

Additional Comments by Senator Siewert

1.1 The Australian Greens are committed to recognition of Aboriginal and Torres Strait Islander peoples in our Constitution and are disappointed that a referendum could not be held either before or with the next election. However, we acknowledge that recognition by the Parliament is a step along the path to constitutional change. The majority committee report identifies a number of important issues raised by submissions to the inquiry. The Greens generally support the majority report and recognise that the on-going work of the Joint Select Committee will address some of these issues. However, we believe the current Bill could be improved taking into account the evidence before the committee.

1.2 Despite short timelines, a significant number of organisations who collectively represent a significant constituency of Aboriginal and Torres Strait Islander peoples and other stakeholders made submissions which, while broadly supportive, raised concerns that have been noted by the Australian Greens as requiring greater consideration.

1.3 In particular, the Greens note that many of the submitters referenced the work of the Expert Panel and drew the committee's attention to the fact that this body has already laid out a model and a pathway towards constitutional recognition.

1.4 Ms Jacqueline Phillips, from Australians for Native Title and Reconciliation (ANTaR), told the committee:

We believe that the reform proposals advanced by the expert panel offer a sound, robust and reasonable platform from which to take both the issue and the process of Constitutional recognition forward. The extensive consultations conducted by the panel, the detailed consideration given to the complex issues before it and the consensus of panel members behind the report's recommendations are all, in our view, compelling reasons why its report should provide the basis for the process from here on.¹

1.5 Mr Russell Taylor, from the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), told the committee:

The second thing we wanted to talk to the committee about this morning is the review process proposed in the bill. We are concerned that it largely duplicates or risks duplicating the work of the expert panel and may not achieve anything that has not already been achieved. What the proposed review process does is measure the levels of support for various options rather than set out a plan for how to build the necessary report. The report of the expert panel is clear on this issue. They think that lots of work needs to be done in boosting public awareness of and support for a constitutional amendment. In our view, there is not much point so soon after the report in engaging in another similar analysis. I know that this has already been

1 Ms Jacqueline Phillips, National Director, ANTaR, *Proof Committee Hansard*, p. 12.

discussed here this morning. We know what needs to be done. The trick is how to achieve it; how to do it.²

1.6 While this Bill has now laid out another step in the pathway to constitutional recognition by triggering a further review within 12 months, the submitters argued persuasively that this substantive body of work compiled by the Expert Panel should not be overlooked or duplicated during the review process.

1.7 Mr Lez Malezer, from the National Congress of Australia's First Peoples (Congress), told the committee:

The clear information we are looking for in congress in particular is how the political leadership is responding to the recommendations that have been made. I think we understood when we presented the report to the Prime Minister that the next step would be discussions between political parties to try and get bipartisan support through those recommendations and so on, and then there would be a process of winning support from the public. The impression seems to be that that is not the process that we are now proceeding through; the process seems to be more one of where public awareness and support is to be built and then political leadership will be put in a position to go forward with a referendum. So we have made it clear in our submission that we want political leadership to be shown in this process—particularly for the major parties, that leadership are able to make positive statements, consistent with the report of the expert panel, as to why these changes to the Constitution should be made.³

1.8 Furthermore, although this review provides another trigger by which the form of the question that will be put to referendum will be finalised, the Australian Greens share the wishes of those submitters, such as Congress in the quote above, who have indicated that they would like the process to move more swiftly and to give greater clarity to the direction that the final model is headed towards.

1.9 The Greens will be active in discussing with the government and through the committee to provide clarity of purpose and timing for the process moving forward.

1.10 We also strongly agree with the call for 'political leadership' as well as multi-partisan agreement that was articulated by Professor George Williams.⁴

1.11 The sunset clause received a great deal of attention in the submissions and evidence put before the committee, as discussed in the majority report. The lack of clarity on the process compounds concern about the sunset clause. While we appreciate the reasoning of the government in including a sunset clause and share the aim of ensuring that legislative recognition does not become a substitute for the

2 Mr Russell Taylor, AIATSIS, *Proof Committee Hansard*, p. 11.

3 Mr Les Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, pp. 6–7.

4 Professor George Williams, Foundation Director, Gilbert + Tobin Centre for Public Law, University of New South Wales, *Proof Committee Hansard*, p. 19.

necessary constitutional change, we also share the concerns expressed by some that the sunset clause dilutes the significance of the Bill.

1.12 This inquiry has also provided an opportunity for reflection on the purpose of a referendum, and submitters such as Congress, ANTaR and the Human Rights Commission have provided useful evidence that should be incorporated into the debate. Notably we are disappointed that the recommendations of the Expert Panel in relation to removing discrimination in the Constitution and providing Constitutional non-discrimination protection were not reflected as a desirable outcome through the processes outlined in the Bill.

