30 September 2011

Expert Panel on Constitutional Recognition of Indigenous Australians
PO Box 7576
Canberra Business Centre
ACT 2610

Dear Members of the Expert Panel

Submission on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Thank you for the opportunity to make a submission to the Expert Panel’s inquiry into the constitutional recognition of Aboriginal and Torres Strait Islander peoples. I am making this submission in my capacity as Co-Director of the Referendums Project at the Gilbert + Tobin Centre of Public Law and as a member of the Faculty of Law, University of New South Wales. I am solely responsible for its contents.

This submission focuses on issues concerning the process of constitutional reform, and in particular on how to ensure adequate public engagement in debates about the constitutional recognition of Aboriginal and Torres Strait Islander peoples. I note that my colleague, Sean Brennan, has addressed the substantive content of the various reform options in a separate submission to the Panel.

In summary, this submission recommends that:

- the federal government establish a new entity to organise and oversee a process of further popular engagement in relation to the constitutional recognition of Aboriginal and Torres Strait Islander peoples, and thus build on the work of the Expert Panel;
- the federal government delay making decisions about which reform options should proceed to a referendum until the end of 2012;
- the federal government, as part of a popular process in 2012, hold a citizens’ assembly, run a series of local deliberative forums, conduct a preamble-writing competition and establish a website that invites citizens to engage with experts on reform options; and
- the federal government implement the recommendations contained in the 2009 House Standing Committee on Legal and Constitutional Affairs report, *A Time for Change: Yes/No.*
The need for a popular process in 2012

The upcoming referendum presents a historic opportunity for Australians to recognise Aboriginal and Torres Strait Islander peoples in the nation’s foundation document. Given the importance of the issues, it is critical that the process of reform is conducted in a way that ensures adequate public involvement and input. The elements of popular ownership and popular education are central not only to ensuring that the referendum has a good chance of success, but also to making sure that the process engages a wide range of voices and attracts broad legitimacy. 1 Public engagement early in the process is crucial to giving people a feeling that their input matters, and reduces the likelihood that people will later resist change out of a feeling that they have not been consulted or do not understand the proposed reforms.

The creation of the Expert Panel was a positive step towards establishing a popular process with respect to the constitutional recognition of Aboriginal and Torres Strait Islander peoples. I congratulate the Panel on the public consultations and other work that it has conducted throughout 2011, and its role in starting a public debate on this very important area of reform.

However, the consultations the Panel has conducted are inadequate for achieving the level of popular engagement necessary to serve as the basis for constitutional change. When something as fundamental as constitutional reform is being considered, it is critical that the debate reach millions of Australians and that a variety of mechanisms are provided that help people have their say. The Expert Panel’s consultations have reached thousands of people, but have been insufficient to achieve widespread public awareness and engagement.

This is not surprising, as consultation processes built around submissions and public meetings have their own inherent limitations. As mechanisms of engagement, they are not designed to achieve broad participation. They also struggle to involve a cross-section of the population (as they tend to attract groups and citizens who already have a particular interest in the issue) and can serve to marginalise disadvantaged groups. The conduct of broad-based opinion polling, such as that undertaken by the Expert Panel, helps to alleviate these limitations to some extent by accessing the opinions of a representative sample of the population. However, opinion polling does not foster the sort of active citizen involvement and learning necessary to establish popular ownership of constitutional reform, and in any event can only be considered of limited value at this early stage given low public awareness and understanding of the issues and the fact that a rich and informed public debate on constitutional recognition is yet to develop.

To address these shortcomings, the federal government should take steps to broaden and deepen public engagement in the debate about the constitutional recognition of Aboriginal and Torres Strait Islander peoples. To do this, the government should establish a new entity to organise and oversee a process of popular engagement in 2012 that builds on the positive work of the Expert Panel. In doing so, the government should delay making decisions about which reform options should proceed to a referendum until that process is completed. This last point is crucial, as popular ownership will not be achieved if citizens perceive that politicians have framed the referendum questions before receiving genuine input from the public. These steps are essential if the eventual referendum is to have a strong chance of success, and if the process as a whole is to be seen as people-driven and legitimate.

