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# Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

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## **Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**

**20 December 2012**

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# Comments in response to the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (the Bill)

1. The Law Council of Australia is pleased to provide these comments in response to the Bill.
2. As outlined in Attachment A, the Law Council represents the 16 Australian state and territory law societies and bar associations and the Large Law Firm Group (collectively referred to as the 'Constituent Bodies' of the Law Council). In this way, the Law Council effectively acts on behalf of some 60,000 lawyers across Australia.
3. This Submission has been lodged by the authority delegated by the Law Council's Board of Directors to the Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.
4. The Law Council strongly supports the proposal to hold a referendum on Constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Law Council has been closely engaged with this process since the announcement by the Prime Minister in August 2010 that a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples would be held at or before the 2013 Federal election. The Law Council's involvement has included:
  - (a) Targeted release of a draft 'Position Paper' in October 2010 on constitutional recognition to over 100 individuals and organisations, seeking views on a number of proposals for constitutional reform (which resulted in around 30 submissions to the Law Council from Indigenous and non-Indigenous individuals and organisations);
  - (b) Nominating a representative to the YouMeUnity Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples;
  - (c) Release of a Discussion Paper in April 2011, incorporating feedback from the earlier consultation process and refining the Law Council's proposals for constitutional change;<sup>1</sup>
  - (d) Hosting a Discussion Forum on *Constitutional Change: Recognition or Substantive Rights* on 22 July 2011 at Old Parliament House, attended by over 80 Indigenous leaders, academics, legal experts, judges and government representatives;<sup>2</sup>
  - (e) Providing a submission to the YouMeUnity Expert Panel on Constitutional Recognition of Indigenous Australians on 6 October 2011;<sup>3</sup>

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<sup>1</sup> See Discussion Paper on *Constitutional Recognition of Indigenous Australians* at [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=2D64AD56-CCF1-979E-72D9-9D0714E6855B&siteName=lca)

<sup>2</sup> Some of the papers from the Discussion Forum, including a keynote address by the Hon Michael Kirby AC CMG and transcript of the entire proceedings, can be viewed at: <http://www.lawcouncil.asn.au/programs/national-policy/indigenous/constitutional-change.cfm>

<sup>3</sup> Submission can be viewed at: [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=4CABE121-1999-B243-6E80-4EEFAD57C51A&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4CABE121-1999-B243-6E80-4EEFAD57C51A&siteName=lca)

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- (f) Assisting the YouMeUnity Panel by arranging consultations with leading constitutional lawyers in Sydney, Melbourne, Brisbane and Perth to discuss the proposals under consideration;
- (g) Nominating a representative to the Reference Group appointed by the Minister for Families, Housing, Community Services and Indigenous Affairs, to assist Reconciliation Australia in a campaign to raise awareness and support for constitutional reform within the community; and
- (h) Offering broad support to the constitutional recognition process through participation in public discussion on this issue.
5. On 21 September 2012, the Law Council issued a Media Release<sup>4</sup> welcoming the announcement that the Government would introduce an 'Act of Recognition'. While the Law Council is disappointed that the constitutional referendum has been deferred, it is recognised that the timing of the referendum should not be attached to a political timetable, and that conditions must be right to ensure the best possible chance of a successful referendum.
6. The Law Council understands that the Bill has been proposed by the Government as an interim step toward a future referendum. It is also understood that the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, if successful in securing the necessary Parliamentary support to ensure this Bill's enactment, may be subsequently required to carry out a Review into Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, to gauge community attitudes and the mood for constitutional change around the country.
7. The Law Council notes that Clause 3 of the Bill relating to 'Recognition' contains a statement that appears to be largely based on the form of words put forward by the YouMeUnity Expert Panel in its final report. However, Clause 3 does not include the fourth paragraph in the YouMeUnity Panel's recommended statement of recognition, which is:
- 'Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander peoples.'<sup>5</sup>
8. This omission is disappointing and is not referred to in the Explanatory Memorandum to the Bill. The Law Council considers the omission of this important reference to the 'advancement of Aboriginal and Torres Strait Islander peoples' at this stage to be of concern. This omission has occurred before there has been any community consultation about the recommendations put forward by the YouMeUnity Panel, or any clear statement from either the Government or Opposition in response to the YouMeUnity Panel's final report.
9. The form of words arrived at by the YouMeUnity Panel is based on over six months of community consultations across Australia and extensive discussions between the expert members of the Panel. The form of words has also been the subject of consultations with constitutional law experts and Aboriginal and Torres Strait Islander representatives. The Law Council considers it undesirable for the Government to unilaterally pre-determine the question that might ultimately be put to referendum on this issue, by precluding consideration by the Parliament of the

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<sup>4</sup> 'Law Council calls for bi-partisan commitment to constitutional recognition', 21 September 2012. See <http://www.lawcouncil.asn.au/media/news-article.cfm?article=EC16E5CB-1999-B243-6ECC-A8EA77D2AB5A>

<sup>5</sup> YouMeUnity Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, January 2012, Commonwealth of Australia, page 133.

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adoption of the term 'advancement of Aboriginal and Torres Strait Islander peoples' in this Bill.

10. The Law Council recommends that the Bill be amended to include a further sub-clause, stating:

**3. Recognition**

...

- (d) The Parliament, on behalf of the people of Australia, acknowledges the need to secure the advancement of Aboriginal and Torres Strait Islander peoples.

11. Subject to that amendment, and the views of Aboriginal and Torres Strait Islander peoples, groups and organisations that may contribute to this Inquiry, the Law Council recommends that the Bill be enacted.
12. The Law Council looks forward to the opportunity to assist the Joint Select Committee in any subsequent Review into Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.