

**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 2012**

**DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS
AFFAIRS**

January 2013

1. Background

The Australian Government has stated its commitment to recognition of Aboriginal and Torres Strait Islander Peoples in the Australian Constitution.

The Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 ('the Bill') recognises the unique and special place of Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. It is intended as a step towards recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. It will assist in raising awareness and building a national consensus for constitutional change.

The Bill follows previous work by the Government to progress constitutional recognition of Aboriginal and Torres Strait Islander peoples. In December 2010, the Government appointed an Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the Expert Panel) to lead a broad national consultation and community engagement program and report on possible options for constitutional change likely to be supported at a referendum.

The Expert Panel included parliamentarians from the Government, Opposition, Greens and Independents, Indigenous and community leaders and legal and constitutional law experts. The Expert Panel consulted widely in preparing its report. Throughout 2011, the Expert Panel met with more than 4,600 people, in more than 250 meetings in 84 locations across the country, and received more than 3,500 submissions.

The Government received the unanimous report of the Expert Panel in January 2012, and the report was immediately made available to the public. In its report, the Expert Panel recommended a package of constitutional amendments it considered that were capable of succeeding at a referendum. These recommendations were that:

1. section 25 be repealed
2. section 51(xxvi) be repealed
3. a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples; the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good

government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

4. a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5. a new 'section 127A' be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

The Expert Panel also made recommendations on the process for the referendum. The Government concluded that more time is needed to meet the preconditions for a successful referendum identified by the Expert Panel.

In February 2012, the Government announced it is investing \$10 million to help build public awareness and community support for change. This will assist to build the necessary foundation of community support to deliver a successful referendum. The funding is supporting community groups and activities to provide Australians with the opportunity to learn more about constitutional recognition. This important work is being led by Reconciliation Australia, supported by a reference group of business and community leaders.

The history of referendums in Australia demonstrates that achieving success is difficult: only eight out of the 44 referendums since 1901 have been approved by voters. As outlined in the Expert Panel's report, achieving constitutional change requires strong community understanding and support, and support from across the political spectrum. The intention is for this Bill to increase momentum towards a referendum by raising public awareness and demonstrating the Parliament's commitment to Indigenous constitutional recognition.

The Bill complements Australia's support for the United Nations Declaration on the Rights of Indigenous Peoples. The Australian Government announced its support for the Declaration on 3 April 2009. Along with the National Apology to Australia's Indigenous Peoples, and in particular, the Stolen Generations, the announcement demonstrated the Government's commitment to strengthening relationships and ensuring genuine engagement with Indigenous Australians.

The Declaration provides guiding principles to be pursued in a spirit of partnership and mutual respect with Indigenous Australians. It is a matter of best practice to consult with Indigenous Australians on decisions likely to impact on them. To this end, the Government and the Expert Panel have consulted extensively with stakeholders on constitutional recognition of Aboriginal and Torres Strait Islander peoples, including with the National Congress of Australia's First Peoples, and has asked that the Committee consider the creation of an Aboriginal and Torres Strait Islander advisory group (see section 3, below).

2. Notes on the Aboriginal and Torres Strait Islander Peoples Bill 2012

The Bill was drafted in consultation with Aboriginal and Torres Strait Islander leaders, and key individuals and organisations involved in the movement towards constitutional recognition of Aboriginal and Torres Strait Islander peoples, including former members of the Expert Panel. Technical constitutional issues have been carefully considered.

At the beginning of the Bill, a preamble sets out the reasons the Parliament is enacting this legislation. This preamble states Parliament's commitment to building the national consensus needed for the recognition of Aboriginal and Torres Strait Islander peoples in our Constitution, and placing before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples. The preamble also acknowledges the important work of the Expert Panel, but recognises that further consultation and consensus is needed for a referendum to be successful. This preamble should not be confused with proposals for constitutional change; it does not represent a proposal for a new preamble to the Constitution.

Recognition by the Parliament, on behalf of the people of Australia, of Aboriginal and Torres Strait Islander peoples, is provided for in Clause 3 of the Bill. It largely reflects elements of Expert Panel recommendation 3.

Subparagraph 4 of recommendation 3 of the Expert Panel, which has been the subject of some debate amongst legal commentators, has not been included in the Bill.

Clause 4 of the Bill provides for a review of support for a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. This review requirement provides a process for progressing constitutional recognition of Aboriginal and Torres Strait Islander peoples. It will assist in identifying which particular proposals for constitutional recognition are likely to receive the support of the Australian people, including Aboriginal and Torres Strait Islander peoples. The review will be tabled in Parliament six months before the Act ceases to have effect, which will promote Parliamentary scrutiny of the review.

