MORRIS, Dr Shireen, Senior Adviser, Cape York Institute

[15:24]

CHAIR: Welcome. I apologise for the absence today of the co-chair, Mr Leeser, and other members and senators. Thank you for agreeing to meet with the committee. The committee has been asked by the Commonwealth parliament to look into constitutional recognition relating to Aboriginal and Torres Strait Islander peoples. The resolution of appointment outlines in more detail the aspects for the committee's consideration. As co-chairs of the committee we have made statements expressing our wish to hear more from First Nations peoples as we start our work. We have also explained that we will continue to receive submissions and hear more views around Australia in coming months.

We need to ensure that everyone present is aware of the procedural considerations. Today the committee is taking a Hansard record of the proceedings but it is not being broadcasted. The microphones aren't broadcasting or amplifying your words in the room, but they are likely to be on, and recording, at any given time. The committee may wish to make the Hansard record public at a later date, but we will seek your views on this before doing so. If you feel very strongly that you don't want your views recorded in any way, we will give consideration to that.

When you provide information to a committee—and you are probably aware of this—you are covered by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage you on account of the evidence given and such action may be treated by the parliament as a contempt. It is also a contempt for you to give false or misleading information. If you make an adverse comment about another individual or organisation, that individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee. Would you like to make a brief opening statement?

Dr Morris: Firstly, I thank you for the opportunity to be here. I am sorry that Noel Pearson couldn't be here as well. He sends his apologies. The first thing I would emphasise is how unprecedented and historic the Uluru Statement from the Heart was. I have been working on this for the last seven years and I have researched so much of the Indigenous history of advocacy. As far as I can tell, there has never been a moment like this. All the petitions of the past and the letters to the king and tp prime ministers all tended to emanate from a particular first nation or a particular region. Never before have Indigenous Australians had the opportunity to choose their own representatives in the various regions and come together to form a national consensus. I want to emphasise how special that is. They did what everyone said they couldn't do, which is form a majority consensus. Seven of the delegates dissented, which is to be expected. No group can be expected to form a majority consensus without first dealing with the dissent, so I think that is good and it shows that it was a proper process. But 250 minus seven gives you a consensus of 97 per cent. That is really remarkable given the intricacy of the models that they had to discuss and the diversity of cultures, politics and backgrounds. So I think that is special.

The other thing that was remarkable about the Uluru consensus is that it came out with really the only proposal that is pragmatic in that it took on board the objections to a racial non-discrimination clause that the expert panel put forward. It moved away from that clause and went instead for the proposal of a constitutional voice, which was a proposal developed specifically to be a constitutionally conservative alternative to a racial non-discrimination clause. It was extraordinary that not only was there a strong majority consensus but it was a consensus around a politically pragmatic proposal. So, I think it was a smart move to shift away from what had been blocked politically in the past to a pragmatic alternative. The other smart thing that Uluru achieved was moving away from the insertion of symbolic words in the Constitution. Completely moving away from that is completely in line with the Indigenous advocacy of the past, which has never really asked for a preamble and things like that. The idea of a symbolic statement in the Constitution has usually been put forward by politicians. But the reason I say it was a smart move is, firstly, because a symbolic amendment failed in 1999. John Howard tried to put forward a symbolic amendment to the Constitution. It got voted down abysmally, and many Indigenous groups at that time opposed it. The problem now, I think, is that if there were a push for a purely symbolic amendment it would get opposition on both fronts. It would be opposed by Indigenous people, who have made it clear repeatedly over the past seven years—in the Kirribilli statement, of course, but, more importantly, in the Uluru statement—that they will oppose mere symbolism. But constitutional conservatives have also said they'll oppose symbolic words being inserted into the Constitution, because they're worried about how the High Court might interpret those words. So it is important thing to understand that a merely minimalist or symbolic amendment to the Constitution would get opposed on both those fronts. That would be very powerful and would, I think, lead to the kind of failure we saw in 1999.