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1 See discussion in George Williams and David Hume, People Power: The History and Future of the Referendum in Australia (UNSW Press, 2010) 246–54.
- **Recommendation 1:** The federal government should establish a new entity to organise and oversee a process of popular engagement on the constitutional recognition of Aboriginal and Torres Strait Islander peoples in 2012.
- **Recommendation 2:** The federal government should delay making decisions about which reform options should proceed to a referendum until the end of 2012.

**The elements of a popular process**

In implementing a process of popular engagement in 2012, the federal government and the new entity should ensure that it has four key elements. These elements, drawn from a diverse literature on participatory and deliberative democracy, are broad participation, sound judgment, inclusiveness and popular influence.

1. **Broad participation**

   The process should be designed to ensure that as many Australians as possible have an opportunity to make a contribution. This is critical because changes to the Constitution affect the lives of all Australians. Also, unlike changes to ordinary policy, amendments to the Constitution alter the very machinery of government, and have the potential to affect policy-making across all areas of government far into the future.

2. **Sound judgment**

   The process should include opportunities for participation that help citizens reach reasoned and well-informed opinions on the issues. In designing the process, an emphasis should be placed on activities that expose people to a variety of viewpoints and perspectives. The provision of accessible, accurate and brief information materials is part of this, as is the provision of structured opportunities for citizens to engage in face-to-face discussion with their peers.

3. **Inclusiveness**

   The process should be designed to ensure that, as far as possible, opportunities to participate are equally distributed across the population and do not pose any inherent barriers to certain groups. This is important to ensure that some voices are not privileged over others, and to ensure that the process captures diverse forms of knowledge and experience. Given the nature of this particular referendum, special emphasis should be placed on accessing a wide variety of Aboriginal and Torres Strait Islander voices and building those perspectives into the process.

4. **Popular influence**

   The process should be designed in a way that gives citizens genuine input into decision-making. Where citizens feel that their input will be ignored, they are less likely to get involved and the overall legitimacy of the process suffers. To avoid this, the federal government should clearly outline how each activity will feed into decision-making, and commit to taking public contributions into account in decision-making about which reform options should proceed to a referendum.
Achieving a popular process in 2012: Four suggestions

In the following paragraphs I suggest four participatory mechanisms that would broaden and deepen public debate on the constitutional recognition of Aboriginal and Torres Strait Islander peoples. These mechanisms would offer citizens a variety of participatory opportunities and, together, would go a long way to achieving a popular process that approximates the four elements outlined above.

1. Citizens’ assembly

One mechanism that has the potential to significantly advance both popular ownership and popular education is a citizens’ assembly. This innovative democratic device operates much like a short-term ‘parliament’ of ordinary citizens brought together to deliberate on, and make recommendations about, a specific issue of public policy. The membership of the assembly (usually around 150 people) is randomly selected from the electoral roll, adjusted to ensure adequate representation across gender, age and geography. This is designed to ensure that the assembly represents, as much as possible, a cross-section of the wider population. Over a period of months, the assembly delegates — or ‘citizen representatives’ — undertake an intensive education program on the issue under discussion, conduct public hearings, and engage in a combination of small group discussion and plenary debate that is broadcast on radio and television. Delegates are given access to experts to help answer any factual questions they may have. At the end of the process, the assembly makes recommendations to the government about potential reforms.

