SUBMISSION TO THE EXPERT PANEL ON CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES BY THE VARIOUS ANGLICAN ORGANISATIONS LISTED IN PARAGRAPH 1

Introduction

1. This submission is made by the following Australian Anglican organisations:
   1.1 The Public Affairs Commission (PAC). The PAC is a body established by the Anglican Church of Australia (ACA) which advises the Primate and Standing Committee of the ACA on matters of public concern and to enable comment on public issues.
   1.2 The Anglican Board of Mission, the national mission agency of the ACA.
   1.3 The Social Responsibilities Commission of the Anglican Diocese of Perth.
   1.4 The Social Issues Executive of the Anglican Diocese of Sydney.
   1.5 The Church in Society Ministry Unit of the Adelaide Diocese.

2 The ACA is organised into twenty-three dioceses across Australia. The views expressed in this submission are only of the bodies named and should not be taken to reflect the opinion of the ACA or any of the dioceses, except as explicitly mentioned below.

3. While these submissions have been guided by some consultations with Aboriginal and Torres Strait Anglicans, the time-line for the submissions has meant that we have been unable to obtain the approval of the National Aboriginal and Torres Strait Islander Anglican Council (NATSIAC), the peak organisation for Anglican Aboriginal and Torres Strait Islanders, as that does not meet until October 2011. As set out below, we acknowledge the principle of obtaining, as far as possible, the full and informed consent of Aboriginal and Torres Strait Islander Peoples to matters affecting them. We hope that the Expert Panel ("the Panel") has been able to consult extensively in this regard and urge the Panel to recommend only such reforms as are substantially supported by the views and desires of Aboriginal and Torres Strait Islander Peoples.

4. We acknowledge and are grateful for the extensive research carried out by the Social Responsibilities Committee of the Anglican Diocese of Brisbane and their consultation work, especially involving the input of Aboriginal and Torres Strait Islander Anglicans. This has greatly assisted the formulation of these submissions.

Key principles informing these submissions

5. Our approach to the recognition and honouring of Aboriginal and Torres Strait Islander Peoples is informed by beliefs which are grounded in the Bible and our theological heritage. Our belief is that humanity is made in the image of God and this establishes the dignity and worth of every person. Our Trinitarian understanding of God means that this image is not only found in individuals but is expressed in relationships and community of mutuality and interconnection. Obviously this includes relationships between Aboriginal and Torres Strait Islander Peoples, as individuals and as communities and other Australians.

6. In the Biblical narrative, there is an emphasis on God's people having a responsibility to seek the wellbeing of the society in which they live. There is a particular imperative to value and seek justice for the vulnerable in the community. In Australia, the vulnerable clearly include the Aboriginal and Torres Strait Islander Peoples who have been the subject of extensive dispossession and injustice since the British colonisation of this country.

7. A key Biblical principle is the need for repentance and acknowledgment of wrong-doing. Such repentance involves a change of heart and direction. This applies not only at the individual level, but also at the level of communities and nations. Such a valuable principle would be reflected in an acknowledgment of this nation's history and in dealings with the First Peoples of this land in ways which are not only symbolic but demonstrate a practical commitment to set relationships on a new and just legal footing.

8. Our national identity is sadly diminished and deluded if Aboriginal and Torres Strait Islanders are not acknowledged and valued as having a unique place in Australia's history as the original owners, custodians and stewards of these lands and waters, and as having an essential, special and lasting part to play in its present and future.

9. There have been many resolutions of the General Synod of ACA and of Diocesan Synods voicing commitments to reconciliation and to building relationships of mutual trust and respect between Indigenous and non- Indigenous Australians. For example, the General Synod in 2007 resolved to make a Joint Statement of Commitment and Affirmation of Faith and Justice with Aboriginal and Torres Strait Islanders. This included the following commitments:

> *"We, the people of the land and seas, the Aboriginal and Torres Strait Islander peoples, as guardians and custodians of the land and islands of Australia, seek a new day when our peoples can practise and share our culture and wisdom as partners with all who call Australia their home.*
>
> *We, the non-Indigenous peoples of Australia recognise the people of the land and the seas, the Aboriginal and the Torres Strait Islander peoples to be the original inhabitants, the indigenous peoples of this land.*
>
> *We, together through this shared commitment continue to seek to heal the wounds, hurts and sufferings of the Aboriginal and Torres Strait Islander peoples of Australia."*
>
> *…..*
>
> *As peoples of Christ's we are bound into a relationship that seeks to be the foundation of mutual trust, respect, and the sharing of power and resources to create a just and righteous Church and nation of Australia. Through this commitment our own homes, communities, parishes, dioceses and national organisations are to be sanctuaries where we will strive to live out to the fullest the tenets of this our shared faith."*
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> *…….*

and we invite all who call Australia their home to join with us as we continue the process of healing our peoples and this land and seas."

