

Submission to the Inquiry into Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, being conducted by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

The Recognition Bill is a welcome step towards putting a question or questions to the electors at a referendum under s 128 of the Commonwealth Constitution regarding the recognition of Aboriginal and Torres Strait Islander peoples.

This submission comments on three aspects of the Bill in its current form.

1. The sunset clause – two types of recognition.
2. A need to consider awareness and knowledge of past and current constitutional status of Aboriginal and Torres Strait Islander peoples.
3. Not limiting proposals for constitutional change to those identified by the Expert Panel.

1. The sunset clause (cl 5)

The sunset clause of the Bill applies to the entire Bill. This means that any legislative recognition of Aboriginal and Torres Strait Islander peoples in clause 3 of the Bill would come to an end after two years. The justification for this in the Explanatory Memorandum and the second reading speech of the Minister is to ensure that legislative recognition does not become ‘entrenched’ at the expense of progress towards constitutional recognition.

I suggest that an alternative approach is to exclude clause 3 from the operation of the sunset clause. This is because legislative recognition can exist alongside constitutional recognition. The two forms of recognition are of different kinds.

Legislative recognition is amenable to ordinary legislative change and, at least on the face of this Bill, has no legal effects. Constitutional recognition is truly entrenched in that it is very difficult to change once put into effect (requiring a referendum under s 128 of the Constitution). It also signifies inclusion amongst the constitutional people, which can have significant jurisprudential and symbolic elements. See my discussion of this in: E Arcioni, 'Excluding Indigenous Australians from "The People": A Reconsideration of Sections 25 and 127 of the Constitution' (2012) 40(3) *Federal Law Review*, a version of which is attached to this submission.

Any form of recognition involves a significant amount of symbolism. To have the legislative recognition rendered ineffective through the sunset clause may signify that recognition has been removed, and at a time when there is no alternative (ie constitutional) recognition yet in place. I am doubtful that the existence of legislative recognition would work against any future constitutional recognition, especially if there is development of greater awareness and understanding of the past and current constitutional status of Aboriginal and Torres Strait Islander peoples.

2. Awareness and knowledge of past and current constitutional status – cl 4(2)(a)

Clause 4(2)(a) refers to the ‘readiness’ of the Australian people to support a referendum regarding recognition of Aboriginal and Torres Strait Islander peoples. This is certainly a key aspect of the work required in order to assess when is an opportune time to hold any such referendum. I would like to

emphasise the importance of understanding the past and current constitutional status of Aboriginal and Torres Strait Islander peoples within that idea of 'readiness'.

Without an understanding of the existing constitutional position, and what would be changed by 'recognising' Aboriginal and Torres Strait Islander peoples under the Constitution, it is difficult to expect the Australian people to support any constitutional change. There is currently misunderstanding of the past and current constitutional position. Many Australians do not understand the precise effects of the 1967 referendum, assuming that the changes made at that time removed any constitutional discrimination against Aboriginal and Torres Strait Islander peoples, leaving no room for further inclusion or recognition. Those assumptions are incorrect, as I argue in my attached article.

3. Not limiting proposals for constitutional change to only those identified by the Expert Panel: cl 4(2)(b)

The Bill is clearly written in a way that avoids making conclusive statements regarding precise proposals for constitutional change. Instead, it is written to support a process of review and consideration in order to both assess levels of support for constitutional change and to identify proposals that are likely to be successful at a referendum. Clause 4(2) of the Bill states that the Review must consider proposals for constitutional change taking into account the work of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples and Reconciliation Australia.

The Expert Panel has proposed a number of changes to the Constitution, following a great deal of discussion and receipt of submissions from individuals and groups across Australia. However, I suggest that this part of the Bill be written in a way to make it clear that the Review would not be limited to only considering the proposals for change as put forward by the Expert Panel but would remain open to different and/or related proposals for recognition. The preambular statement regarding 'refinement' of proposals may be sufficient to address this concern, but explicit words within cl 4(2)(b) would be clearer.

Thank you for the opportunity to make this submission.

Yours sincerely

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