Citizens’ assemblies have been conducted around the world on a range of issues and have proven highly effective, including with respect to issues of constitutional change. In 2004, for example, British Columbia conducted a citizens’ assembly on electoral reform. It attracted huge media coverage and prompted unprecedented levels of public interest in the issue. After months of public meetings and deliberations that were broadcast on television, assembly delegates recommended that the province adopt a new electoral system based around a single transferable vote. The government put this recommendation to a referendum, where it attracted 58 per cent of the vote, falling just short of the super-majority required for its adoption. Despite this failure, the assembly was seen as a success because it had captured the public’s imagination and sparked unusually high levels of interest in the issue of electoral reform. It also demonstrated the capacity of ordinary citizens to deliberate seriously about issues of high public importance.

The citizens’ assembly model would seem well-suited to the specific question of the constitutional recognition of Aboriginal and Torres Strait Islander peoples. Given that there are several possible options for reform (as set out on pp 17-20 of the Expert Panel’s discussion paper), each with their own complexities, a citizens’ assembly would provide a forum for the careful and deliberate consideration of the merits of each. While it is true that federal Parliament could perform this task, the citizens’ assembly has the advantage of being removed from the adversarialism and short-term thinking of parliamentary debate, and is thus more capable of being seen as ‘people-driven’ and creating a sense of popular ownership. The citizens’ assembly model is also well-suited to this particular issue because it has the potential to spark the widespread public awareness, and informed public debate, that has not yet been achieved. The success of any assembly would depend, in part, on ensuring that its membership is accepted as a representative cross-section of the Australian community. Given

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the nature of the issue, it would be desirable to ensure that the assembly’s membership included a significant number of Aboriginal and Torres Strait Islander delegates.

Assuming that the referendum is held in 2013, there is ample time to hold a citizens’ assembly in 2012 and have it report to the federal government towards the end of that year. The assembly’s recommendations would not be binding, but would instead inform the federal Parliament’s deliberations over which reform ideas should proceed to the referendum. The recommendations would arguably have special force given that they would have emerged from an open and intensive process of learning, consultation and deliberation.

- **Recommendation 3:** The federal government should hold a citizens’ assembly on the constitutional recognition of Aboriginal and Torres Strait Islander peoples in 2012.

2. **Local deliberative forums**

Another mechanism for popular engagement that has been used successfully in relation to constitutional reform is the local deliberative forum. Such forums invite citizens to attend a local venue (such as a town hall) to engage in facilitated small group discussions with their peers on particular issues, with the aim of identifying areas of broad support and making recommendations for change. To help foster discussion, participants are provided with basic information materials, and are assisted by experts who are on hand to answer questions.

This model was used with great success in the period 1997–98. The Constitutional Centenary Foundation, in conjunction with the Australian Local Government Association and participating local councils, conducted 58 local forums over a 14-month period, attracting more than 3,000 participants. These forums discussed issues such as the republic, preamble reform, the federal system and human rights. Participants said that the forums helped them improve their understanding of these issues, and reported feeling energised by their involvement and the opportunity to have input into public debate about constitutional change. Some of the communiqués issued by the local forums were mentioned by delegates to the 1998 Constitutional Convention.

The local deliberative forum would be an ideal mechanism for encouraging citizens to learn about, and have input into, debates about the constitutional recognition of Aboriginal and Torres Strait Islander peoples. In contrast to the passive nature of public meetings, these forums prompt individuals to engage with other peoples’ perspectives and take an active role in debate. Forum communiqués could be forwarded to the federal government to assist its consideration of which reform options should proceed to the referendum. They could also be filtered into the deliberations of the citizens’ assembly.

- **Recommendation 4:** The federal government should hold a series of local deliberative forums on the constitutional recognition of Aboriginal and Torres Strait Islander peoples in 2012.

3. **Preamble-writing competition**

One mechanism that is likely to have wide appeal is a preamble-writing competition. A competition that asked Australians to develop their own words for giving preambular recognition to Aboriginal and Torres Strait Islander peoples would not only spark broad interest, but would be likely to attract widespread participation. It could also motivate otherwise uninterested citizens to learn more about the various reform options.

