Statement to the

Senate Legal and Constitutional Affairs Committee Inquiry into the

Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

by the National Congress of Australia's First Peoples

NATIONAL CONGRESS
OF AUSTRALIAS FIRST PEOPLES

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Introduction

The National Congress of Australia's First Peoples (Congress) is a national representative body for Aboriginal and Torres Strait Islander Australians. Congress is an independent national voice, a leader, an advocate, and a source of advice and expertise for First Peoples. Drawing strength from culture and history, Congress aims to bring equality, freedom, opportunity and empowerment to all First Peoples. We acknowledge and pay respect to our ancestors, our Elders and all traditional owners of this ancient land.

Congress has almost 5000 individual members, and close to 150 organisational members collectively representing around 50,000 Aboriginal and Torres Strait Islander people.

Congress welcomes the opportunity to participate and contribute to the Senate Legal and Constitutional Affairs Committee Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012. We have not attempted to address all provisions in the Bill but rather focused on issues of particular significance to Australia's First Peoples.

Retention of existing protections including racial vilification

Congress has previously supported the Government's commitment to no diminution of existing protections in federal anti-discrimination legislation through this consolidation process.[1]

Congress particularly welcomes the retention, without change, of the racial vilification provisions, added to the *Racial Discrimination Act 1975* (Cth) in 1995.

Aboriginal and Torres Strait Islander people are subjected to direct and indirect racial discrimination and racism, as well as racial vilification or racial hatred. Congress' discussion paper on the National Anti-Racism Strategy[2] provided a number of examples of when Aboriginal and Torres Strait Islander people have experienced racial vilification:

- racially offensive material on the internet, including blogs and social networking sites[3]
- racially offensive comments or images in publications including newspapers, magazines or leaflets[4]
- racist graffiti in a public place[5]

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[1] National Congress of Australia's First Peoples (Congress), *Position Paper: National Anti-Racism Partnership and Strategy*, June 2012, p.11 http://nationalcongress.com.au/wp-content/uploads/2012/06/20120603CongressAntiRacismDiscussionPaper.pdf

[2] Congress, *Position Paper: National Anti-Racism Partnership and Strategy*, *op cit*, pp.7-8.

[3] The Australian Human Rights Commission has conciliated a number of complaints where websites have contained video footage, photos and other material derogatory about Aboriginal people. After being contacted by the Commission, the websites have removed the offending material and in some cases issued warnings against the person responsible for posting the material: see Australian Human Rights Commission (AHRC), Conciliation Register: Racial Discrimination Act 1975, For complaints conciliated and finalised in the period of Jan-June 2010, http://www.humanrights.gov.au/complaints_information/register/rda/rda_jan_june10.html#racial (viewed 3 June 2012).

[4] In September 2011, the Federal Court found that *Herald Sun* columnist Andrew Bolt had breached the Racial Discrimination Act when he wrote that a number of light-skinned Aboriginal people chose an Aboriginal identity in order to further their careers: *Eatock v Bolt*, *op cit*.

- racially abusive comments at sporting events by participants, spectators, coaches or officials.[6]

Racism in all forms has a debilitating individual impact on Aboriginal and Torres Strait Islander people, devaluing their cultural pride and identity and having adverse impacts on their physical and mental health. More broadly, racism and the lack of trust it engenders is detrimental to reconciliation efforts in Australia.

Congress asserts that there is no room in a modern and responsible Australia for racial vilification. While we must fight to protect freedom of speech, freedom of speech is not a licence to foster intolerance and racial hatred.

We urge Committee members to explicitly support clause 51 of the Bill, which prohibits racial vilification subject to exceptions intended to preserve artistic performances, genuine academic, artistic or scientific debate, and fair reporting of matters in the public interest.

We further urge all Members of Parliament and Senators to support these provisions when this Bill comes before the Parliament.

Congress also welcomes the retention of s 10 of the Racial Discrimination Act in clause 60 of the Bill, which provides for equality before the law for people of all races.

Aboriginal and Torres Strait Islander people's underuse of anti-discrimination legislation

Congress is concerned about the underuse by Aboriginal and Torres Strait Islander people of remedies available in current anti-discrimination legislation.

The 2008 National Aboriginal and Torres Strait Islander Social Survey found that 27% of Aboriginal and Torres Strait Islander people aged 15 years and over reported having experienced discrimination in the previous 12 months[7]. This represents more than 88,000 people who did not complain under the Racial Discrimination Act about racial discrimination that they experienced. Race discrimination complaints under State and Territory legislation do not make up the difference - for example, 44 complaints were made in NSW[8] and 43 complaints made in WA[9] in 2008-09, two states in which almost half of all Aboriginal and Torres Strait Islander people live.

