Joint Select Committee on Aboriginal Constitutional Recognition — First Report — "Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia — Motion

Resumed from 6 May on the following motion moved by Hon Michael Mischin (Attorney General) —

That the report be noted.

Hon SALLY TALBOT: I believe I have already made some remarks about this committee report but I have a couple of other opportunities to do so, one being now. As a member of the joint select committee, I devoted most of my previous contribution to the work that the committee did in a spirit of unified cooperation and commitment to the task we had been given by the Parliament as a joint select committee. It was indeed a pleasure and an extremely rewarding experience to be part of this committee.

I thought that in the rest of the time available to me, it would be worth talking honourable members through the committee's findings and recommendations, for one reason—to give members a chance to see how widely the committee's considerations ranged. I will not, of course, talk about the committee's deliberations. I want to draw honourable members' attention to the summary of the recommendations contained at the front of the report. Members can see that in finding 1, one of our first tasks was to find a suitable starting point for the investigation into whether and then how Aboriginal people could be recognised in the Constitution. One of the things we did was consider what had been done in other jurisdictions. It will not have escaped honourable members that when it came to the question of what has been done elsewhere, we had a wealth of material on which to draw because both internationally and in other Australian states there is a very significant wheel that does not need to be reinvented. I draw members' attention to chapter 3, beginning on page 9, where there are equivalent provisions in the statutes and constitutional documents of Brazil, Bolivia, Ecuador, Singapore, the Philippines, Norway, Finland, Sweden, Colombia, the United Mexican States, Canada, the United States, and New Zealand. As I said, members do not have to look terribly far to find some templates with which to work. Further into that chapter, members can see when it comes to recognition at the state level that we were able to draw on existing wisdom from Victoria, Queensland, New South Wales and South Australia. We went to the trouble to reproduce the relevant documents in the report's appendices. Members will see that appendix 4 contains the provisions that were inserted into the Constitution in Victoria, appendix 5 relates to Queensland and appendices 6 and 7 relate to New South Wales and South Australia.

There is plenty of material for considering sets of words, but we had one more vitally important document—that is, the Constitution Amendment (Recognition of Aboriginal People) Bill 2014, which had already had some hours of consideration in the other place. It was introduced into the other place as a private member's bill by the member for Kimberley, Josie Farrer. Again, I stress that I am not talking about any of the committee's deliberations, but members can see at finding 1 that the committee concluded that, having looked at all the international and domestic jurisdictions, the private member's bill that had already been debated in the Legislative Assembly was a suitable starting point for considering an appropriate form of words for constitutional recognition in Western Australia. The final sentence of finding 1 states —

> The statement is simply framed, comparatively modest in its scope, and among the least contentious in terms of its content.

That comment was not made lightly. I want to spend a little bit of time talking about this particular point. We know it is a recognised aspect of human nature that whenever a person drafts a document and gives it to a third person to consider that third person feels under almost a moral obligation to make some change to the words that have been drafted for them. I joked with a previous employer of mine who occasionally asked me to draft a letter or media statement and then change almost every word. I got to the stage when I would say, "Would you like me to jot down a random series of words on the page, and then you can actually write what you want in the margins?" The committee was very conscious that, particularly when it comes to a subject as important as the constitutional recognition of Aboriginal people, everybody has a point of view and everybody thinks that they can find a better word to conclude a particular sentence or better order for the sentiments expressed in a paragraph or a better way of phrasing something or a better set of words to couch a particular sentiment. I think it was very important and a sound indication of the genuine way that the committee endeavoured to work on a consensus basis that we decided that we would work with the words that had been given to us in that private member's bill. I think it was a very important moment.

Of course, that determined the frame of mind in which the committee looked at a number of submissions. We received a number of submissions, which are all enumerated in the back of the report. Every submission wanted to put its own particular stamp on the issue, which was something the committee was very happy about and members welcomed the expression of a variety of opinions. But we had to ask ourselves a serious question about the relative merits of different proposals. This was not in the sense of ranking them in order of merit.

It was not a question of saying that this proposal gets 10 out of 10, but this proposal only gets nine out of 10 for the following reasons. We had to ask ourselves whether a proposal was substantively better and had qualitative merit over and above the words we had been already asked to consider. I think that is quite different from the way that a committee would often go about its work. That is the frame of mind in which we read the submissions and the spirit in which we assessed the considerations in the submissions.

