GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

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Committee Secretary
Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

Thank you for the invitation to make this submission to the Inquiry into the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

We welcome the attempt by the government to keep alive the prospect of a referendum for constitutional reform regarding Indigenous Australians. However, we nevertheless have real concerns about the adequacy of this Bill as, per the preamble, 'a significant step in the process towards achieving constitutional change'.

The Minister's stated reason for delaying the referendum on these issues was that 'there is currently insufficient awareness and support to enable a successful referendum at this time'. This reflected the views of many with a stake in the referendum, but especially prominent Indigenous spokespersons and organisations. There was a broad appreciation of the undesirability of proceeding with the original timetable for holding the referendum, absent sufficient community readiness to vote on the question.

The Bill displays a strong awareness of this problem. For example, the preamble talks of the need for 'further engagement with Aboriginal and Torres Strait Islander peoples' and a commitment to 'building the national consensus'. The readiness of the Australian public and levels of support for (and presumably understanding of) the proposals are essential questions for those conducting the review outlined in section 4.

However, the Bill is not itself directed in any clear way to fixing these problems. Its passage through the Parliament may do something to build campaign momentum, but alone it will not sustain public awareness of the issue. Without more, the Bill risks sending one of two possible signals: (1) that the debate can simply be put off for another two years (when the

sunset clause of the Bill will expire); or (2) that the debate is to be conducted through Parliament and political leaders, and not through the community.

The second of those messages is particularly to be guarded against since the history of referendums in this country indicates that the people are likely to exercise their veto over constitutional change when they perceive that a reform is being pushed by 'politicians' and not by themselves. This is a key reason why referendums almost always fail, and the defeat of the 1999 republican referendum may readily be understood in this way. The current proposal remains vulnerable to this problem given that the current process did not emerge (in an immediate sense) out of a popular movement like that in 1967, but due to the political agreements reached after the 2010 federal election. The Bill would serve a much more useful function than is currently the case if it implemented measures to redress that perception.

A better approach would be for the Parliament to use the Bill to map out a series of specific process goals. These goals should reflect bipartisan agreement on how, over the course of the next two to three years, the groundwork can be prepared for a referendum proposal that is capable of attracting wide support. Ideally this roadmap would include commitments on the timing of the referendum and the intermediate mechanisms that will be used to engage the public and determine the final form of the proposals to be put to the electorate. The Joint Select Committee may itself recommend commitments of this order for inclusion in the Bill.

This involves more than a financial commitment of the kind that has been made to support the ongoing work of the YouMeUnity campaign. While that is certainly important, we believe that money will not itself be effective unless it is supported by clear public processes around which the community can be informed and mobilised in respect of the issue. The work of the Expert Panel put this in train but it is now almost a year since it reported to the government and we fear that what energy and engagement has been brought about by its extensive community consultations will fade unless additional, reinforcing mechanisms are put in place. The strength of the Panel's unanimous recommendations, impressive in light of its diverse membership, also risks being dissipated.

While a range of mechanisms might be adopted to build on the unanimous recommendations of the Expert Panel, one of them should be a popularly elected constitutional convention or a citizens' assembly. As the 1998 convention on the republic showed (despite the subsequent referendum's failure), such events are effective in raising the profile of an issue, generating awareness and improving public understanding. These forums are also well-suited to refining options and building consensus where there are multiple proposals under consideration. That is definitely the case with the issue of constitutional change regarding Indigenous people, encompassing as it does questions around racial discrimination, reconciliation and cultural identity. Conventions and assemblies provide an impetus for national discussion and reflection that might not otherwise occur and yet are fundamental to the people exercising their choice in an informed way.

A convention or assembly can also be run in conjunction with other complementary activities. One option would be to have two sittings, and to use them to conduct further, targeted consultations with Indigenous communities to build on the work done by the Expert Panel. Deliberative forums could be held in local communities, as they were in 1997–98, and their recommendations fed into convention deliberations. These sorts of activity should complement the worthwhile work that You Me Unity is currently doing, including through a

small grants program that involves local communities in building awareness and support on constitutional change regarding Aboriginal people and Torres Strait Islanders.

We also make a further point about concrete steps that the Commonwealth Parliament may take in order to prepare the ground for the proposed referendum. In 2009, two of this submission's authors made a number of recommendations to the inquiry conducted by the House Standing Committee on Legal and Constitutional Affairs concerning the need to update the *Referendum (Machinery Provisions) Act 1984*. We would reiterate those recommendations and those of that inquiry more generally and suggest that action on this front also be included in any timeline of preparations agreed upon by this committee for the constitutional change regarding Indigenous Australians.

Lastly, given its subject matter, we believe that this Bill should only be passed by Parliament after it receives strong support from Indigenous people and organisations – most obviously through submissions to this Committee. Their views on the specific clauses of recognition in section 3 of the Bill are central to its acceptability. We make no comment on the content of those clauses, deferring to the views of those to whom such recognition is directed.

Yours sincerely

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