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[5] In March 2012 gravestones in an Aboriginal community's cemetery at Fingal Head were spray-painted with the words 'white power', the letters 'KKK' and a swastika: Elloise Farrow-Smith and Samantha Turnbull, 'Racist vandalism of burial site', *ABC North Coast NSW* website, 8 March 2012, http://www.abc.net.au/local/stories/2012/03/08/3448730.htm (viewed 3 June 2012).

[6] Racial slurs toward Aboriginal people have long been common in the sporting arena: for example, in AFL, then-Collingwood AFL president Allan McAlister's 1991 remark that Aboriginal people were welcome at the club as long as they conducted themselves like white people; Nicky Winmar's reaction to abusive spectators in 1993 and Damian Monkhorst's racist taunt of Michael Long in 1995: Greg Baum, 'Rules of the game: no place for racism in today's AFL', *The Age*, 28 June 2011, http://www.theage.com.au/afl/afl-news/rules-of-the-game-no-place-for-racism-in-todays-afl-20110627-1gnmi.html#ixzz1S84FUaOV (viewed 3 June 2012). More recently in Australian Rugby League, in 2010, Andrew Johns, the assistant coach of the NSW Origin team, resigned after calling an opposition Aboriginal player a "black c**t" at a team camp: Andrew Webster, David Riccio and Peter Badel, 'Inglis racial slur is unacceptable', *The Sunday Telegraph*, 13 June 2010, http://www.dailytelegraph.com.au/sport/nrl/inglis-racial-slur-is-unacceptable/story-e6frexv9-1225878945387 (viewed 3 June 2012).

[7] Australian Bureau of Statistics, May 2012. 4704.0 – *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Oct 2010. Results of the 2008 National Aboriginal and Torres Strait Islander Social Survey. *http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010*

[8] Anti-discrimination Board (NSW) Annual Report 2008-09. http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2008_2009#Aboriginal

[9] Equal Opportunity Commission (WA) Annual Report 2008-09. http://www.eoc.wa.gov.au/Libraries/pdfs/Annual_Report_2008-2009.sflb.ashx

The greatest proportion of complaints made by Aboriginal and Torres Strait Islander people are about racial discrimination. Aboriginal and Torres Strait Islander people lodged 36% of complaints (171 of 477) under the Racial Discrimination Act in in 2011-12[10] and have lodged an average of 33% of all complaints under the Racial Discrimination Act in the last 10 years[11].

In contrast, the use of other Federal anti-discrimination Acts is roughly in proportion to the 2.5% of Aboriginal and Torres Strait Islander people in the Australian population. In 2011-12, Aboriginal and Torres Strait Islander people lodged 3% of complainants under the Sex Discrimination Act, 2% under the Disability Discrimination Act, 2% under the Age Discrimination Act and 3% under the Australian Human Rights Commission Act.[12]

These figures demonstrate that the current legislative framework has not provided an effective remedy for endemic racial discrimination experienced by many Aboriginal and Torres Strait Islander people, often on a daily basis.

Some legislative frameworks may better facilitate discrimination complaints. For example, over the last 9 years Aboriginal and Torres Strait Islander people made an average of 20% of all complaints under WA anti-discrimination legislation[13] (while making up approximately 3.1% of the WA population) compared to 6.6% of complaints under NSW anti-discrimination legislation[14] (while making up approximately 2.5% of the NSW population).

Better access to justice under the proposed Act

Congress welcomes the proposed legislative framework in this Bill, which aims to be more efficient, effective and easier to understand. We particularly welcome the following aspects of this Bill:

- Simpler and streamlined definitions as to what discrimination means (clause 19), when discrimination is unlawful (clause 22) and what areas of public life are covered by the Bill (clause 22)
    - We particularly welcome the simplification of the existing multi-stage definition of racial discrimination in s 9 of the Racial Discrimination Act. We consider that the Racial Discrimination Act may not be used as much as it could be due to the complicated current test and hope that a simpler test for racial discrimination should assist Aboriginal and Torres Strait Islander people use these provisions more regularly.
- Shifting the burden of proof (clause 124) so that the complainant is responsible for establishing a prime facie case, and once the complainant has discharged this burden, the reason for the conduct will be presumed unless the respondent can establish a defence (clause 126).
- The provision of a no costs jurisdiction (clause 133) – a default position that each party will bear their own costs in proceedings in the Federal Court or the Federal Magistrates Court, rather than costs following the event as is currently the case.