Moving on to finding 2, members will see that the committee admitted that it had been limited in the amount of consultation it had been able to undertake. I think that bears some detailed discussion and explanation that I think will help to inform honourable members with the way that they read this report. We were constituted by the Parliament as a joint standing committee in November and the reporting date was in March. That meant we were working over the summer. As Madam Chair may remember from my previous comments, there are some difficulties in convening a committee to work over the summer, particularly when the deputy chair is the member for the Kimberley and people in the Kimberley cannot always move around readily because of the climate. It makes it particularly difficult for a committee to consult with Aboriginal people, because a number of them live in the Kimberley and Pilbara over that period of the year. It meant that the committee did not undertake any travel. Under slightly different circumstances, we may well have travelled statewide and heard the opinions of groups and individuals all over the state. We were very respectful of the reporting time Parliament had given us and very determined to present something workable—a practical suggestion to Parliament about the way to proceed—within that reporting date. A very careful decision was made that we would look at the kind of consultation that had already taken place and work largely with that body of material, as well as, of course, inviting people to make further submissions specifically to the committee inquiry. There was no shortage of that wealth of material; there was almost no limit to the material that we were able to draw on. There had already been an enormous amount of discussion nationally about the proposal to include the recognition of Aboriginal people in the commonwealth Constitution. Members will notice that a number of people who made submissions to us were basically repeating the points that they already had made in previous submissions to those negotiations. A number of local Aboriginal groups and individuals that made submissions to that national inquiry repeated their comments to us.

It is noted in the body of the report that there had been a lot of consultation in relation to the private member's bill; that is, in relation to the specific set of words that the committee had already considered was an appropriate form of words to use as a starting point. In actual fact, although under different circumstances we may have talked directly to more people and given more people the opportunity to meet with the committee, given the circumstances of this inquiry I think we did a pretty good job. I think what we have been able to give Parliament is a very broad representation of the opinions associated with this particular issue.

I recognise that these are the last few minutes of my opportunity to speak on this report. Let me move to some of the specific things that we considered. Rather than going through the individual recommendations, which are not difficult to read, I will just go ahead to a point in this report that I specifically marked out extremely clearly so I would be able to turn to it very quickly. Paragraph 3.77 on page 25 summarises the points that our research told us legislators need to consider. I want to assure honourable members that these were indeed matters to which the committee applied its collective mind. The paragraph states that legislators need to consider —

1. whether statements of recognition should be included within a preamble or the main body of the Constitution;

We looked very closely at that question and considered what other people had done and all of the submissions that had been made to us and the form of words we had taken as a starting point and made our determination that the preamble was indeed the appropriate place to expressly recognise Aboriginal people in the Constitution.

The second point states —

2. whether the content of such statements should be limited to historical, aspirational, and explanatory commentary or whether 'substantive changes' should be made;

Again, I can assure honourable members that considerable time was spent by the committee, both in our deliberations and also in our discussions with our legal advisers on that point. We are very happy to recommend unanimously that the form of words in the original private member's bill are essentially the words that are adopted by this Parliament. The third point is —

3. 'whether there should be an express provision that denies any legal consequences … that might otherwise arise from what were intended to be non-substantive provisions';…

That is, of course, the question about the non-effects clause. Members will notice that different jurisdictions both internationally and across Australia have drawn different conclusions about whether a non-effects clause is needed. I am personally very proud to have been part of a committee that made a unanimous recommendation

that in Western Australia we do not require a non-effects clause. Indeed, we went further than that. I draw members' attention to finding 13, which recommended to the Parliament that a non-effects clause would, in fact, "undermine the spirit in which the statement of recognition is made." That is not done lightly, and I doubt that it would have been the recommendation of the committee or, at least, I am pretty sure it would not have been the unanimous recommendation of the committee had we not received assurances about the likely effects of the recommendation on other pieces of legislation. Members will see, with a quick skim of the findings at the beginning of the report, that what the committee was told was that there was an exceedingly low risk of the recognition having any impact on the interpretation of other Western Australian legislation. The risk of such a recognition having a decisive impact on the interpretation of other WA legislation or any state executive and administrative power appears to be negligible. Finally, the form of constitutional recognition proposed in that private member's bill will not have any substantive effect on native title law or pastoral leases in Western Australia. On that basis, the committee unanimously recommends that the Parliament does not insert a non-effects clause, because to do so would undermine the spirit in which the recognition was made. The final point on page 25 for consideration states —

> 4. whether such statements should be enacted via the ordinary legislative process or via referendum and what consideration is given to 'the consequences for community involvement and understanding.'

