



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Senator Trish Crossin
Chairperson, Joint Select Committee on
Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator,

Re: Inquiry into the Aboriginal and Torres Strait Islander Peoples Recognition Bill

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia.

NSWALC is a self-funded statutory corporation under the *Aboriginal Land Rights Act 1983 (NSW)*, and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC also provides support to the network of 119 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their own local communities.

NSWALC's submission to the Expert Panel on Constitutional Reform in 2012 discusses and recommends options for Constitutional recognition and NSWALC's priorities for reform.¹ NSWALC's priorities for reform include moving beyond symbolic recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution and ensuring conformity with Australia's human rights obligations at international law.

NSWALC's position of Constitutional Recognition

As previously submitted NSWALC's position on Constitutional reform is that affirmative Constitutional recognition is essential if Australia is to meet its international human rights obligations. In this context, NSWALC has recommended that the Australian Government move beyond symbolic recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution and seek to, at the minimum:

- I. Provide full constitutional recognition of Aboriginal and Torres Strait Islander peoples as the sovereign First Peoples of Australia.
- II. Remove section 51(xxvi) of the Australian Constitution, also known as the 'race power', and replace this with a power for the Australian Government to make laws with respect to

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'matters beneficial to Aboriginal and Torres Strait Islander peoples in that such laws are only enacted for the sole purpose of securing the adequate advancement and the equal enjoyment or exercise of human rights and fundamental freedoms for Aboriginal and Torres Strait Islander peoples'. This conforms to the accepted international standard for 'special measures' as allowed under the Convention on the Elimination of All Forms of Racial Discrimination.

- III. Remove in its entirety, section 25 of the Australian Constitution, which anticipates the disqualification of persons of a particular race from voting in state elections.
- IV. Insert a general guarantee of racial equality and a prohibition on racial discrimination into the Constitution.

The Aboriginal and Torres Strait Islander Recognition Bill 2012 (Cth)

On the 27 November 2012, the Government introduced the *Aboriginal and Torres Strait Islander Recognition Bill 2012 (Cth)* into Parliament as an 'Act of Recognition'. The Bill was deemed by the Minister for Indigenous Affairs to be a 'clear step forwards to holding a successful referendum to change the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples'.

While this step may be seen as an indication of the sustained commitment of the Government towards full Constitutional recognition, it is noted with some concern that neither the Bill nor the Minister's procedural motions give clear insight into the precise position of the Government on the options to be put to referendum.

The effect of the Bill is as follows:

- The Bill does not oblige future parliament to support a referendum. NSWALC is well aware that such an obligation would be unconstitutional. The preamble to the Bill notes however 'that the Parliament is committed to placing before the Australian people at a referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples'.
- The Bill expresses Parliament's 'recognition' and 'acknowledgement' of Aboriginal and Torres Strait Islander peoples. NSWALC is pleased that there is no disclaimer clause appended to this recognition as is the case in similar provisions enacted in the Constitutions of NSW, Victoria and Queensland.
- The Bill contains a sunset provision which terminates its operation two years after commencement. This prevents the recognition of Aboriginal and Torres Strait Islander peoples contained in section 3 of the Bill from remaining in force in lieu of more meaningful Constitutional reform. It is nevertheless up to the discretion and will of the next Parliament to ensure that Constitutional reform is pursued.

NSWALC's comments on the Recognition Bill

1. NSWALC is supportive of the Bill, provided that it leads to substantive Constitutional reform in accordance with the recommendations for reform outlined above and detailed in NSWALC's previous submission to the Expert Panel;
2. NSWALC appeals to all political parties and independents to commit to bipartisan support of Constitutional reform to recognise Aboriginal and Torres Strait Islander peoples in accordance with the recommendations for reform outlined above and detailed in NSWALC's previous submission to the Expert Panel;
3. NSWALC encourages both major political parties to commit to the re-establishment of a Joint Select Committee immediately after the next Federal election to continue the work required towards Constitutional reform. Constitutional recognition of Aboriginal and Torres Strait Islander peoples is fundamental to working towards Australia's human rights obligations to this country's First Peoples. Without a bipartisan commitment to the re-establishment of a Joint Select Committee in a prompt manner after the next federal election, Constitutional recognition of Aboriginal and Torres Strait Islander peoples will be significantly hampered;
4. NSWALC asserts that the establishment of an extra-parliamentary advisory group of Aboriginal and Torres Strait Islander representatives is essential. NSWALC recommends that the extra-parliamentary advisory group is made up of a wide range of Aboriginal and Torres Strait Islander peoples and is not reliant on previous members of the Expert Panel. Grass roots community members from around the country should be appointed to the advisory group.
5. NSWALC is concerned by the absence of any prohibition against racial discrimination in the Bill. While it is recognised that such a legislative provision would merely duplicate and have no greater effect than the *Racial Discrimination Act 1975* (Cth), the inclusion of such protections in the Bill would evince a commitment to pursue the Constitutional reforms required to enshrine this fundamental human right, and overcome the inadequacies of the *Racial Discrimination Act 1975* that have been so blatantly on display when the will of the Parliament has been to take discriminatory actions against Aboriginal peoples as in the instances of the Hindmarsh Island Bridge case (*Kartinyeri v Commonwealth* (1998)) and the Northern Territory Emergency Response.

Effective process towards referendum

NSWALC notes the Australian Government's deferral of the referendum on Constitutional recognition until after the next federal election. NSWALC appreciates the need to defer the referendum in order to provide as much opportunity for the referendum to be successful. With the history of successful referendums in Australia as limited as it is, bipartisan political support is an essential foundation for success. Likewise the double majority required in a referendum necessitates specific and substantial investment in public education and engagement in order for foster support for a successful referendum.

Recognising these realities, NSWALC is mindful of the need to be realistic about the timing of the referendum and considerate of the challenges and complexities involved in amending the Constitution. However, NSWALC can only support the *Aboriginal and Torres Strait Islander Recognition Bill 2012* (Cth) as an interim step towards substantive Constitutional recognition.

In order to gain meaningful change, NSWALC supports the extended timeframe towards Constitutional recognition provided that the additional time is used to build awareness and help ensure informed support of Constitutional recognition as well as undertake proper and meaningful consultation with Aboriginal peak bodies, organisations and communities.

It remains essential that meaningful engagement with Aboriginal and Torres Strait Islander peoples is undertaken to inform the position of the Government on the model for Constitutional reform. NSWALC recommends that consultation processes with Aboriginal and Torres Strait Islander communities are adequately resourced and are designed to obtain Aboriginal and Torres Strait Islander peoples free, prior and informed consent to any proposal towards a referendum. When considering an engagement process towards referendum, NSWALC strongly encourages consultation with Aboriginal peak organisations. In NSW, NSWALC recommends consulting with (at a minimum):

- Aboriginal Land Councils constituted under the *Aboriginal Land Rights Act 1983* (NSW);
- NTSCORP who has responsibilities under the *Native Title Act 1993* (Cth); and
- Peak Aboriginal organisations including the Aboriginal Health and Medical Research Council of NSW, Aboriginal Legal Services NSW/ACT Limited, Link-Up NSW, AbSec and the NSW Aboriginal Education Consultative Group Incorporated.

Should you require further information regarding the content of this letter, please contact NSWALC's Policy Unit on (02) 9689 4444.

Yours Faithfully,

Gepff Scott
Chief Executive Officer

January 2013

¹ NSWALC's previous submission is available at <http://www.alc.org.au/media/73892/110902%20australian%20constitutional%20reform%20submission.pdf>.