

Explanatory Memorandum to Proposed Constitution Amendments

**84th Annual General Meeting of The Royal Australasian College of Physicians
held Friday, 5 May 2023**

Proposal for new Indigenous Object in the College Constitution

The College has undertaken a review of its Constitution and considered advice from the Māori Health Committee and the Aboriginal and Torres Strait Islander Health Committee for the addition of a new Indigenous Object to the College's Constitution. The Board requested the Māori Health Committee and the Aboriginal and Torres Strait Islander Health Committee in 2019 to prepare a new Indigenous Object that could be proposed to the College members as an addition to the current list of Objects listed in clause 1 of the College's Constitution. The Māori Health Committee and the Aboriginal and Torres Strait Islander Health Committee prepared the new Indigenous Object below and at a joint meeting with the Māori Health Committee, the Aboriginal and Torres Strait Islander Health Committee and the Board in November 2022, it was agreed to propose that Indigenous Object to the College members:

- 1.1** The objects of the College are, in Australia and New Zealand, and such other places as the Board thinks appropriate, to: ...

“1.1.9 demonstrate a commitment to Indigenous aspirations and outcomes by:

- (a) respecting and promoting the principles as enshrined in the Uluru Statement from the Heart, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples;
- (b) advancing justice and equity in health care for Aboriginal and Torres Strait Islander and Māori communities; and
- (c) acknowledging the world views, protocols and cultures of the Aboriginal and Torres Strait Islander and Māori peoples.”

What is a Constitutional Object of the College

The Constitution sets out the Objects of the College which are the purposes for which the College is formed and generally (but not exclusively) form the basis for its activities. The College's objects are binding on the College and its board.

As a registered charity, under the Australian Charities and Not-for-profits Commission (ACNC) Governance Standard 1, the College is required to work towards the College's charitable purpose it was established to achieve. To do this, the College must be able to

demonstrate, by reference to its constitution or other means, its purposes and character as a not for profit entity. This is achieved in part through the objects provision of the College's constitution setting out its charitable purpose.

The objects clause does not set out the scope or limits of the legal capacity of a company and an act of a company is not invalid merely because it is contrary to or beyond any objects in the constitution. However, if the College were to engage in conduct which is contrary to a stated object in the constitution (as opposed to not positively furthering a particular object) such conduct may be asserted or relied on in other actions against the College or its directors.

What are the Uluru Statement from the Heart, Te Tiriti o Waitangi (The Treaty of Waitangi) and the United Nations Declaration on the Rights of Indigenous Peoples?

As described above, the proposed new Object includes a commitment to Indigenous aspirations and outcomes by respecting and promoting the principles as enshrined in the Uluru Statement from the Heart, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples.

The Uluru Statement from the Heart, Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples are each directed at State action and the College is not under an obligation to comply with those documents. The effect of the proposed change to the Constitution is that it will be an object of the College demonstrate a commitment to Indigenous aspirations and outcomes by respecting and promoting the principles enshrined in those documents. The effect of the College's objects provision in its Constitution is summarised below.

Uluru Statement from the Heart

The Uluru Statement from the Heart was issued on 26 May 2017 by delegates to the First Nations National Constitutional Convention. The Uluru Statement from the Heart calls for the enshrinement in the Commonwealth of Australia Constitution of a First Nation Voice to Parliament together with a Makarrate Commission to supervise a process of agreement-making between Aboriginal and Torres Strait Islander peoples and governments and truth-telling about First Nations history. The Statement is directed at State action and is not a legally binding document.

Te Tiriti o Waitangi

Te Tiriti o Waitangi is Aotearoa New Zealand's founding document and is comprised of two agreements between rangatira (chiefs) and representatives of the British Crown, one in English and the other in Te Reo Māori and which are not exact translations of each other. Te Tiriti o Waitangi confers the right of governance on the British, guarantees to the tribes of Aotearoa "tino rangatiratanga" or sovereignty over their lands, homes and all their "toanga" (matters of importance to the tribe) while the English version guarantees "full exclusive and undisturbed possession" of lands, estates, forests, fisheries and other properties and the Crown extends royal protection and confers rights and privileges of British subjects to Māori. The principles of Te Tiriti o Waitangi are not defined anywhere in legislation and instead have been developed over time by the courts and the Waitangi Tribunal. Te Tiriti o Waitangi relationship is between Māori and the Crown, rather than between Māori and other entities.

Accordingly, non-Crown entities such as the College are not under an obligation to comply with the principles of Te Tiriti o Waitangi unless there is a specific requirement to do so.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples is an international document that sets out rights of indigenous peoples in relation to a wide range of areas other than just health including self-determination, culture and identity, education, economic development, religious customs, health, and language and actions that States/Countries are expected to take to ensure that those rights are realised. While Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2009, it is not legally binding or enforceable and has not been adopted as Australian law.

Recommendation by the Board

Having considered the benefits and disadvantages of the proposal, the Board recommends members vote in favour of the Special Resolution to include the new Indigenous Object in the College's Constitution. The Board recommends that members read the benefits and disadvantages of the proposed new Indigenous Object set out below.

