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Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples

By email: jscrc@aph.gov.au

Dear Joint Select Committee

RE: 2018 ENQUIRY INTO CONSTITUTIONAL RECOGNITION RELATING TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

We welcome the opportunity to make a submission in relation to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples. In making the submissions below, we note that this submission was written on the traditional lands of the Yugambah language group, and to that end, acknowledge the traditional custodians and pay respects to elders past, present and emerging.

We make this submission as we share a deep personal commitment to human rights and genuine, meaningful reconciliation with Aboriginal and Torres Strait Islander peoples. Additionally, we are legal academics teaching and researching in the broad area of public law, with expertise in constitutional law, international law and administrative law.

1. SUMMARY

In summary, we consider the current *Australian Constitution* to have been drafted on racially discriminatory premises that do not reflect contemporary Australian values. It is not insignificant that due to a number of restrictions on the right to vote in elections, only 15 percent of the then total Australian population actually voted to approve the Constitution. There is no evidence that women were involved and no evidence that any Aboriginal and Torres Strait Islander peoples had any say in the drafting of the blueprint of the nation. We consider the importance of constitutional “truth-telling” be essential to the reconciliation of all Australian narratives with one another. In short, we endorse the Uluru Statement from the Heart (2017). In particular, we endorse the proposal to establish a consultative body to advise the Commonwealth Parliament on issues relevant to Aboriginal and Torres Strait Islander peoples. We support the removal of sections 25 and 51(vi) from the *Australian Constitution* and the inclusion of a prohibition on racial discrimination as proposed by the Expert Panel on Constitutional Recognition of Indigenous Australians (2012). We also support the introduction of a new section in the *Australian Constitution* granting an express right to equality before the law. Although such a provision is not confined to protecting Aboriginal and Torres Strait

Islander peoples, our view is that it would help prevent recurrences of past oppressive policies, such as the systematic removal of children and denial of voting rights.

2. INTRODUCTORY COMMENTS

Australia is both a very old and a very young country. While Aboriginal and Torres Strait Islander peoples represent the oldest living culture in the world,¹ Australia only achieved full constitutional independence from the United Kingdom in 1986.² By way of historical context, the first European claim to Australia was made on behalf of Britain in 1770 and that in 1788, Australia was colonized by Britain as a prison. The *Australian Courts Act 1828* (Imp) established introduced a legislative council and *Australian Constitutions Act (No 1) 1842* (Imp) introduced representative government to part of the country. In the mid to late 1850s, legislation was passed to create constitutions for the various Australian states. Between 1890 and 1900, a series of conventions were held in order to formulate a draft constitution for Australia. In 1900, the British Parliament passed the *Commonwealth of Australia Constitution Act 1900* (Imp), which came into force on 1 January 1901. Notably, due to a number of restrictions on the right to vote in elections, only 15 percent of the then total Australian population actually voted to approve the Constitution.³ It appears that no Aboriginal and Torres Strait Islander peoples and no women were included in its making. There is evidence that many of the drafters of the *Australian Constitution* mistakenly thought Aboriginal and Torres Strait Islander peoples were a dying peoples and that other 'non-white' peoples were in some way inferior. It was not until 1969 that the *Australian Constitution* was amended to transfer legislative power over Indigenous peoples from the state parliaments to the Commonwealth parliament, which in effect, facilitated the ability of Aboriginal and Torres Strait Islander peoples to vote. The *Australian Constitution* was not drafted with a view to comprehensively protect individual rights. Instead it was largely concerned with the distribution of power between state parliaments and the Commonwealth parliament. This is problematic in many ways, not least for Aboriginal and Torres Strait Islander peoples who have endured centuries of oppression and inequality enabled, at least in part, by the absence of entrenched rights. In our view, it is not acceptable that the Indigenous legal history of Australia is not acknowledged in the *Australian Constitution* and that it is marred by racially discriminatory ideas such as those contained in sections 25 and 51(xxvi).

3. SPECIFIC RESPONSE TO ISSUES IDENTIFIED IN RESOLUTION OF APPOINTMENT

We now consider each of the subparagraphs in paragraph 1 of the Resolution of Appointment.