Our approach to the issues of Constitutional reform in relation to Aboriginal and Torres Strait Islander Peoples seeks to give effect to this call to recognition, trust, respect and healing.

Terminology

10. The overwhelming view of the Aboriginal and Torres Strait Islander Anglicans consulted is that the terms "Aboriginal" and "Torres Strait Islander" peoples should be used rather than "Indigenous". In an Australian context, it is important to recognise and name them as distinct peoples with different cultures. We would also support the use of "First Nations" or "First Peoples" if that is what is preferred by the Aboriginal and Torres Strait Islander Peoples consulted.

11. The Aboriginal and Torres Strait Islander Anglicans consulted also expressed a view that "race" was an irrelevant and discredited term and should not be used. Any Constitutional provisions should not be based on "race" as such but on the unique place of Aboriginal and Torres Strait Islander Peoples as the original owners of this country.

12. We also recommend that the term "Peoples" rather than "people" be used, in line with the approach of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration), which Australia has now endorsed. This too is a recognition that Aboriginal and Torres Strait Islander Peoples have collective rights as distinct groups of Peoples or Nations.

Statement of recognition and values in a preamble

13. We support a strong Constitutional statement to recognise and value Aboriginal and Torres Strait Islander Peoples. Given our nation's history, it is vital that there should be a symbolic statement in the Constitution that affirms the crucial importance of Aboriginal and Torres Strait Islander Peoples in the building of this nation and its identity. The most suitable location for this would appear to be in a preamble to be inserted into the Constitution, although we do not have any major objection in principle to it being inserted as a section in the body of the Constitution.

14. Any such statements of recognition should be generous and visionary in order to achieve the necessary symbolic impact and reflect pride in the Aboriginal and Torres Strait Islander cultures. We note that Victoria, Queensland and New South Wales have included statements of recognition in their Constitutions of Aboriginal people and, in the case of Queensland, also of Torres Strait Islanders. These have set useful precedents for the Commonwealth to follow. However, we would not support qualifications like those found in the State Constitutions which expressly provide that the statements of acknowledgement do not create legal rights and do not affect the interpretation of any laws. While preambles generally do not create substantive legal rights, such express qualifications undermine the symbolic impact of the statements and appear mean-spirited.

15. Any statement of recognition should mention the following points in relation to Aboriginal and Torres Strait Islander Peoples:

    15.1 their prior ownership and custodianship of the lands and waters of Australia;
    15.2 the past injustice suffered by them;
    15.3 their continuing connection and kinship with the land and waters;
    15.4 their continuing unique value and contribution to the life and identity of this nation.
    15.5 an ongoing acknowledgment and celebration of their diverse and distinct cultures; and
    15.6 their roles as creators and interpreters of their own cultures.

16. Any form of the statement of recognition must be satisfactory to most Aboriginal and Torres Strait Islander Peoples and it is vital that their representatives should be involved in negotiating and drafting the precise wording and there should be wide consultation about the precise wording.

Removal of s25

17. Section 25 of the Constitution, which deals with disqualifying people of a particular race from voting, must be deleted. This reads:

    "For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted."

18. There is no basis for retaining such an obviously discriminatory provision.

Removal of the "Race Power", s51 (xxvi), and replacement with a power to make laws for the benefit of Aboriginal and Torres Strait Islander Peoples.

19. There has been some considerable debate about the precise reforms that should be made to the race power found in s51 (xxvi) of the Constitution. This is the provision which allows the Commonwealth government to make laws with respect to:

    "the people of any race ~~, other than the aboriginal race in any State~~ for whom it is deemed necessary to make special laws;"

    The 1967 Constitutional referendum removed the words excluding the Commonwealth from making laws with respect to the Aboriginal race as indicated above. The clear intent of the supporters of that referendum was to benefit Aboriginal and Torres Strait Islander Peoples. However, particularly in the light of the likely original intent of the race power, the section is still open to a legal interpretation that will allow the Commonwealth to make laws to disadvantage Aboriginal and Torres Strait Islander Peoples or people of any particular race. The potential adverse and discriminatory effect of such a power has led to calls for its removal.

20. There appears to be no need for the Commonwealth to have general powers to make special laws with respect to race. On the other hand, the Commonwealth government has a responsibility to make laws to protect and safeguard the rights of Aboriginal and Torres Strait Islander Peoples, particularly given the history of disadvantage and the clear intent of the 1967 referendum to give the Commonwealth such powers. An example of such laws is the Commonwealth Indigenous Heritage Protection legislation. A specific head of power to legislate is therefore crucial for this role.

21. A reasonable approach to reform in this regard is the suggestion that the race power as it stands should be repealed and replaced by a specific power to make laws "with respect to the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander Peoples".