When you think about it, there are three proposals here. The expert panel proposal is a racial non-discrimination clause. It became clear after the joint select committee that that wasn't going to be viable. The joint

select committee put forward three versions of a racial non-discrimination clause, and a few weeks later Ken Wyatt said, 'The Liberal Party's opposing it; it's not going to fly.' I think that proved beyond a doubt that that is a dead-end.

Ms BURNEY: If there isn't a change of government.

Dr Morris: I am assuming that—

Ms BURNEY: I'm being facetious.

Dr Morris: All I mean is: if you need bipartisan support then that is a dead end. The second option is constitutional minimalism or symbolism, which has failed in the past. For the reason I explained before, I think it is not a viable solution: it would be opposed by Indigenous people who want substantive constitutional reform, and it would be opposed by constitutional conservatives. So those two options are out. The third option is the constitutional voice option, which is a middle-ground option. It's been described by Professor Greg Craven, for example, as 'modest yet profound'. Noel and I would call it a radical-centre solution, because it is substantive but it also addresses conservative concerns. It gives a voice, which is something Indigenous advocates have been asking for for decades, but it doesn't involve the High Court. So it's a proposal that tries to balance the competing concerns.

We know that that third proposal is going to be hard, because we have seen how the Prime Minister rejected it in October last year. But, when you compare the three, it still remains the best chance of success even though it is so hard. We've always known it would be hard. I say it is the best chance because (1) it has, most importantly, this historic backing of Indigenous people, which has never happened, and (2) it has the backing of constitutional conservatives. This is the very interesting thing: for minimalism you get united opposition from those two groups, but for a constitutional voice you get united advocacy. That's because it was a proposal designed in 2014 with those constitutional conservatives who are so opposed to a racial non-discrimination clause. That's a huge opportunity—the fact that Uluru came out with a proposal that constitutional conservatives are prepared to put their hand up and advocate for. To give you a practical example of why that's so politically significant, those constitutional conservatives have opposed all of the other attempts at constitutional reform. They're the group that can galvanise extremely effectively and mount a very effective 'no' case. Co-chair Julian Leeser is one of those. He was one of the co-designers of the voice proposal. He successfully ran the 'no' case against a republic, against a bill of rights and against local government recognition. He's never been on the 'yes' team before, but on this proposal he is, so that is extraordinary. It is extraordinary that Uluru asked for a proposal that constitutional conservatives are prepared to support.

The other reason we haven't lost hope yet is that there is a way to achieve what the Uluru statement asks for that also addresses the Prime Minister's concerns. I think there's a way through if we are nuanced and strategic about it. I say that because there are a number of constitutional models for achieving a voice that have been put forward by various people, and there are a number of legislative models. If you saw the CYI body design report, it discussed some of those approaches. If you look carefully at what the Prime Minister rejected in October last year, he was very specific about it. He doesn't want a third chamber of parliament, he doesn't want a top-down elected additional representative assembly and he's worried about the Australian people rejecting this proposal. I think it's possible to put forward a constitutional amendment that's clearly not a third chamber and legislative design that's clearly not a third chamber. And I think it's very possible to put forward both constitutional and legislative design that is not a top-down representative assembly. I think there's definitely a way through. In fact, if you look really closely at what came out of the dialogues, they don't want another ATSIC. They don't want another top-down structure. Indigenous people were definitely not asking for what Malcolm Turnbull is worried they were asking for. What they were asking for was local empowerment of First Nations voices and communities. So I do think there's a way through there.

The other reason I think there's a way through is the two sets of polling. Even in the face of the government's negativity and fearmongering about a third chamber, we had one set of polling that showed 61 per cent support, particularly high support, predictably, amongst progressives, and a second set that showed 57 per cent support, again, particularly high support amongst progressives. And that is with the Prime Minister and his ministers arguing against it. Imagine how high that support might be if we managed to get the government to a better position. I think it would be a lot higher. It's an interesting parallel that it's around 60 per cent, because that's what the same-sex marriage survey found. It's a significant enough majority to be able to say, 'Okay, if politicians were to show leadership and argue the "yes" case, you could imagine how that could be referendum-winning support.'