- a. [the recommendations of the Referendum Council \(2017\)](#), [the Uluru Statement from the Heart \(2017\)](#), [the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples \(2015\)](#), and [the Expert Panel on Constitutional Recognition of Indigenous Australians \(2012\)](#)

The Uluru Statement from the Heart 2017: In responding directly to the Resolution of Appointment for this Committee, we deliberately choose to address the Uluru Statement from the Heart first, as this is an initiative of Aboriginal and Torres Strait Islander peoples and we wish to accord those views

¹ Australian Government, 'Australian Indigenous cultural heritage', (online) <<http://australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>>. See also, for example, 'DNA Confirms', Australian Geographic (Online), 23 September 2011, <<http://www.australiangeographic.com.au/news/2011/09/dna-confirms-aboriginal-culture-one-of-earths-oldest/>>.

² Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, Australia, 2010), 6.

³ Peter Botsman, *The Great Constitution Swindle: A Citizen's View of the Australian Constitution* (Pluto Press, 2000) 52.

priority. The Uluru Statement from the Heart was developed following an extensive consultation process with Indigenous communities which renders its request very powerful. That said, it does not represent the uniform and unanimous views of all Indigenous individuals and any process which is progressed must be prefaced by a recognition of the diversity of views within Indigenous communities. Mechanisms of further consultations should be explored to encourage participation by those Indigenous individuals who have been silent or are outside the Uluru process. For example, possible mechanisms might include directly contacting individuals known to have not been involved in the dialogue process and expanding the reach of the dialogues by holding new dialogues, undertaking an audit of indigenous community groups to identify any indigenous groups not included in the original dialogue invitations. To reach indigenous participants recently having achieved voting age, consideration could be given to working in cooperation with TAFEs, universities and organisations such as AIME (the Australian Indigenous Mentoring Experience), and to developing a social media campaign to promote their involvement in an extended dialogue process. The Uluru Statement asserts that the sovereignty of Aboriginal and Torres Strait Islander peoples can co-exist with modern Australia and together represent a comprehensive account of Australian nationhood. We support these claims and note that Constitutional recognition of Aboriginal and Torres Strait Islander people does not diminish the Australian nation or our shared 200-year history. It corrects a silence that pervades our Constitution.

The Uluru Statement from the Heart calls for a First Nations Voice Enshrined in the Constitution. We support this call unequivocally. The alternative to enshrinement is to establish a body that reports to Parliament through passing legislation – such as occurred with the former Aboriginal and Torres Strait Islander Commission (ATSIC). Constitutional enshrinement would ensure that a future government would require the level of support needed to amend the Constitution rather than be able to abolish any such body established by passing ordinary legislation. What legislation grants it can take away. The Constitution is a more stable mechanism to ensure that Aboriginal and Torres Strait Islander peoples have a sustainable voice in matters that affect them. To use a metaphor “to grow strong trees, start with good soil” and the Constitution is the best way to provide the basis for an enduring future voice for Aboriginal and Torres Strait Islander peoples. The amendment of the Constitution to create a voice for Aboriginal and Torres Strait Islander peoples to be consulted on issues of relevance to them is not creating a third chamber of Parliament. To do the latter would require extreme Constitutional amendments. A chamber of Parliament denotes the ability to initiate and pass legislation. These are not powers that the “voice to Parliament” proposal is seeking.

The Uluru Statement from the Heart also calls for a Makarrata, a process leading to a formal Treaty. We support this initiative. We note that it would be a longer-term project and would necessitate the creation of a Makarrata Commission, which must be designed in careful consultation with Aboriginal and Torres Strait Islander peoples. The tasks facing the Makarrata Commission are complex and will require careful consideration with future implications anticipated, so that the mistakes of the past do not recur and also so that future generations are not encumbered or limited by any Treaty provision whose meaning, or scope has changed over time. Other challenges for a Treaty include the settling and agreement of terms amongst many Indigenous groups and the acceptance of the colonizers’ legal system.

Finally, the Uluru Statement from the Heart also calls for truth-telling. Other countries such as Canada and South Africa have responded to the need for truth-telling by creating Truth and Reconciliation Commissions. This is but one way of addressing this need and it is not the only way. We support truth-telling in a form that is ultimately decided to be best for Australia as a whole and we are not tied to a particular forum. Truth-telling will aid the knowledge and understanding of non-Indigenous Australians and create the honest foundations for strengthened future relationships between all Australians.

It is significant that the Uluru Statement from the Heart, unlike the prior calls for engagement, was presented to the Australian people and not to the Prime Minister or other politicians. This reflects the desire for a true dialogue and solution to be developed at a grass roots level rather than rely on political will to drive the process forward.