I want to add my personal comments to the recommendation of the committee and, indeed, that the enactment via the ordinary legislative process is entirely appropriate and in itself sends the right message to future Parliaments about the precise intention of this Parliament's move to amend the constitution. For that reason, the committee has said that the ordinary legislative processes in both houses of this Parliament is the appropriate path down which to go.

That just about concludes the comments I wanted to make, other than the fact that there was one other component of the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 that the committee decided also fell within its terms of reference, which was the deletion of section 42 of the Constitution Act 1889. Section 42 is not the only remaining clause of the Constitution that contains either clauses that are entirely redundant, for reasons that are not contested by anybody, or language that is, to put it mildly, of questionable political correctness or completely redundant as far as the common use of language goes. Section 42 includes a reference to the Aborigines Protection Board. I am sure members are familiar with section 42, which outlines what will be enacted when certain measures fall into place. It explains what happens when the population of the colony reaches a certain number, not including Aboriginal people, because Aboriginal people were not counted in the census in those days.

Hon Liz Behjat interjected.

Hon SALLY TALBOT: I think Hon Liz Behjat is right. It is the two sections—sections 42 and 75. Section 42 refers to the census. Thank you, Hon Liz Behjat; I appreciate your vigilance over that. Section 42 explains the census data and Aboriginal people not being counted in that, and section 75 refers to the Aborigines Protection Board.

The committee felt that both those sections should be deleted and has made that recommendation. The point was raised, quite legitimately, by several people that we are dealing with a historical document. We have a history of which most of us are quite embarrassed—certainly not proud. The deletion of those sections is very significant and, again, I want to stress, that those clauses are entirely redundant. They do not have any statutory force. So, indeed, it is appropriate to delete those clauses, which contain language of that type. I note, of course, that the historical document remains intact and that scholars in the future, whether it is a primary school student learning about the history of their Constitution or a scholar focusing on constitutional law in the future, will always be able to have reference to those clauses. As with any other piece of legislation that we deal with, if a clause is redundant, it does not have to be in the statute. We have made the recommendation that those clauses should be deleted.

Hon LIZ BEHJAT: It is very rare that I will rise in this place to utter the words that Hon Sally Talbot has provided me with a beautiful segue into what I will be saying. However, on this occasion, I find that that is certainly the case. Yes, I was being vigilant about sections 42 and 75, because I wanted to pick up on that issue in my contribution to the debate on this most excellent report that the Joint Select Committee on Aboriginal Constitutional Recognition has brought down. There is no doubt that everyone who has spoken from all sides of the house are very grateful for the work the committee has done. There is certainly unanimous agreement with the recommendations that were made by the committee. I will not canvass those further, except to add my thanks to those members on the committee who took the time to go into this. I would have loved to have been on a committee of this nature looking into something as important as this issue, and I congratulate those who did sit on the committee for the work that they have done.

Hon Sally Talbot raised a very important issue in her contribution; that is, the redundancies in the Western Australian Constitution. This report is going to be incredibly important not only in the way that Western Australia will now move forward with the recognition of the first peoples in our Constitution, but also because it outlines some interesting groundwork for what future work should be done on the Western Australian Constitution. People talk about their constitutional rights, "The Constitution says this, the Constitution says that", but I would almost bet boots to a dollar that a lot of people do not actually understand that Western Australia has its own Constitution. I think when people refer to the Constitution they talk about the Australian Constitution. One of the reasons we do not talk very often about the Western Australian Constitution is that it is confusing. It is confusing for us as legislators to work out what forms the Western Australian Constitution. At best, it can be called a spider's web of a few acts that come together to create the framework for what we know to be the Western Australian Constitution. If members read chapter 1 in this report, it outlines very nicely and succinctly what is the Constitution of Western Australia and the history of it, and the fact that the Western Australian Constitution came into being prior to Federation; therefore prior to the Australian Constitution, because at the time of the Australian Constitution recognition was given that the states' Constitutions existed, and then that those two Constitutions work together. There is a lot of precedent case law in relation to constitutional matters. It is a vexatious issue, half the time at best, when people argue these matters and what the Constitution means in the court system in Western Australia.