22. It is vital, however, in the spirit of the 1967 referendum, that such law-making power should be for *beneficial* legislation only and not legislation to further dispossess and disadvantage Aboriginal and Torres Strait Islander Peoples. It is essential then that any power should expressly provide that the power is limited to laws which are beneficial and do not discriminate against Aboriginal and Torres Strait Islander Peoples.

    While such limitations would still be an improvement on the current situation, we realise that there have been concerns expressed about whether terms such as "beneficial" legislation will be too subjective. The danger is whether this could enable the enactment of legislation that the Parliament believes to be beneficial but which in fact is not and may even be opposed by most Aboriginal and Torres Strait Islander Peoples. Such a risk is real in the light of the history of "good intentions" in relation to the Stolen Generations and, more recently, in relation to the Northern Territory Intervention.

    We urge that the drafting of the power should make it as clear as possible that the power should only be to make laws which are objectively beneficial and supported by Aboriginal and Torres Strait Islander Peoples. Even if the interpretation will ultimately be left to a court, this could at least enable a means of review of such legislation.

23. A stronger requirement, if a reasonably practicable formulation could be arrived at, would be to include a requirement for the free, prior and informed consent of Aboriginal and Torres Strait Islander Peoples who will be affected by proposed laws.

    "Free, prior and informed consent" of Indigenous Peoples has been established as an internationally-recognised principle in the Declaration and in earlier international guidelines. This principle encapsulates the notion that actions which affect an Indigenous group should not occur without first obtaining that group's consent.

    We recognise there may be legal difficulties in incorporating such a principle in full in a Constitutional power and in setting up an appropriate mechanism for doing so, but consideration could be given in the drafting of a head of power to reflect such a principle, or at least a principle of prior consultation and negotiation, to ensure that

legislation for the benefit of Aboriginal and Torres Strait Islander Peoples is also considered by them to be for their benefit.

Agreement-making Power

24. We support the inclusion of a power for the Commonwealth to make agreements, such as treaties, with Aboriginal and Torres Strait Islander Peoples, and for these to have the force of law. This is consistent with the principle of free, prior and informed consent as discussed above. It also incorporates the principle that government actions affecting Aboriginal and Torres Strait Islander Peoples should be the subject of negotiation and agreement rather than by imposition. It would also reflect the principles of self-determination recognised in the Declaration as well as the *UN Declaration of Human Rights* and *International Convention on Civil and Political Rights* (ICCPR).

25. Unlike other nations, such as New Zealand, Canada and the USA, Australia has still failed to enter into a treaty with Aboriginal and Torres Strait Islander Peoples. An amendment to the Constitution to give it the power to do so is important to facilitate such a possibility in future. Short of treaties, such a power would also enable smaller specific agreements to be made, dealing with all manner of things such as funding, housing, health and welfare and the like. These could each result in many practical benefits and avoid the pitfalls of imposed interventions.

Constitutional prohibition of racial discrimination

26. There have been suggestions that the Constitution should be amended to include a clause prohibiting racial discrimination or guaranteeing racial equality. We support the principle of laws prohibiting racial discrimination or guaranteeing racial equality, as long as there are provisions allowing positive discrimination or special measures to redress disadvantage. The latter provisions are particularly important for the reasons set out above for retaining a power to make laws for Aboriginal and Torres Strait Islander Peoples.

27. We note that it might be anomalous to include prohibition in the Constitution for only one type of discrimination. Many other countries deal with racial discrimination as part of general non-discrimination provisions in constitutional bills of rights or specific human rights legislation. Such an approach is, in many ways, more logical. We are aware however that such expansive human rights legislation has been controversial in Australia and we would be wary of such an expanded clause confusing the aims and debate of this specific referendum to recognise Aboriginal and Torres Strait Islander Peoples.

Process Issues

28. In order for the Constitutional reforms to be passed, we believe that it is important to address the process. It has been well-recognised that for the referendum to be successful it is vital that there should be multi-party support, wide education and popular ownership of the proposal. In this particular case, it is essential that there be broad understanding and support for any proposals from the Aboriginal and Torres Strait Islander communities. In this regard, we welcome the establishment

and extensive consultation being undertaken by the Panel and by the National Congress of Australia's First Peoples..

There must also be ample time for people to understand and appreciate the Panel's recommendations and any final proposal that is to be put to a referendum. In this regard, we urge the Government to inject the funding required to carry on the ongoing process of consultation and education in the lead-up to the referendum.

29. The Anglican organisations who are making this submission also intend to engage in a broad educational programme amongst Anglican communities throughout Australia, particularly also Anglican Aboriginal and Torres Strait Islander communities. The aim will be to keep them informed, involved and to encourage support for such reforms.

30. It is also important that any referendum on these Constitutional reforms should not be held in conjunction with other referenda or elections as these would run the risk of confusing the issues and risk losing a multi-party approach.