1.13 For example, Les Malezer from Congress states that during the expert panel discussion, Congress:

...ensured that Aboriginal and Torres Strait Islander communities were consulted so that the recommendations made by the expert panel reflected a balance of providing recognition as the First Peoples in Australia, along with a protection of interest—that is, non-discrimination provisions in the Constitution... If it was just to look at the preamble paragraph to provide recognition as the first peoples, for example, we feel that that is not consistent with the discussions we had out there in the community and the balance that people wanted between having recognition as well as some substantive protections provided in the Constitution for the first people.⁵

1.14 ANTaR told the committee that the:

...inclusion of language which recognises the need to remove or reform racially discriminatory elements in the Constitution should be added, confirming parliament's support for changes which go beyond the symbolic—again, a key recommendation of the panel. The inclusion of a reference to the need to continue efforts to close the social and economic gap that Australia's first peoples experience should also be a key feature.⁶

1.15 The Gilbert + Tobin Centre of Public Law told the committee:

Recognition needs to deal with the fact that the Constitution was drafted on a premise of racism, essentially. It was drafted at a time when, in the words of our Prime Minister, Edmund Barton, we needed a power in the Constitution to enable the federal parliament to pass laws against 'the coloured and inferior persons' within the Commonwealth. Those words in the Constitution and that racist power have now been extended to Aboriginal people. Section 25 still recognises the possibility that states might enact laws that disenfranchise people on the basis of their race. Certainly from my dealings across the community, including with very conservative groups, it is that element of racism that most motivates people

5 Mr Les Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, p. 1.

6 Ms Jacqueline Phillips, National Director, ANTaR, *Proof Committee Hansard*, p. 13

to think that they need to fix the Constitution to move beyond the values of the time.⁷

1.16 The Australian Greens share this view that the final model that is put to a referendum should address the legacy of racial discrimination and enable the federal government to legally act to meet its commitments under both Close the Gap and the United Nations Declaration on the Rights of Indigenous Peoples.

1.17 Furthermore, both AIATSIS and the Human Rights Commission focused on how a lack of recognition impacts on the social and emotional wellbeing of Aboriginal and Torres Strait Islander people, particularly young people. The Australian Greens agree that at each step it is crucial that this process improves emotional and social wellbeing among Aboriginal and Torres Strait islander people and that above all it takes care to avoid creating significant uncertainty within the process that triggers distress or disengagement by Aboriginal and Torres Strait Islander people.

1.18 The submission from Recognise also demonstrated how difficult it is to advocate for a successful referendum when the model of that referendum is so unclear and the enduring problem this presents to their work to build public awareness.

1.19 Similarly, when talking about the polling that Recognise has already undertaken to test public support and the challenges of gauging the willingness of the general population to support a referendum on constitutional recognition, Ms Broun from Congress noted:

...it has to be done in parallel with really strong leadership and engagement with the broader community and also education. I think we have to have a lot more education of the community. It is great to poll people before they have the information but let us poll them when they are fully informed as well. I think we have to move people through this process and I think that takes a lot of political leadership as well.⁸

1.20 The Australian Greens share the view of those submitters who indicated that the work to educate the community and build support for a referendum is very difficult without greater clarity about the model and multiparty commitment to that model.

1.21 Subsequently the Australian Greens share the concerns about a review process which weighs public willingness equally to best practice, given the difficult task of building public awareness and therefore the difficulties associated with assessing the likelihood of success of particular models.

1.22 Submitters such as Congress have outlined the need for commitments to occur well before the review process gets underway, rather than there being no other significant triggers for commitment and progression between the passage of the Bill and the completion of the review process.

7 Professor George Williams, Foundation Director, Gilbert + Tobin Centre for Public Law, University of New South Wales, *Proof Committee Hansard*, p. 18.

8 Ms Jody Broun, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, p. 4.

1.23 The Australian Greens agree that the Joint Select Committee provides a framework for such triggers and other milestones to be developed and acted upon. Submitters have acknowledged the significance of having several of the parliamentarians who served on the Expert Panel included on this committee and their expectation that this will provide continuity in that work.

1.24 However, some submitters also raised concerns and questions and provided suggestions about how this Joint Select Committee might continue to ensure that it achieves effective engagement with Aboriginal and Torres Strait Islander peoples. The Australian Greens acknowledge those concerns and also emphasise the importance of ensuring that there are real opportunities for on-going engagement by Aboriginal and Torres Strait Islander peoples.

1.25 Similarly the Australian Greens acknowledge that while Recognise noted 'we hope the day the act passes will be a major milestone on the journey to full constitutional recognition. It will be the day the parliament makes its down payment of good faith for the journey ahead for the rest of us,' the work of Recognise is currently only funded to the 18 month mark of the life cycle of this Bill.⁹

1.26 It is the view of the Australian Greens that one way to demonstrate commitment and leadership would be to ensure that the resources that submitters have demonstrated to be required for education and engagement are available.

1.27 In conclusion, the Australian Greens recognise that the submitters presented some significant issues not just relating to the Bill, but also about the path to constitutional recognition, that must be addressed by the Joint Select Committee in consultation with Aboriginal and Torres Strait Islander Peoples as it continues to develop both multiparty support and a clear path towards a success for referendum.

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9 Mr Tim Gartrell, Campaign Director, Reconciliation Australia/Recognise, *Proof Committee Hansard*, p. 2.