Certainly, we need to move forward with the constitutional recognition of the first people, there is no doubt about that, and I am sure that is well in hand. The next step in the program—this issue is so important that it needs to stand on its own—is the modernisation of the Western Australian Constitution. Hon Sally Talbot in particular spoke about section 42. There was unanimous support for the deletion of section 42 on the basis that it is redundant; in fact, the reason given was that, in the context of providing for Aboriginal constitutional recognition, section 42 provides that, in calculating the population of the colony of Western Australia, the Aboriginal natives of Western Australia are to be excluded. Of course, that is completely redundant in today's society and we would not see that at all. Nobody was arguing for the retention of that section. In all the submissions to the inquiry on constitutional recognition, there was explicit support from the Department of Aboriginal Affairs, the Yamatji Marlpa Aboriginal Corporation, Reconciliation WA and the Law Society of Western Australia to remove that section from the WA Constitution. Of course, interestingly, there was no submission that recommended the retention of section 42, so one can assume that the silence in that regard meant that there is no opposition to its removal.

It is incumbent on us as legislators to not only make good legislation and make sure that that legislation can endure, but also ensure that we go back to the statute book from time to time to make sure that the statutes and laws that are in place are still relevant today. They need to be modernised. If we want people to understand what we do in this place week in, week out, we have to do it in a way so that people can understand what is going on. This report is an excellent example of a very quick explanation of the WA Constitution; in fact, I had a discussion about it with my son, who is studying law and politics, and he said that he did not even know that we had a Constitution in WA. I think that is a fault in the syllabus in that it is centric on Canberra, not the states' rights. Obviously, I always fight to let them know that they should study more from the states' point of view. When my son asked me what it is all about, I gave him this report to read and it gave him a better understanding of the acts that make up the Constitution of Western Australia.

We are also seeing nationally the issue of the Federation itself. We need to modernise the Federation. If we are to modernise the Federation and turn it into the competitive Federation that it should be, we have to go right back to the grassroots, and what better place to start than the Constitution of WA and what it encompasses. This is a plea, if you like, to those people who have sway in those areas to take this opportunity—I am certain that we will change the part on Aboriginal recognition—to remove sections 42 and 75, which are completely irrelevant. Let us look at the whole thing and if we can encompass it in one act, I think we will come from a better starting place in further negotiations down the track on matters to do with the Federation.

Hon STEPHEN DAWSON: I have previously made a contribution on the report of the Select Committee on Aboriginal Constitutional Recognition, but I note that I have 10 minutes to speak, so I will complete my contribution. When I previously spoke on the report, I congratulated the select committee. I also expressed concern that it had taken us 126 years to finally be within reach of amending Western Australia's Constitution Act 1889 to recognise Aboriginal people in it. I also touched on the fact that Western Australia is the only state of mainland Australia that has not provided recognition of Aboriginal Australians in the Constitution. Victoria recognised Aboriginal Australians in 2004, and Queensland, New South Wales and South Australia recognised Aboriginal Australians in 2010, 2010 and 2013 respectively. Although we are years behind Victoria, we are certainly not years behind some of the other mainland states. I also touched on the fact that this is a symbolic gesture. It will not change the lives of Aboriginal Australians immediately or in any huge way, but it is an important recognition for us to make.

I want to touch on some of the submissions that were received by the select committee. I am aware—Hon Sally Talbot made the point, as I think have other members previously—that there was not a huge window within which to consult on this issue. In fact, I have previously acknowledged that members of the committee worked through their non-parliamentary summer period. Even though there was not a long period to consult, I am very happy with the report. I am also very happy that the committee acknowledged that Josie Farrer, the member for Kimberley, had undertaken a significant amount of consultation last year after she had given the second reading for the bill in the other place. Submissions were received from Professor George William from the University of New South Wales; the Goldfields Land and Sea Council; the Central Desert Native Title Services; the Yamatji Marlpa Aboriginal Corporation; Hon Fred Chaney, AO; Professor Anne Twomey, a professor of constitutional law at the University of Sydney; Matthew Keogh, the president of the Law Society of Western Australia; Matthew Howard, the deputy president of the Western Australian Bar Association; Reconciliation WA, which Hon Liz Behjat touched on; and Cliff Weeks, the director general of the Department of Aboriginal Affairs in Western Australia.

