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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES
RECOGNITION BILL 2012**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Families, Community Services and Indigenous Affairs,
Minister for Disability Reform, the Hon Jenny Macklin MP)**

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES RECOGNITION BILL 2012

OUTLINE

This Bill recognises the unique and special place of Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. It is an interim 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.

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 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, namely 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 section 25 be repealed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 section 51(xxvi) be repealed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 Government agrees with the Expert Panel that it is important for a referendum to be held at a time when it has the most chance of success. The Government recognises that there are currently relatively low levels of awareness and support across the broad Australian community for the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

It is important that the work begun by the Expert Panel towards constitutional change is continued. This Bill acknowledges the important work of the Expert Panel, and provides a mechanism for continuing the work of the Panel.

This Bill reflects an intention to pursue meaningful 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 constitutional change.

A review provision sets out a process for Parliament to consider next steps towards constitutional recognition, while a sunset provision ensures that legislative recognition does not become entrenched at the expense of continued progress towards constitutional change.

The Bill is not intended to be a substitute for constitutional recognition. The Bill does not reflect all the recommendations of the Expert Panel, particularly recommendations which can only be implemented through constitutional amendment. The Bill does not restrict the scope of future issues for debate in regards to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Bill also does not reflect the Expert Panel's recommendation for a constitutional prohibition of racial discrimination. The Government remains firmly committed to the elimination of racial discrimination. The *Racial Discrimination Act 1975* already prohibits racial discrimination, which means incorporating a legislative prohibition in this Bill is unnecessary.

The Government has established a Parliamentary Joint Select Committee to progress constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Joint Select Committee will consider the Expert Panel recommendations, including those which are not reflected in the Bill, in progressing constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Financial impact statement

The Bill has no financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

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NOTES ON CLAUSES

Preamble

At the beginning of the Bill and before the substantive clauses, there is a statement which 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 does not represent a proposal for a new Preamble to the Constitution.

Clause 1: Short title

This clause provides for the new Act to be cited as the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2012*.

Clause 2: Commencement

This clause provides for the new Act to commence on the day after it receives the Royal Assent.

Clause 3: Recognition

This clause provides for the recognition by the Parliament, on behalf of the people of Australia, of Aboriginal and Torres Strait Islander peoples. It largely reflects the preambular elements of Expert Panel recommendation 3. It does not represent a proposal for a new Preamble to the Constitution.

Clause 4: Review of support for a referendum to amend the Constitution

Clause 4 legislates for a review of support for a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. This review requirement sets out a process for progressing constitutional recognition of Aboriginal and Torres Strait Islander peoples into the future.

Subclause 4(1) provides that the Minister must cause a review to commence within 12 months of commencement of the Act.

Subclause 4(2) essentially prescribes the terms of reference for the review, and requirements for the timing of the report of the review. Specifically:

- Paragraph 4(2)(a) ensures that the review considers the general attitudes of Australians to constitutional recognition of Aboriginal and Torres Strait Islander peoples.
- Paragraph 4(2)(b) ensures that the review continues and builds on work that has already been done towards constitutional recognition of Aboriginal and Torres Strait Islander peoples.
- Paragraph 4(2)(c) ensures the review considers and assesses proposals for constitutional change to identify which proposal is most likely to be successful.
- Paragraph 4(2)(d) recognises that the support of Aboriginal and Torres Strait Islander peoples, the wider Australian public and state and territory governments is critical to the success of a referendum to amend the Constitution to recognise Aboriginal and Torres Strait Islander peoples.
- Paragraph 4(2)(e) ensures that the Government and Parliament have sufficient time to consider the report and decide how best to progress the aim of recognising Aboriginal and Torres Strait Islander peoples in the Constitution before the legislative recognition provided by the Act ceases.

Subclause 4(3) ensures that there is appropriate Parliamentary scrutiny and consideration of the report.

Clause 5: Sunset provision

This clause ensures that legislative recognition of Aboriginal and Torres Strait Islander peoples does not become entrenched at the expense of progress towards the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. The note to this clause makes this objective clear in the text of the Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

Overview of the legislative amendments

This Bill recognises the unique and special place of Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. The Bill is an interim step towards a referendum on constitutional recognition of Aboriginal and Torres Strait Islanders at some time in the future. This Bill is an effective measure, taken by this Parliament, to promote understanding of and support for constitutional recognition.

Human rights implications

Australia has a range of international human rights obligations in relation to the recognition of Aboriginal and Torres Strait Islander peoples and their culture, language, heritage and rights to self-determination – notably, under the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of all forms of Racial Discrimination*. This Bill does not impact any of the applicable rights or freedoms.

Conclusion

This Bill is consistent with Australia's human rights obligations.

**Minster for Families, Community Services and Indigenous Affairs,
Minister for Disability Reform, the Hon Jenny Macklin MP**