Dr Anne Twomey
Professor of Constitutional Law

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

12 December 2012

Dear Mr Bryant,

Inquiry into the *Aboriginal and Torres Strait Islander Peoples Recognition Bill* 2012

Please accept this submission to the Committee's inquiry into the *Aboriginal and Torres Strait Islander Peoples Recognition Bill* 2012.

General observation

In my view it is appropriate that a Bill be enacted to set out and secure the procedure that will lead to the holding of a referendum on Indigenous constitutional recognition. I note the similarities with the history of federation. After the Commonwealth Constitution was first drafted in 1891, it was returned to the colonies, but without a fixed procedure for further action. It fell into neglect. A critical factor in its revival was the proposal by Dr Quick at the Corowa Convention that laws be enacted in each of the colonies setting out the procedure for the election of a new constitutional convention and the process for putting the revised draft Constitution to the people in a referendum. Agreeing the procedure at the start is a great help in ensuring that the desired end is actually achieved.

Preamble

The recitals recognising that Aboriginal and Torres Strait Islander peoples were the first inhabitants of Australia and committing Parliament to placing a referendum proposal for their constitutional recognition before the people, both appear to be appropriate.

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Recital 4 of the Preamble refers appropriately to the work of the Expert Panel and 'their proposals'. Surely it should be 'its proposals'?

The fifth recital recognises that further 'engagement' is required to 'refine' proposals for a referendum. In my view it is very important that the Expert Panel's proposals not be set in stone. They are a very good beginning, but they should be regarded as the start of the journey. It is very hard to debate proposals with any precision until they have been reduced to a form of words. Hence the first battle is to produce the words, which is what the Expert Panel has done. But those words should only be a first draft. They need further consideration, analysis and refinement.

For example, I am concerned about entrenching in the Constitution a statement to the effect that there is a need to 'secure the advancement' of Aboriginal and Torres Strait Islander peoples. This is for two reasons. First, while obviously well-intended, it may be construed by others as implying that Aboriginal people, by reference to their race, are 'backwards' or 'insufficiently advanced'. Such a statement might be regarded as racist and inappropriate to be enshrined in a national Constitution. Secondly, it is framed in such a way as to address present circumstances, rather than to stand the test of time. In writing a Constitution, one must anticipate that its provisions may stand unchanged for at least 100 years. One would hope that in twenty years or fifty years, it would be the case that there was no need to secure the advancement of Aboriginal and Torres Strait Islander peoples, because they no longer suffered any disadvantage.

Hence, in my view, it is appropriate to include a preambular reference to the need for the refinement of the Expert Panel's proposals.

Substantive provisions

Clause 3(2) contains an acknowledgement of 'the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters'. There was some controversy back in June 2012 about the need for native title claimants to prove their continuing connection with their lands and waters and the issue of who bears the onus of proof to establish that continuing connection. Patricia Karvelas, in 'Nicola Roxon scraps native title tax', *The Australian,* 6 June 2012, reported that 'the government will not reverse the onus of proof in the *Native Title Act* which requires Aborigines to demonstrate an

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unbroken connection to their land to be awarded title. Indigenous people have been agitating for the change.' Dan Harrison and Michael Gordon, in 'Gradual changes to native title law', *Sydney Morning Herald,* 6 June 2012, also reported that 'Ms Roxon said today she believed Parliament was unlikely to support reversing the onus of proof'.

It would be helpful to clarify whether cl 3(2), which provides legislative acknowledgement of 'the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters' is intended to impliedly amend or repeal provisions of the *Native Title Act* or affect proceedings in relation to native title by no longer requiring proof of such a continuing connection as it has now been acknowledged to exist by the Parliament.

I note that cl 3(4) of the Exposure Draft, concerning securing the advancement of Aboriginal and Torres Strait Islander peoples has been dropped from the Bill. For the reasons outlined above expressing concern about the phrasing of that clause, I would support its exclusion from the Bill.

Clause 4 sets out the procedure for another review, which is to commence within 12 months of the commencement of the Act and report at the latest 18 months from the commencement of the Act. It does not specify whether this review is to be undertaken by a parliamentary committee, a government department or an independent body. This certainly allows greater flexibility for the government in establishing the review, but it also leaves Parliament uncertain as to what is actually proposed. No mention is made of the funding of the body and the Explanatory Memorandum to the Bill states that the Bill has no financial impact. It is unclear how this could be the case, as there must be some financial impact involved in running this review, even if it simply involves drawing from the existing budget of a government department (unless it has already been the subject of a budget allocation).

I note that the review is framed in terms of an amendment to the Constitution 'to recognise Aboriginal and Torres Strait Islander peoples'. This would seem to exclude from the review consideration of other provisions, such as an anti-racial discrimination provision (which does not itself involve the recognition of Aboriginal and Torres Strait Islander peoples, or even mention them). Is it intended that provisions outside the scope of 'recognition' are to be excluded from the review?

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I also note that the review is framed in terms of assessing the 'readiness of the Australian public to support a referendum' and the identification of which proposals 'would be most likely to obtain the support of the Australian people'. While popularity is important and a necessary factor for constitutional success, it is not the only question that the Commonwealth Government ought to be considering. The more important question is what form of amendment is 'right', appropriate and consistent with the operation of the rest of the Constitution. There should be scope for the making of some kind of judgement as to what the *best* form of amendment would be, as well as what would attract the most popular support. It may be inappropriate, for example, to make an amendment that is 'popular' if it causes unresolved conflicts with other constitutional provisions, potentially giving rise to unanticipated and unwanted consequences. More thought needs to be given to the long term operation of any constitutional amendment and how it will operate consistently with the rest of the Constitution. This is an issue that goes beyond popularity, but should not be neglected.

Clause 5 of the Bill is a sunset clause. The intention appears to be to ensure that this Bill is not regarded as a substitute for constitutional recognition and to use the termination of the operation of the Bill in two years as a catalyst for further action. This seems to me to be an appropriate step.

If you need any further information, please do not hesitate to contact me.

Yours sincerely,

Professor Anne Twomey
Director
Constitutional Reform Unit