Benefits of the proposed Indigenous Objects provision

The benefits of the proposed changes include the following:

1. In relation to the proposed change in clause 1.1.9 (a) and the Te Tiriti o Waitangi, while the law does not require the College to make a commitment to the principles of Te Tiriti o Waitangi in Australia and Aotearoa New Zealand, the College provides education training to physicians who also work in the public Health system. In Aotearoa New Zealand, legislation requires the public health care system to commit to equitable outcomes and to recognise and respect Te Tiriti in Aotearoa New Zealand, and to give effect to that, in the manner in which medicine is practised.
2. The commitment by the College to the proposed change in clause 1.1.9 (a) and (c):
 - (a) by respecting and promoting the principles enshrined in Te Tiriti o Waitangi, the Uluru Statement from the Heart and the United Nations Declaration on the Rights on the Rights of Indigenous Peoples; and
 - (b) by acknowledging the world views, protocols and cultures of the Aboriginal and Torres Strait Islander and Māori peoples,

will reflect the recognition by the College of the significance of those documents and the recognition of the unique status and needs of the Aboriginal and Torres Strait Islander and Māori peoples.

3. The commitment by the College to the proposed change in clause 1.1.9 (b) advancing justice and equity in health care for Aboriginal and Torres Strait Islander and Māori communities reflects the commitment by the College to promote equitable health outcomes for those communities.

4. The proposed new Indigenous Object in the College's Constitution is a recognition by the College of its intention to consult with Aboriginal and Torres Strait Islander and Māori peoples on Aboriginal and Torres Strait Islander and Māori health matters.

Disadvantages of the proposed Indigenous Objects provision

The disadvantages of the proposed changes include the following:

1. In relation to the proposed change in clause 1.1.9 (a), the Uluru Statement from the Heart, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples are directed at State action, and the College is not under any obligation to include a commitment to these documents in its Constitution. Since they are directed at State action, there are likely to be at least some circumstances in which it is not clear what a private entity such as the College would need to do to comply with them.
2. There is a risk that non-compliance with the proposed new Indigenous Object gives rise to the risk of legal challenge to Board and management decisions. In Aotearoa New Zealand, along with members, third parties may be able to legally challenge such Board or management decisions if either their personal rights and interests are affected by the decision under challenge or they have an honest interest in a sufficiently public issue.
3. In relation to the proposed change in clause 1.1.9 (c) to demonstrate a commitment to indigenous aspirations and outcomes by acknowledging the world views, protocols and cultures of the Aboriginal and Torres Strait Islander and Māori peoples, there is no one interpretation of such world views, protocols or cultures and in some cases there will not be a single world view, protocol or cultural practice within any particular Aboriginal and Torres Strait Islander and Māori culture or individuals. Māori, Aboriginal and Torres Strait Islanders are diverse and differences exist between each peoples and individuals within each culture.
4. Since there is no one interpretation of world views, protocols and cultures of the Aboriginal and Torres Strait Islander and Māori peoples, this increased uncertainty as to the meaning of this proposed Object may lead to increased risk of legal challenge to Board and management decisions.

How the College currently intends to implement the Indigenous Object

The College intends to implement the proposed Indigenous Object in the following ways:

1. Consult with the Māori Health Committee and the Aboriginal and Torres Strait Islander Health Committee in relation to Māori, Aboriginal and Torres Strait Islanders health matters.
2. Continue to develop initiatives for improved health outcomes for Māori, Aboriginal and Torres Strait Islander peoples as the College notes that Māori, Aboriginal and Torres Strait Islanders experience health disparities and higher burdens of ill health and shorter life expectancies. Examples of current initiatives in this regard include:

(a) the College's Indigenous Strategic Framework (2018-2028)
<https://www.racp.edu.au/about/board-and-governance/governance-documents/indigenous-strategic-framework-2018-2028>);

(b) awarding of Indigenous Scholarships and Prizes

(<https://www.racp.edu.au/about/foundation/indigenous-scholarships-and-prizes>) to help grow the Indigenous Physician workforce.

3. Respect and promote the principles as enshrined in the Uluru Statement from the Heart, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples by advocating for justice and equity in health care for Aboriginal and Torres Strait Islander and Māori communities.
4. Respect and promote the principles as enshrined in the Uluru Statement from the Heart, Te Tiriti o Waitangi, and the United Nations Declaration on the Rights of Indigenous Peoples by building into the College's Physician training program Indigenous Health and cultural safety training.

Requirement to pass the Resolution to change the Constitution

In order to amend the College's Constitution, the Corporations Act requires that a special resolution of College members is passed by at least 75% of the votes cast by members entitled to vote on the resolution.

Consequences of Resolution not being passed

The College is not legally obligated to pass this resolution. If the resolution is not passed by 75% or more of the votes cast by College members, there will no amendment to the College Constitution. However, the College can, without any constitutional change, continue to consult with Māori, Aboriginal and Torres Strait Islander peoples through its Committees, the Māori Health Committee and the Aboriginal and Torres Strait Islander Health Committee or seek specialist Indigenous skills and advice in relation to Indigenous matters and advancing justice and equity in health care for with Māori, Aboriginal and Torres Strait Islander peoples.