To ensure the Bill does not come to be regarded as a substitute for constitutional recognition of Aboriginal and Torres Strait Islander peoples, the Bill includes a sunset date of two years after it commences. The sunset provision will assist in maintaining momentum towards a referendum, and provide an impetus for a future Parliament to reassess how the campaign for change is travelling, and the appropriate timing for a successful referendum.

This Bill reflects a commitment by the Government to pursue change to the Constitution that echoes the hopes and aspirations of Aboriginal and Torres Strait Islander peoples and unites the nation. It is one part of the ongoing conversation that needs to happen in the lead up to constitutional change. In particular, the Bill will enable all Australians to become familiar with formal recognition of Aboriginal and Torres Strait Islander peoples ahead of a referendum on this issue.

The Bill cannot deal specifically with all the findings of the Expert Panel, many of which involve specific recommendations for constitutional amendment. The Bill does not restrict the scope of future debate about proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples.

While the Bill does not deal specifically with the Expert Panel's recommendation for a constitutional prohibition of racial discrimination, the Government remains firmly committed to the elimination of racial discrimination and the prohibition of discrimination under the *Racial Discrimination Act 1975*.

The Bill has been designed to serve as a clear and public indication of the Parliament's intention to build a national consensus for constitutional recognition of Aboriginal and Torres Strait Islander peoples.

3. Possible advisory group including representatives of Aboriginal and Torres Strait Islander people to guide the work of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander (the Committee)

The Committee may wish to consider, at an early stage, the establishment of an advisory group to support its work, comprised of Aboriginal and Torres Strait Islander peoples. Beyond the consideration by the Committee of the Bill and securing strong multi-partisan Parliamentary support for its passage, the role of the advisory group would be to assist the Committee in taking forward proposals for a referendum.

The Expert Panel included the current and former Co-Chairs of the National Congress of Australia's First Peoples, the Aboriginal and Torres Strait Islander Social Justice Commissioner, academics as well as community and business leaders. In reaching its recommendations, the Expert Panel consulted widely with Aboriginal and Torres Strait Islander organisations, leaders and the broader Indigenous community.

FaHCSIA is of the view that Aboriginal and Torres Strait Islander peoples should remain engaged in the process to ascertain their views on the content of any referendum proposals. The involvement of Aboriginal and Torres Strait Islander peoples will ensure referendum proposals reflect their hopes and aspirations. It is also important to securing referendum success that proposals are considered meaningful by Aboriginal and Torres Strait Islander peoples. The absence of their strong support for a referendum could limit broader community support and impair national unity which is one of the outcomes sought from the referendum process.

If the Committee wishes to establish an advisory group of Aboriginal and Torres Strait Islander peoples, it is important that it is established sufficiently early in the Committee's work so that Aboriginal and Torres Strait Islander peoples are represented in as much of the Committee's deliberations as possible. It is also important that the Committee takes the time to seek advice so as to ensure the role and composition of the Committee has the support of the Aboriginal and Torres Strait Islander community. The Committee could consider engaging with Aboriginal and Torres Strait Islander individuals and organisations on the best way to establish an Aboriginal and Torres Strait Islander advisory group.

FaHCSIA provides the initial observation that an advisory group of Aboriginal and Torres Strait Islander peoples could support the work of the Committee by:

- engaging, or advise about engaging, with Aboriginal and Torres Strait Islander peoples on proposals for constitutional recognition;
- representing the views of Aboriginal and Torres Strait Islander peoples to the Committee;
- working with the Committee to agree on meaningful proposals for constitutional change likely to be overwhelmingly supported at referendum; and
- advising the Committee on the development of mechanisms to build further support for the constitutional recognition of the First Australians amongst Aboriginal and Torres Strait Islander peoples.

An advisory group could contain a range Aboriginal and Torres Strait Islander members including:

- representative organisations, such as National Congress of Australia's First Peoples and others;
- key Aboriginal and Torres Strait Islander leaders involved in constitutional recognition to date, including former members of the Expert Panel;
- other key individuals and representatives of organisations as nominated by the Aboriginal and Torres Strait Islander community; and
- young people, upcoming and less nationally profiled leaders.

Ideally any advisory group should look to contain representatives of Aboriginal and Torres Strait Islander peoples, a range of urban, regional and remote representatives, a range of youth and elders, and a gender balance.