this effect without the inclusion of such language in the proposed power.

In addition, out of the three options offered under Recommendation 5 of the Joint Select Committee’s Progress Report, we support Option 1, given that it remains truest to the non-discrimination recommendation of the Expert Panel.

Recognition of languages

The Joint Select Committee has proposed a step back from the Expert Panel’s recommendation that a statement of recognition of languages be introduced in the form of S.127A. The Interim Report instead muses that the purpose of this power could be otherwise achieved through inclusion in proposed S.51A as part of its preambular language, or via legislative means and the Progress Report recommends (in recommendation 3) not inserting section 127A.

In line with our extensive national consultations, we support constitutional recognition of the languages of Aboriginal and Torres Strait Islander peoples as the original languages of our modern nation, and recognition that these languages are part of our national heritage. The Assembly supported the form of constitutional wording recommended by the Expert Panel in good faith that, after extensive consultation, this was considered the most effective way of introducing this recognition.

⁶ Dixon R and Williams G, ‘Drafting a Replacement for the Races Power in the Australian Constitution’, *Public Law Review* (25) 2014 p86, quoted by the Interim Report.

We do not support the downgrading of this recognition to a legislative recognition. We would ask that the Joint Select Committee consider that the Constitution has an important symbolic function, as well as a practical and legal function, as the foundation of our system of governance, an expression of our nation's values, and a set of guiding principles for making policy into law. The symbolic importance of constitutional recognition of the languages of Aboriginal and Torres Strait Islander peoples is important, because it embeds it in the very foundation of governance.

Timing

In response to Recommendation 6 of the Joint Select Committee's Progress Report about timing of the referendum, we suggest that the timing of the referendum be no later than the 2016 election and preferably by the end of 2015. As was expressed in the joint NGO media statement on the subject, the referendum should not be put off any longer than is necessary.⁷

6. Conclusion

We note the Joint Select Committee's comments that a strong community base of support for the proposed form of constitutional change is likely to increase popular ownership of the referendum proposals, with "practical and substantive" proposals more likely to secure this support. We assert in response that—without the raising of a substantial, serious and previously unconsidered effect of the particular wording proposed—the recommendations of the Expert Panel represent the most effective form of proposal.

The Expert Panel's recommendations were made after an exhaustive process of consultation with an extensive array of stakeholders. As with many of these organisations, the Uniting Church Assembly's endorsement of these recommendations reflects a long internal discussion and negotiation, with the leadership of our Aboriginal and Torres Strait Islander members. This discussion was informed by our own history and by our acceptance of and sorrow for our part in the violence that has characterised this history. We seek to move forward in a relationship of renewing covenant between First and Second peoples within our faith community, in the spirit of reconciliation and love. The Assembly has called on its members and bodies to be actively involved in this process of national Constitutional change, in recognition that this work is a symbol of our commitment to this relationship of covenant for our faith community. As such we cannot support a step back from the spirit of the changes recommended by the Expert Panel and endorsed by the Church.

⁷ ANTaR, NGOs: clear path to a referendum held no later than 2016 is needed, racial non-discrimination must stay, October 17, 2014

Preamble, Uniting Church in Australia Constitution

The Uniting Church in Australia was formed on 22 June, 1977 by the union of the Congregational Union of Australia, the Methodist Church of Australasia and the Presbyterian Church of Australia after the approval of “The Basis of Union” by the Councils and Courts of those three churches, guided by the belief that they had been called by God into this union.

The Church in accordance with the Basis of Union accepts that the responsibility for government in the Church belongs to the people of God by virtue of the gifts and tasks which God has laid upon them and so organises its life that locally, regionally and nationally, government is entrusted to representatives, men and women, bearing gifts and graces, with which God has endowed them for the building up of God’s Church and that therefore the Church shall be governed by a series of inter-related councils, each of which has its tasks and responsibilities in relation to the Church and the world.

The Church in accordance with the Basis of Union acknowledges that the demand of the Gospel, the response of the Church to the Gospel and the discipline which it requires are partly expressed in the formulation by the Church of its law, the aim of which is to confess God’s will for the life of Christ’s Church.

As the Church believes God guided it into union so it believes that God is calling it to continually seek a renewal of its life as a community of First Peoples and of Second Peoples from many lands, and as part of that to

RECOGNISE THAT

When the churches that formed the Uniting Church arrived in Australia as part of the process of colonisation they entered a land that had been created and sustained by the Triune God they knew in Jesus Christ.

Through this land God had nurtured and sustained the First Peoples of this country, the Aboriginal and Islander peoples, who continue to understand themselves to be the traditional owners and custodians (meaning ‘sovereign’ in the languages of the First Peoples) of these lands and waters since time immemorial.

The First Peoples had already encountered the Creator God before the arrival of the colonisers; the Spirit was already in the land revealing God to the people through law, custom and ceremony. The same love and grace that was finally and fully revealed in Jesus Christ sustained the First Peoples and gave them particular insights into God’s ways.

Some members of the uniting churches approached the First Peoples with good intentions, standing with them in the name of justice; considering their well being, culture and language as the churches proclaimed the reconciling purpose of the Triune God found in the good news about Jesus Christ.

APPENDIX

Many in the uniting churches, however, shared the values and relationships of the emerging colonial society including paternalism and racism towards the First Peoples. They were complicit in the injustice that resulted in many of the First Peoples being dispossessed from their land, their language, their culture and spirituality, becoming strangers in their own land.

The uniting churches were largely silent as the dominant culture of Australia constructed and propagated a distorted version of history that denied this land was occupied, utilised, cultivated and harvested by these First Peoples who also had complex systems of trade and interrelationships. As a result of this denial, relationships were broken and the very integrity of the Gospel proclaimed by the churches was diminished.

From the beginning of colonisation the First Peoples challenged their dispossession and the denial of their proper place in this land. In time this was taken up in the community, in the courts, in the parliaments, in the way history was recorded and told, and in the Uniting Church in Australia.

In 1985 Aboriginal and Torres Strait Islander members of the Uniting Church in Australia formed the Uniting Aboriginal and Islander Christian Congress.

In 1988 the Uniting Aboriginal and Islander Christian Congress invited the other members of the Church to join in a solemn act of covenanting before God.

After much struggle and debate, in 1994 the Assembly of the Uniting Church in Australia discovered God's call, accepted this invitation and entered into an ever deepening covenantal relationship with the Uniting Aboriginal and Islander Christian Congress. This was so that all may see a destiny together, praying and working together for a fuller expression of our reconciliation in Jesus Christ.

AND THUS the Church celebrates this Covenantal relationship as a foretaste of that coming reconciliation and renewal which is the end in view for the whole creation.

“Through this land God had nurtured and sustained the First Peoples of this country, the Aboriginal and Islander peoples, who continue to understand themselves to be the traditional owners and custodians (meaning ‘sovereign’ in the languages of the First Peoples) of these lands and waters since time immemorial.”

*Preamble, Uniting Church
in Australia Constitution*



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