Of the three options, constitutional voice is the best hope. It's still hard, but, with some really collaborative, careful work, I think there is a way to put some options forward that say to the Liberal Party: 'Look, we've heard

you. We've addressed your concerns, and this is a way of achieving what Indigenous people have asked for that's not the third chamber, that's not those things.'

Ms BURNEY: Thanks, Shireen. I've read the paper as well.

Dr Morris: Which one?

Ms BURNEY: A paper that you put together.

Dr Morris: That one. Great.

Ms BURNEY: You're very clear on what our role is. It's a difficult role. And you've described really well some of the challenges in front of us, in both a practical way and a political way. I'll ask you to comment on a couple of things. I think we would all agree, no matter what side of the fence we're on, where we're from or whom we represent, that what came out of Uluru was not what people were expecting. That's stating the bleeding obvious. It has come out and there is enormous support for it. I think that's reflected in statements by people around this room. We need to think things through really carefully. If we can do all the things that you and other people have suggested over the last two days—and I'm sure people will continue to suggest things—and craft something that's acceptable to everyone but still holds true to the aspirations of First Nations people, and it goes to referendum and it fails, what is plan B? My sense is that we haven't really thought that through. One thing that we do know is that, if it fails, it's not going to go away.

Dr Morris: Exactly.

Ms BURNEY: I don't know whether you'd like to reflect on that. That's something that part of this crafting is going to need to consider.

Dr Morris: If the polling indicated it would fail, there might be a call made: 'Let's not do it.' That would be a sensible thing to do. One thing that Noel and I always reflect on, just to answer it in another way, is that, if we went ahead with the minimalist, purely symbolic referendum that Indigenous people have said they don't want—

Ms BURNEY: Which is the recognition being in the Constitution.

Dr Morris: Which are the symbolic statements that Indigenous people at Uluru said they didn't want.

CHAIR: What are the symbolic statements?

Senator SIEWERT: If you had a preamble or something like that.

Ms BURNEY: That we were the traditional owners and—

CHAIR: You mean the set of words that was governing the change to section 51—

Dr Morris: Yes. Usually when people talk about a minimalist model, they say, 'Remove section 25, change the race power to an Aboriginal and Torres Strait Islander power and put in some symbolic words, whether that's in the preamble or in section 51A.' That's what I mean when I say 'minimalist'.

CHAIR: The words in the proposal that came from the expert panel for new section 51A were inside the Constitution, so they would not necessarily be symbolic.

Dr Morris: I would argue that they would be symbolic, but maybe not in the way that constitutional conservatives are worried about, in that the High Court can still interpret them.

CHAIR: They would be there to govern and guide the interpretation as to how the substantive clause could be interpreted. In that sense, they're not symbolic.

Dr Morris: They would only be used to interpret the way the power works if there were an ambiguity in the power, to be technical about it.

CHAIR: Yes, I understand that. That's why you have preambles. Without that, the power would just be what it is. It would stand as it does now, basically, except for a change of words.

Dr Morris: What I mean is that there's a difference between putting in preambular words like that and putting in a substantive limit on the power. To explain that difference, it would be a limit on the power that said: 'Here's a power to make laws for Indigenous people but not to discriminate against them.' That's one version that the joint select committee played with. That's a substantive limit. It's like a racial non-discrimination clause. So I mean that distinction where it's not a hard limit on the power, but you're right: judges might still use that to interpret various things. The problem is that we don't know how.