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[10] Australian Human Rights Commission, Annual Report 2011-12, Appendix 3, Tables 12 and 14. http://humanrights.gov.au/about/publications/annual_reports/index.html

[11] Compiled from Australian Human Rights Commission Annual Reports 2002-03 – 2011-12 http://humanrights.gov.au/about/publications/annual_reports/index.html

[12] Australian Human Rights Commission, Annual Report 2011-12, Appendix 3. http://humanrights.gov.au/about/publications/ annual_reports/index.html.

[13] Compiled from Equal Opportunities Commission WA annual reports available at http://www.eoc.wa.gov.au/Publications/AnnualReports.aspx

[14] Compiled from Anti-Discrimination Board of NSW annual reports available at http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_index

- Congress believes that the risk of an adverse decision and a significant cost order is among the factors that may have impeded Aboriginal and Torres Strait Islander people pursuing actions under current anti-discrimination legislation.

We consider that these provisions will provide an important step forward in progressing access to justice for First Peoples.

However, we remain concerned that there are no measures within this Bill that will specifically encourage more Aboriginal and Torres Strait Islander people to use anti-discrimination legislation as a means to remedy the discrimination they face as individuals, and systemically as Australia's First Peoples.

We also stress that access to justice under the proposed Human Rights and Anti-Discrimination Act requires that the process of lodging a complaint be within the reach of those for whom English is not a first language or for whom written literacy is limited. The existing process requires that complaints be lodged in writing, forming a barrier for many Aboriginal and Torres Strait Islander people who have limited written literacy. Consideration should be given to improving access in this regard.

Intersectional discrimination

Congress supports the Bill's provisions for explicit recognition of discrimination on the basis of a combination of attributes for all grounds, which recognises that people with multiple attributes often face compounded discrimination.

Aboriginal and Torres Strait Islander people experience disability at significantly higher rates that the general population and those with disability report more racial discrimination (32%) than those without disability (22%).[15]

Standing for representative and public interest bodies

Clause 89 of this Bill sets out the requirement that in all matters there must be one or more persons or an industrial association on behalf of a person or persons who have been aggrieved by the conduct before a complaint can be lodged with the Australian Human Rights Commission.

Congress notes that bringing a complaint to the Commission can be an intimidating process for an individual who has experienced discrimination. For this reason we have previously recommended that consideration be given in the consolidation process to allow organisations with a special interest in a matter to have standing to bring public interest cases.[16] Congress considers that such public interest cases may provide a greater opportunity for systemic change than does the more *ad hoc* complaints system that currently operates.

Congress therefore strongly recommends that this Bill provide a capacity for representative third parties, such as Aboriginal and Torres Strait Islander governing bodies, advocacy organisations and representative institutions, to bring complaints in their own right in the public interest.

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[15] Australian Bureau of Statistics, May 2012. 4704.0 – *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Oct 2010. Results of the 2008 National Aboriginal and Torres Strait Islander Social Survey. *http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010*

[16] National Congress of Australia's First Peoples (Congress), *Position Paper: National Anti-Racism Partnership and Strategy*, June 2012, http://nationalcongress.com.au/wp-content/uploads/2012/06/20120603CongressAntiRacismDiscussionPaper.pdf, p.12.

Targeted education and promotion of anti-discrimination legislation to Aboriginal and Torres Strait Islander peoples

Congress considers that there is a great need for rights-based training for individuals and communities experiencing discrimination, including information about remedies to address discrimination. The Australian Human Rights Commission should work in partnership with State and Territory Anti-Discrimination Boards or Equal Opportunity Commissions in such work, and provide clarification and guidance as to whether a victim of race discrimination or vilification should make a complaint to the AHRC or a State or Territory body.

Congress notes that there is considerable confusion about this issue within our communities, which may contribute to the underuse of these remedies by Aboriginal and Torres Strait Islander people.

Compliance tools

Congress supports provisions of the Bill that provide for measures such as reviews, action plans, compliance codes and certification of special measures aimed at encouraging wider compliance with anti-discrimination law. These tools are aimed at assisting individuals and organisations to better understand and comply with anti-discrimination law.

Congress regards these measures as potential tools to reduce systemic discrimination against Aboriginal and Torres Strait Islander Peoples, rather than relying on complaints mechanisms alone. Consideration should be given to making some tools a requirement for public bodies and large corporations.