The Referendum Council recommendations 2017: In 2017 there was a process which led to recommendations by the Referendum Council. The Referendum Council consisted of 16 experts jointly appointed by the Prime Minister and Leader of the Opposition. The Council contained a mixture of Indigenous and non-Indigenous representatives. In addition to initiating a process of Indigenous consultations which ultimately led to the Uluru Statement, the Referendum Council additionally recommended:

1. That a referendum be held to provide in the *Australian Constitution* for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the head of power in section 51 (xxvi), assuming it is not removed, and section 122, the territories power. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia; and
2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.

We support these recommendations.

The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015): On 28 November 2012, Parliament agreed that a Joint Select be established to inquire and report on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. This included steps that could be taken to progress towards a successful referendum on Indigenous constitutional recognition. The Committee presented its final report in June 2015. It contained 10 recommendations. Significant amongst these was recommendation 2 that a ‘referendum on constitutional recognition be held when it has the highest chance of success.’ This submission acknowledges that a defeat at a referendum would be likely to have a negative effect on race-relations in Australia. In that context, we urge the development and implementation of mobile education resources to improve constitutional literacy in the Australian community.

The Expert Panel on Constitutional Recognition of Indigenous Australians (2012): The Expert Panel membership consisted of Indigenous and non-Indigenous members and it conducted wide consultations and issued its recommendations in 2012. The fundamental principle laid down by the 2012 Expert Panel, was that any proposal should “be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums”. There were four specific proposals which were:

1. Repeal section 25 of the Constitution;
2. Replacing the race power in section 51(xxvi) with a new general power;
3. Inserting a new provision into the Constitution prohibiting racial discrimination (s.116A); and
4. Inserting a new provision into the Constitution that recognises English as the national language and recognises Indigenous languages as the original languages, a part of our cultural heritage (s.127A).

The recommendations to repeal section 25 and section 51(xxvi) are supported. We also support the third recommendation to insert a new provision into the Constitution prohibiting racial

discrimination. While we acknowledge this protection offered by such a section would not be not limited to Aboriginal and Torres Strait Islander peoples, it nonetheless may benefit that community, and, additionally, the support it offers to others may also make constitutional change easier to succeed. Finally the fourth recommendation is not supported by one of the authors of this submission as it situates Indigenous languages in an inferior position and category to that accorded to English. It has the potential to be used in future to impose English as the national language upon Indigenous communities and schools with high Indigenous enrolments. Further, it may undermine the urgent and necessary efforts to preserve these Indigenous languages as it creates no positive rights.

b. the methods by which Aboriginal and Torres Strait Islander Peoples are currently consulted and engaged on policies and legislation which affects them, and consider if, and how, self-determination can be advanced, in a way that leads to greater local decision making, economic advancement and improved social outcomes

As noted above, there is no evidence that Aboriginal and Torres Strait Islander peoples were consulted in the making of the *Australian Constitution*. However, Indigenous Australians have attempted to engage with the Australian polity on a number of issues. For example, the 1988 Barunga Statement called for a formal Treaty,⁴ and the 2008 Yirrkala Statement which sought self-determination, economic independence and 'serious constitutional reform.'⁵ The former Aboriginal and Torres Strait Islander Commission (ATSIC) was constituted through an electoral process, so it could be said to be representative engagement, at least, until it was abolished. We do not seek to make a comprehensive recount of indigenous engagement, but rather to note that there have been sustained initiatives by Indigenous people to engage with Australian non-Indigenous leaders including the 2017 Redfern statement.⁶ Comprehensive account must be taken of the requests developed and contained in each of these Indigenous-initiated calls for engagement.

More recently, the Uluru Statement from the Heart involved 45 days of dialogue and more than 1300 Indigenous people from 200 different communities. This is extensive consultation. For too long Australia has sought the views of experts and non-Indigenous leaders on Indigenous issues, and so now is the opportunity to listen and learn from Indigenous people about which methods they think may be effective. The challenge will be to engage those Indigenous individuals who are silent, dis-enfranchised or who oppose majority opinions or dominant narratives. Active engagement of these people requires patience, persistence and deep respect. Innovative methods need to be developed to engage as broad a range of Indigenous Australians as possible. These initiatives should be developed by Indigenous people, rather than being imposed. In our view, engaging with the Uluru Statement from the Heart would be a useful first step in this direction.

