



Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

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

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Introduction

1. The Human Rights Law Centre (**HRLC**) welcomes and supports the Australian Government's commitment to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The introduction of the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (**Bill**) is an important stepping stone on the path to recognition of and equality for Aboriginal and Torres Strait Islander peoples in the Australian Constitution.
2. Regardless of the eventual outcome of any Constitutional reform, it is essential that the process for considering potential reform respects and gives effect to Australia's international human rights obligations, including in particular the right of Aboriginal and Torres Strait Islander peoples to participate meaningfully in decision making about matters that directly affect them.
3. This submission identifies aspects of the Bill which are supported by the HRLC and also makes a number of recommendations to amend the Bill to ensure that its passage properly represents "a clear step forward towards holding a successful referendum".¹

2. Passage of the Bill is an Important Step

4. The HRLC welcomes the introduction of legislation that positively recognises that Aboriginal and Torres Strait Islander peoples were the first inhabitants of Australia. Formal recognition in an Act of Parliament is an important step to garner multi-partisan and broad public support for a referendum. The Bill should not, however, be seen as an alternative to Constitutional recognition.² In this respect, the HRLC welcomes the references in the Explanatory Memorandum and the Bill to building national consensus towards a referendum for Constitutional reform.
5. In the context of the need to build and maintain momentum towards a referendum, the HRLC also supports the inclusion of the sunset clause in the Bill, which requires the Minister to cause a review to occur and a report to be produced to Parliament within a defined period.

¹ Minister Jenny Macklin, Second Reading Speech, 28 November 2012.

² See also ANTaR's submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples: Inquiry into the Aboriginal and Torres Strait Islander Peoples Recognition Bill, December 2012, page 3.

3. Meaningful Participation of Aboriginal and Torres Strait Islander Peoples

3.1 Conduct of the Review

6. Clause 4(2) of the Bill requires the Minister to cause a review to be commenced within 12 months after the commencement of the legislation. However, no provision is made for who will be appointed to conduct that review. Consistent with the right of self determination, the HRLC recommends that the Bill provide that the persons undertaking the review include representatives of Aboriginal and Torres Strait Islander organisations and communities.

Recommendation 1:

Clause 4 of the Draft Bill be amended to provide that the persons to be appointed by the Minister to conduct the review shall include representatives of Aboriginal and Torres Strait Islander organisations and communities.

3.2 Obtaining the Support of Aboriginal and Torres Strait Islander Peoples

7. Clause 4(2)(c) of the Bill directs the review to focus on identifying proposals for Constitutional reform that “would be most likely to obtain the support of the Australian people”. The HRLC is concerned that clause 4(2) as currently drafted may not adequately ensure that any proposals for Constitutional reform that are identified first have the support of Aboriginal and Torres Strait Islander peoples.
8. While clause 4(2)(d) does require the review to consider the levels of support for amending the Constitution amongst Aboriginal and Torres Strait Islander peoples (as well as the wider Australian public and State and Territory governments), the inclusion and positioning of clause 4(2)(c) could arguably be interpreted to require that:
- (a) firstly, proposals that would be most likely to obtain the support of the Australian people are identified; and
 - (b) secondly, that the level of support of Aboriginal and Torres Strait Islander peoples then be considered.

9. In order to avoid any uncertainty, and to ensure that the support of Aboriginal and Torres Strait Islander peoples for any proposed Constitutional amendments is obtained first and foremost, the HRLC recommends that clause 4(2)(c) of the Bill be removed. This would provide certainty and be consistent with the right of self determination by ensuring that any proposed referendum questions must have the support and backing of Aboriginal and Torres Strait Islander peoples.

Recommendation 2:

Clause 4(2)(c) of the Draft Bill be removed, or alternatively, that clause 4(2) be amended to provide clarity regarding the need for any proposed referendum questions to have the prior support of Aboriginal and Torres Strait Islander peoples.

4. Work Already Undertaken by the Expert Panel

4.1 Expert Panel's Work Constitutes a Solid Foundation

10. Clause 4(2)(b) of the Bill envisages the review "taking into account" the work of the Expert Panel, as well as that of Reconciliation Australia, when they consider and report on the proposals for Constitutional change. The Expert Panel was tasked with conducting broad national consultation and presenting recommendations that were "capable of being supported by an overwhelming majority of Australians from across the political and social spectrums".³
11. As identified in ANTaR's submission to this inquiry, the Expert Panel's recommendations are "sound, robust and reasonable". The HRLC considers that the work already undertaken by the Expert Panel should form a strong basis for the review to be undertaken in accordance with the Bill.
12. Accordingly, the HRLC recommends that a stronger emphasis be placed in both the Bill and Explanatory Memorandum on the work that has already been undertaken by the Expert Panel, including in particular the Panel's full range of recommendations (discussed further below). The HRLC suggests that the words "taking into account" contained in clause 4(2)(b) of the Bill be strengthened to "based on".

³ *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, Report of the Expert Panel (January 2012), Executive Summary, xi.

Recommendation 3:

Clause 4(2)(b) be amended to provide that the findings and recommendations of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (together with the work of Reconciliation Australia) form a strong basis for the proposals for Constitutional change to be included in the review.

4.2 Recognition of Other Recommendations of the Expert Panel

13. The HRLC notes that both the Bill and the Explanatory Memorandum largely focus only on *recognition* of Aboriginal and Torres Strait Islander peoples and not on the other recommendations made by the Expert Panel relating to equality. Indeed, the Bill makes no specific mention of the recommendations of the Expert Panel, while the Explanatory Memorandum suggests that the review should only consider proposals for Constitutional *recognition* of Aboriginal and Torres Strait Islander people and not the full range of recommendations made by the Expert Panel.
14. The HRLC is concerned that there may be a risk that the text of the Explanatory Memorandum could be taken to limit the proposals for Constitutional reform that may be considered by the review. Accordingly, the HRLC recommends that both the Bill and the Explanatory Memorandum be revised to promote a review process that considers the full range of recommendations of the Expert Panel, without limitation. This would in no way compel the Australian Government to put a particular set of questions to a referendum that did not have the support of the Aboriginal and Torres Strait Islander peoples or indeed the broader Australian public.

Recommendation 4:

Clause 4(2) of the Draft Bill, together with the Explanatory Memorandum, be amended to reflect the full range of recommendations made by the Expert Panel.

5. Statement of Compatibility

15. Finally, the HRLC welcomes the inclusion of a Statement of Compatibility, as required by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Subject to the recommendations made in this submission, the HRLC agrees with the statement that the Bill is consistent with Australia's human rights obligations.