Past experience points to the value of such an initiative. Between September 1998 and February 1999, the Constitutional Centenary Foundation invited members of the public to
give their input on the contents of a new constitutional preamble. In total, the Foundation’s ‘Preamble Quest’ attracted submissions from 383 people, many of whom drafted their own preambles. Submissions were made by a wide variety of people, including school students. Many participants remarked that they found the opportunity inspiring and educational. At around the same time, various media outlets and local MPs (including then Member for Lalor, Julia Gillard) ran their own preamble-writing competitions, which also proved popular.

The success of these initiatives highlights the potential of a preamble-writing competition to attract public interest and to give people a feeling that their input matters. Used effectively, competition entries could be fed into wider public debate in a manner that instils a sense of popular ownership with respect to the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

- **Recommendation 5: The federal government should hold a preamble-writing competition in 2012.**

4. **Online participation**

Another means of enhancing popular engagement is to set up a mechanism for effective online participation. While it is important to make use of social networking sites such as Facebook and Twitter, online engagement must go beyond this if it is to foster genuine input into debate about constitutional reform.

This can be achieved by inviting citizens to enter into an online dialogue with experts about proposed constitutional changes. Iceland recently adopted this approach as part of an attempt to encourage public engagement in the drafting of a new national constitution. Each week, the constitutional council (or *Stjórnlagaráð*) posted draft clauses on its website and invited members of the public to comment on them. The council then responded to those comments. In addition, all council meetings were streamed live on its website and on its Facebook page, and citizens were encouraged to send their input via Facebook or Twitter. The constitutional council recently settled on a draft constitution and said that the public input it received via its website had been a significant part of the drafting process.

A similar approach could be adopted in connection with the constitutional recognition of Aboriginal and Torres Strait Islander peoples. The government could establish a body of experts to post draft clauses implementing each of the different reform options and invite public comment on them. For example, a week of online discussion might be devoted to the amendments required to repeal or amend the ‘races power’ (as canvassed on pp 18-19 of the Expert Panel’s discussion paper), while another week might address the changes needed to establish an agreement-making power (pp 19-20 of discussion paper). People could be invited to make comments either on the website itself, or through Facebook and Twitter, and each week the experts could issue a response.

One advantage of this form of online engagement is that it gives people an avenue to ‘have their say’, while also improving their understanding of the issues. In particular, it gives citizens an insight into the difficult decisions that must be made in drafting new text for a constitution. Additionally, the public’s online input would help inform wider debate. The body of experts could compile a report based on the feedback it received, and forward it to the government to assist their consideration of which reform options should proceed to a referendum.
Recommendation 6: The federal government should establish a website that invites citizens to comment on draft clauses implementing various reform options to advance the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Reforming Australia’s referendum machinery

Implementing the four mechanisms outlined above will help to establish a process of popular engagement in 2012 that will serve as a strong foundation for the subsequent referendum. However, looking ahead to the referendum itself, there are additional steps that the government can take to establish the basis for public engagement in the lead-up to polling day. These steps involve reforming Australia’s referendum machinery, which has remained mostly unchanged since 1912 and is badly outdated.

In 2009, the House Standing Committee on Legal and Constitutional Affairs made 17 recommendations aimed at improving Australia’s referendum machinery. Among other things, the Committee recommended that current restrictions on Commonwealth spending on referendums be removed, that an independent Referendum Panel be established prior to each referendum to determine an appropriate information and communications strategy, and that the Australian government develop and implement a national civics education program to enhance public engagement and improve knowledge of the Australian Constitution.

The federal government should implement the Committee’s recommendations on reforming referendum machinery. This is crucial to ensuring that the upcoming referendum is conducted in a manner that is capable of achieving popular ownership and education.

Recommendation 7: The federal government should implement the recommendations contained in the 2009 House Standing Committee on Legal and Constitutional Affairs report, A Time for Change: Yes/No?

Yours sincerely,

[Signature]

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