I will quote from the submission of Hon Fred Chaney, AO, to the committee. None of the submissions is very lengthy, but they did not need to be. I think they tackled the issue. They recognised the bill brought forward by the member for Kimberley and they were fairly positive. The submission from Hon Fred Chaney states —

> My Dear Attorney,
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> Thank you for your letter of 14 December and for the opportunity to make a submission on this matter although the timetable is rather odd given the reality that the Xmas/January period is a down period for the whole community and the usual time of law business for remote Aboriginal communities in this State. Responses, including my own, are likely to be of less value than they would be if there were a more realistic timetable.

Even though this is what Hon Fred Chaney said, I am confident that, given the work that had been done last year, a series of consultations took place. The letter goes on —

> I am writing this as I leave the Board of Reconciliation Australia on which I served from 2000. The views expressed are mine but are coloured by my participation in the Expert Panel on Constitutional Recognition which reported to the Commonwealth in January 2012. No doubt that report is available to the Committee. Since then the Commonwealth Government and Parliament have been considering what proposition might be put to Australian people and when a referendum might be held. Neither point is yet settled.

I have to say that I am concerned that there has not been a great deal of movement in the federal sphere on this issue. It has vexed parties of both persuasions for a number of years. I hope that eventually, and soon, we will see some movement from the federal Parliament. I am not having a go at any particular politician, but they need to get their act together and recognise Aboriginal people in the Australian Constitution too.

The letter continues —

> I strongly support recognition of Aboriginal prior ownership of Western Australia in the State constitution and the continuing presence of Aboriginal collectives as an ongoing part of the law and culture of this State. This should not be a contentious matter given the High Court's Mabo decision and the many determinations of native title in Western Australia since that decision, all of which recognise an existing title vested not in individual Aboriginal people but in their culturally determined collectives. Miners and other corporations have entered into extensive agreements with native title holders as collectives rather than as individual citizens of Western Australia. In addition successive Governments have entered into land settlement negotiations with the Noongah native title groups in recognition of the reality of their continuing rights and interests.
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> The existing law recognises continuing native title interests which are rooted in long existing rights in place at the time of settlement. These rights are vested in collectives defined by Aboriginal law and custom.
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> Recognition which falls short of acknowledging this existing legal position would in my view be a sham and an attempt to step back from the recognition already achieved at law.
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> The precise wording of any recognition should not be determined unilaterally by the Government if it wishes to see something in place which advances the unity of our population and which provides an assurance to Aboriginal Western Australians that the continuing place of their cultures in the State is accepted and secure.

On that, I made the point when I spoke last time that I was afraid that the government would try to bring this issue forward without the member for Kimberley being involved. I am pleased at the slight nodding of the head of the Leader of the House this afternoon, but I was also pleased to hear from him when he spoke on this report

when we last sat. In fact, I am aware that there has been some movement this week and that the government is very keen to proceed with this legislation. It is just unfortunate that the member for Kimberley has been away from the Parliament—I will not say on urgent parliamentary business; she has been unwell and so she has been away from the Parliament. I look forward to the speedy recovery of my good friend Josie Farrer and I look forward to her coming back to this place in a couple of weeks, and hopefully we will see movement on the bill.

I continue reading the letter from Hon Fred Chaney —

> Every effort should be made to have a unified position across party lines within the Parliament and to provide a sufficient opportunity for the various Aboriginal collectives (tribes) to express their views before the words are finalised. This is likely to require a longer timeline than MPs and governments normally allow but there seems little point in having a form of words in the constitution which is unsatisfactory to a substantial part of the Aboriginal population you are seeking to recognise.

Again that concern was raised about the time line and whether it was long enough. I am pleased, though, that Simon Hawkins, the chief executive officer of the Yamatji Marlpa Aboriginal Corporation, acknowledges in his submission on behalf of the Yamatji Marlpa Aboriginal Corporation —

> YMAC is aware of the Private Member's Bill—the *Constitution Amendment (Recognition of Aboriginal People) Bill 2014*—that led to the creation of this joint select committee. We had previously written to Ms Farrer during her process of consultation about the Bill last year. This submission is similar to that previous letter to Ms Farrer.
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> In short, we strongly support the passage of Ms Farrer's Bill. It is simple, and without any legal controversy. It is important and long overdue.

They too, Hon Liz Behjat, in their submission touched on the issues around sections 42 and 75 of the Constitution Act, and they are issues that we will have to deal with at some stage. However, I certainly acknowledge the good work of the committee on this report and I look forward to this issue proceeding through the Parliament.

Question put and passed.