⁴ On 12 June 1988, during Australia's bicentennial year, Prime Minister Bob Hawke was presented with the Barunga Statement at the annual Barunga cultural and sporting festival. Written on bark, the Statement called for Aboriginal self-management, a national system of land rights, compensation for loss of lands, respect for Aboriginal identity, an end to discrimination, and the granting of full civil, economic, social and cultural rights.

⁵ The 2008 Yirrkala Statement was presented to Prime Minister Kevin Rudd on 23 July 2008. It is the most recent in a series of bark petitions to be presented to Australian Prime Ministers with additional petitions presented in 1968, 1988 and 1998.

⁶ Indigenous leaders gave the Redfern Statement to Prime Minister Malcolm Turnbull, Opposition Leader Bill Shorten, and the leader of the Australian Greens, Richard di Natale, ahead of the 9th Closing the Gap Report to Parliament, released on 14 February 2017.

c. recommend options for constitutional change and any potential complementary legislative measures which meet the expectations of Aboriginal and Torres Strait Islander Peoples and which will secure cross party parliamentary support and the support of the Australian people

Between May and October 2011, an Expert Panel conducted a national consultation on constitutional recognition of Aboriginal and Torres Strait Islander peoples. As noted above, it expressly recommended, among other things, that both section 51(xxvi) and section 25 be repealed. It also recommended that a new section be inserted prohibiting racial discrimination. We support those recommendations. We also recommend the inclusion in the *Australian Constitution* of a right to legal equality.

The removal of sections 25 and 51(xxvi) from the Australian Constitution: Section 25 of the *Constitution of Australia* is entitled ‘provisions as to races disqualified from voting’. In effect, while it may have been included as a disincentive for states to do so, it was used, as recently as the 1960s, to prevent Aboriginal and Torres Strait Islander peoples from voting. In theory, Indigenous peoples obtained the right to vote at Commonwealth election in 1902 if they were on the electoral roll of their respective state. However, in practice they were denied this right, even if they were on the state electoral roll (only Queensland and Western Australia had a complete ban on Aboriginal voting). As Megan Davis has observed, ‘[t]he Constitution, the core public document underpinning Australia’s legal and political system ... continues to imbue the Australian polity with race’.⁷ Section 51(xxvi) of Constitution grants the federal Parliament the power to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. This is often referred to as the ‘race power’. The High Court in *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)*⁸ held that there is no implicit requirement that a law made under the race power may be used to the detriment of a race provided that it does not constitute ‘manifest abuse’. However, as the then Justice Kirby pointed out in his minority judgment:

The criterion of "manifest abuse" is inherently unstable. The experience of racist laws in Germany under the Third Reich and South Africa under apartheid was that of gradually escalating discrimination. Such has also been the experience of other places where adverse racial discrimination has been achieved with the help of the law. By the time a stage of "manifest abuse" and "outrage" is reached, courts have generally lost the capacity to influence or check such laws.⁹

In essence, we support the removal of sections 25 and 51(xxvi), not only out of moral compulsion, but also because the inherently racist nature of these provisions is inconsistent with our international obligations under the *Universal Declaration of Human Rights* (the *UDHR*), the *International Covenant on Civil and Political Rights* (the *ICCPR*) and the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP).

For example, the first sentence of Article 2 of the *UDHR* reads: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as **race**, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. In turn, Article 7 states: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination’. And, more specifically, Article 21 mandates: ‘Everyone has the right to take part in the government of his country, directly or through freely chosen representatives’. Therefore, the constitutionally

⁷ Megan Davis ‘A Culture of Disrespect: Indigenous Peoples and Australian Public Institutions’ (2006) 8 *University of Technology Sydney Law Review* 135, 139.

⁸ (1998) 195 CLR 337.

⁹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 416 [163].

entrenched ability to exclude a race from being counted for the purpose of electing parliament is a breach of Article 21, for a reason prohibited by Article 2. Further, the existence of a constitutional power to legislate either to the detriment or benefit of a particular 'race' is a breach of Article 7.

Further, Article 2(1) of the *ICCPR* reads: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as **race**, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Examples of the rights referred to in Article 2(1), include the right in Article 25 to 'vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage'. Clearly, the capacity under section 25 to exclude a race from voting contemplates action that would be in breach of the right to universal and equal suffrage granted by the *ICCPR*.