United Nations Declaration on the Rights of Indigenous Peoples

Congress notes that Clause 3(2) of the Bill defines human rights instruments by listing the seven core United Nations human rights instruments. We note that this definition aligns with the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2012* and are the same international instruments underpinning the Human Rights Framework. We believe that this provision should be amended to also include an explicit reference to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

Congress insists that the rights in the Declaration apply in all policy and law that affects Aboriginal and Torres Strait Islander people. In 2009, the Hon Jenny Macklin, Minister for Indigenous Affairs, described the Declaration as "a landmark document", both "historic and aspirational", by which "we show our faith in a new era of relations between states and Aboriginal people grounded in good faith, goodwill and mutual respect".[17]

Despite its formal endorsement by the Australian Government in 2009, we have been disappointed that – unlike the seven core international treaties to which Australia is a signatory – the Declaration is seen within some sectors of Government as "an aspirational rather than binding document".[18]

Congress is firmly of the view that the Declaration is an interpretive tool for existing human rights already referenced through the *Human Rights (Parliamentary Scrutiny) Act 2012*, and as such is an essential part of Australia's human rights framework.

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[17] Macklin, J., 2009. Minister for Families, Housing, Community Services and Indigenous Affairs – Statement on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra, 3 April 2009. http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[18] Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), International Indigenous Issues – Declaration on the Rights of Indigenous Peoples, http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Pages/InternationalIssues.aspx (viewed 3 June 2012).

Importantly, the Declaration confirms in Article 1 that First Peoples have group or collective rights. These collective rights should be recognised in the proposed Human Rights and Anti-Discrimination Act through a capacity for Aboriginal and Torres Strait Islander governing bodies and representative institutions to bring discrimination complaints in their own right in recognition of the collective rights of First Peoples.

Congress expects the Government to comply with the Declaration and to the overall protection of Aboriginal and Torres Strait Islander people's rights, both collective and individual. We believe that the Australian Government, as a result of its endorsement of the Declaration, has a moral obligation similar to its obligations to comply in the position as a signatory. Putting the legal and technical arguments of complicity to one side, what does it actually mean when the Australian Government commits to something like the Declaration? Congress firmly believes that the moral obligation on the Government due to its commitment to implementation is as valuable as its obligations under international law to treaties as a signatory.

Pursuant to the Australian Government's stated commitment to Aboriginal and Torres Strait Islander rights, and its formal endorsement of the Declaration, Congress has previously argued for an amendment to the *Parliamentary Scrutiny (Human Rights) Act 2012* to require all new Bills submitted to Parliament to be accompanied by a "Statement of Compatability" to the Declaration, in addition to the seven core treaties currently listed under the Act.[19]

We strongly recommend that this Bill be amended to include reference to the Declaration, and that a consequential amendment be made to the *Parliamentary Scrutiny (Human Rights) Act 2012* to ensure consistency between these two pieces of legislation.

Special measures require free, prior and informed consent of First Peoples

Congress notes that the Bill adopts a uniform definition for special measures, but does not include a specific requirement for free, prior and informed consent of First Peoples in the making of laws and policies which affect Aboriginal and Torres Strait Islander Peoples, as required in the United Nations Declaration on the Rights of Indigenous Peoples.

Congress expects the Government to comply with the Declaration and to the overall protection of Aboriginal and Torres Strait Islander people's rights, both collective and individual.

Special measures are used across Australia to enact laws for the 'advancement' of First Peoples without any yard stick for their effectiveness, duration or community support and acceptance. The International Convention on the Elimination of All Forms of Racial Discrimination and the Declaration require that the right of self-determination and informed consent be central considerations for decisions that affect Aboriginal and Torres Strait Islander communities.

Congress calls for application of the Declaration in relation to this Bill, particularly with regard to the Declaration's requirement under Article 19 that where laws and policies are being created that affect First Peoples, these peoples should be properly informed and there should be honest and open negotiation so that affected peoples are able to give their free and prior informed consent.

Congress is also of the view that the following principles should apply to the application of special measures to Aboriginal and Torres Strait Islander Peoples. Special measures must:

- Have the sole purpose of ensuring equal human rights.
- Obtain the prior, informed consent of the people affected.
- Be designed and implemented through prior agreement with the people concerned.