The inclusion of a right to legal equality in the Australian Constitution: The decision in 1900 to not include a guarantee of equal protection before the law in the *Australian Constitution* was deliberate. A racial basis for opposition to these guarantees is apparent from the remarks of the then Premier of Western Australia, John Forrest, which can be seen in the Official Record of the Debates of the Australasian Federal Convention, (Melbourne), 1898 at 666:

It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia, in regard to that class of persons.¹⁰

In short, the decision not to include rights of equality before the law and due process were influenced, at least in part, by the dominant racial ideologies of the time. That the *Australian Constitution* also grants no implied right to equality before the law was confirmed by the High Court of Australia in *Kruger v The Commonwealth*.¹¹ In that case, Indigenous Australians in the Northern Territory asserted that the policy of removing Aboriginal children from their family infringed their human right to due process before the law, equality before the law, and freedom of movement. The case failed because the High Court held the *Australian Constitution* did not grant or protect those rights. This in itself is an argument in favour of constitutional reform.

- d. [ensure that any recommended options are consistent with the four criteria of referendum success set out in the Final Report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: i\) contribute to a more unified and reconciled nation; ii\) be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and be technically and legally sound; iii\) engage with key stakeholders, including Aboriginal and Torres Strait Islander Peoples and organisations; and iv\) advise on the possible steps that could be taken to ensure the referendum has the best possible chance of success, including proposals for a constitutional convention or other mechanism for raising awareness in the broader community](#)

We acknowledge these criteria and make the following brief comment on each:

- ***contribute to a more unified and reconciled nation:*** providing Australians with the opportunity to reform their Constitution has the potential to contribute to a more unified and reconciled nation. The inclusion of a right to legal equality and a prohibition against racial discrimination will also be of benefit to communities other than Aboriginal and Torres

¹⁰ Official Record of the Debates of the Australasian Federal Convention, (Melbourne, 1898), 666.

¹¹ (1997) 190 CLR 1.

Strait Islander communities, and for this reason, along with the power of historical truth-telling may assist in unifying us as a reconciled peoples.

- ***be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander Peoples and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and be technically and legally sound:*** as noted above, our submission is that the *Uluru Statement from the Heart* should be taken seriously by the Australian Parliament as an expression of the wishes of a significant number of Aboriginal and Torres Strait Islander peoples and that bipartisan support should be lent to an educational program to ensure the consequences of constitutional change are understood by the broader community.
- ***engage with key stakeholders, including Aboriginal and Torres Strait Islander Peoples and organisations:*** As with criteria (i), our view is that the *Uluru Statement from the Heart* should be taken seriously by the Australian Parliament as an expression of the wishes of a significant number of Aboriginal and Torres Strait Islander peoples and that bipartisan support should be lent to an educational program to ensure the consequences of constitutional change are understood by the broader community
- ***advise on the possible steps that could be taken to ensure the referendum has the best possible chance of success, including proposals for a constitutional convention or other mechanism for raising awareness in the broader community:*** As the Committee is no doubt aware, although there have been 44 referenda to change the Constitution, only 8 have been successful.¹² In order to increase the chance of success of any referendum, a campaign of community civics education should be undertaken with the assistance of Indigenous educators and/or constitutional experts. We also refer to the submission of Professor George Williams and support his comments on increasing the changes of a successful referendum .

CONCLUSION

There are, of course, good things about Australia's constitutional arrangements and we have much to celebrate. However, long shadows are cast by racist provisions in the *Australian Constitution* and the lack of acknowledgement of Australia's Indigenous history. Today, Aboriginal and Torres Strait Islander peoples continue to be incarcerated at alarming rates, and the gap between the social and economic wellbeing of Aboriginal and Torres Strait Islander peoples as compared with non-Indigenous Australians, is concerning to say the least. Constitutional reform is an important place to start as we need to reset any racist foundations on which the *Australian Constitution* was built. There are many reasons why a racist constitution is unacceptable. It is dangerous and capable of abuse. It damages our national identity, and in turn, our domestic, international and trade and security relationships. It is inconsistent with our international obligations. To that end, we support calls for constitutional change to increase the political participation of Aboriginal and Torres Strait Islander peoples and to help ensure that the blueprint of our nation reflects our aspirations as a cohesive and reconciled people.

¹² House Standing Committee on Legal and Constitutional Affairs, Committee inquiries and reports, *Inquiry into Constitutional Reform* (Chapter 2)
< http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/laca/constitutionalreform/report.htm >), 8.

Thank you for the opportunity to contribute this submission.

Yours sincerely,

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