[19] National Congress of Australia's First Peoples, Position Paper: National Anti-Racism Partnership and Strategy June 2012, p.11 http://nationalcongress.com.au/wp-content/uploads/2012/06/20120603CongressAntiRacismDiscussionPaper.pdf

- Have clarity in regard to the results to be achieved from the special measures.
- Have accountability to the people concerned.
- Be appropriate to the situation to be remedied and grounded in a realistic appraisal of the situation to be addressed.
- Have justification for the proposed special measures including how they will obtain the perceived outcomes.
- Be temporary and only maintained until disadvantage is overcome.
- Have a system for monitoring the application and results of special measures.

Aboriginal and Torres Strait Islander Social Justice Commissioner

Congress welcomes the retention in clause 160 of the Bill of the Aboriginal and Torres Strait Islander Social Justice Commissioner as a member of the Commission.

We also welcome the retention in clause 153 of the Bill of the requirement that reports on the enjoyment of human rights by Aboriginal and Torres Strait Islander peoples, and reports under section 209 of the Native Title Act 1993, be specifically prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner.[20]

The AHRC Act currently requires that the reports relating to the enjoyment of human rights by Aboriginal persons and Torres Strait Islanders be produced as soon as possible after 30 June each year. We note that under clause 147 of this Bill, the Aboriginal and Torres Strait Islander Social Justice Commissioner will no longer be required to report, or specify any period within which reports must be produced. We understand a report may be produced at any time by the Commission on its own initiative, or at the request of the Minister.

We are concerned that this change allows for the future downgrading of the importance of the role of and work done by the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Congress notes and supports the Aboriginal and Torres Strait Islander Social Justice Commissioner's recommendation, reiterated in the *Social Justice Report 2012*, that the Australian Government should provide a formal written response to the 2012 Report and subsequent Social Justice Reports.[21] Congress also proposes that the Australian Government should provide public hearings on the Social Justice Reports so that issues may be aired openly and transparently.

Conclusion

Subject to the considerations outlined in this statement, Congress supports the Human Rights and Anti-Discrimination Bill 2012 and encourages the Parliament to promptly consider and pass the Bill.

In particular, we urge the Parliament to support these provisions of the proposed Bill:

1. No diminution of existing protections in federal anti-discrimination legislation.
2. Retention without change of the existing racial vilification provisions in the Racial Discrimination Act.
3. Retention of s 10 of the Racial Discrimination Act which provides for equality before the law for people of all races.

[20] Currently Subsection 46C(2), AHRC Act.

[21] Aboriginal and Torres Strait Islander Social Justice Commissioner, AHRC, *Social Justice Report 2012*, *op cit*, p.21.

4. Simplification of the existing multi-stage definition of racial discrimination in s 9 of the Racial Discrimination Act.
5. Shifting the burden of proof in complaints (clause 124).
6. The provision of no-cost jurisdiction (clause 133).
7. Explicit recognition of discrimination on the basis of a combination of attributes.
8. Retention of the Aboriginal and Torres Strait Islander Social Justice Commissioner as member of the Australian Human Rights Commission.
9. Retention of the requirement that the Aboriginal and Torres Strait Islander Social Justice Commissioner report on the enjoyment of human rights by Aboriginal and Torres Strait Islander peoples, and reports under section 209 of the Native Title Act 1993.
10. Provisions that provide for compliance tools such as reviews, action plans, compliance codes and certification of special measures.

Congress strongly urges the Senate Legal and Constitutional Affairs Committee and Parliament to consider the following additions to the Bill:

11. The addition of a capacity for Aboriginal and Torres Strait Islander governing bodies and representative institutions to bring complaints in their own right on behalf of the collective rights of First Peoples which are recognised in the UN Declaration on the Rights of Indigenous Peoples.
12. The addition of education measures that will specifically encourage more Aboriginal and Torres Strait Islander people to use anti-discrimination legislation as a means to remedy the discrimination they face as individuals and systemically.
13. The addition of reference in Clause 3(2) to the United Nations Declaration on the Rights of Indigenous Peoples, and a consequential amendment to the *Parliamentary Scrutiny (Human Rights) Act 2012* to ensure consistency between these two pieces of legislation.
14. The requirement that free, prior and informed consent is gained from affected communities before the design and implementation of special measures that affect Aboriginal and Torres Strait Islander Peoples.
15. The requirement that all special measures that affect Aboriginal and Torres Strait Islander Peoples have the sole purpose of ensuring equal human rights, have clear goals, have accountability to the people concerned, and are justified, appropriate, temporary and monitored.
16. The requirement for the Australian Government to provide a formal written response to, and public hearings on, the 2012 and all subsequent Social Justice Reports.

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