If we went forward to referendum with that kind of minimalist recognition package, one outcome is that, because Aboriginal people oppose it and constitutional conservatives oppose it, it might fail like in '99. But, if my theory is wrong and it succeeded against Indigenous wishes, the strategic problem, I think, is that we'd probably be taking constitutional recognition off the agenda forever, because they'll be able to tick the box and say, 'Good;

recognition's done now.' There'll be no chance of constitutionalising a voice or a racial non-discrimination clause later, because you know the Liberal Party and others are going to say, 'Tick; we've done it.' Meanwhile, Indigenous people don't feel like they've got some substantive power from that amendment. That's what is meant by a minimalist model. A minimalist model doesn't give you some concrete power, whether it's a voice or a racial non-discrimination protection. It just gives you some symbolic statements. We would have won a referendum and ticked the recognition box, but Indigenous people wouldn't have gained any power.

CHAIR: I'm a bit lost. We don't understand—and there's been no proposal apart from Professor Twomey's draft—what the substantive head of power would be that sets up the voice. In the absence of that, it's very hard to know what power Indigenous peoples would have, particularly if the power that they're going to have or would enjoy would be subject to the parliament legislating what that power would be or the scope of those powers would be. Their powers would be entirely reliant, as I understand it, upon the goodwill of the parliament in any negotiations with First Peoples that set out the legislation for what the voice would be, how it would function and all those other matters. I'm not sure how you get power because there's a head of power in the Constitution.

Dr Morris: Yes. Can I finish answering Linda's question and then come back to yours so that I don't forget?

CHAIR: Sure.

Dr Morris: So that's if the minimalist one was won. I think that would be the problem. If we went ahead with a 'voice' referendum and it won, great. If it failed, at least Indigenous people would be no worse off. That's how we tend to think about it. At least, as you correctly say, it will remain alive. It won't go away, and maybe down the track, when there's a better polity or a better government, it can succeed. At least we haven't ticked the box.

Ms BURNEY: Sure. I understand that.

Dr Morris: That's the way I would answer that one.

There are a few amendments on the table. There's Professor Twomey's amendment. Warren Mundine's put forward a couple of versions that would focus on the local voices, which is very interesting.

CHAIR: I'm referring specifically to a head of power. I don't think Warren's done that, though. Has he?

Dr Morris: Yes, he has under his drafting. There's also Megan Davis and Professor Rosalind Dixon, who also put forward a different version. So there are versions out there. But you're right: it's not a solution that would involve the High Court, so it does rely on political goodwill in that sense. It would provide a constitutional guarantee and constitutional requirement that parliament must set up a body. The Constitution wouldn't dictate what the body has got to look like; all of that would be subject to political negotiation. And, depending on what constitutional amendment you choose—for example, Professor Anne Twomey's amendment would provide a constitutional obligation for the body's advice to be tabled in parliament and for parliamentarians to consider the advice. Anne Twomey's amendment is pretty strong, because there are three guarantees there: a constitutional requirement to set up the voice, a constitutional requirement to table the advice and a constitutional requirement to consider the advice. But they're requirements that aren't adjudicated by the High Court, and that's the key. So constitutional law still carries a lot of moral and political force—and legal force, I would argue—but it's enforced by parliament, not the High Court, and that's what makes it a constitutionally conservative proposal.

Senator SIEWERT: That's the issue that we've been talking about today also. The chair brought it up to begin with. It's the issue of what happens if the parliament doesn't do anything—how enforceable is that? I was asking one of our other witnesses about that and whether you could build that into the heads of power to ensure that, if parliament chose not to do anything, like they're not doing anything with the interstate commission, and haven't done for years and years, you would want that power to force them to do something—or the ability to take parliament to the High Court to get parliament to do something, wouldn't you?

Dr Morris: You would, but remember the whole logic behind the proposal is: how do you address the concerns of conservatives about getting the High Court involved? Because that was the compromise we were looking for, this was designed so as not to involve the High Court. The technical legal word is 'non-justiciable'. The justiciable constitutional clause—that's like the racial non-discrimination clause. That's when the High Court comes in and strikes down laws. That's what scares the conservatives so much. They're like, 'Oh my God, we don't want the High Court to come in and strike down laws.' That's why they opposed it. So, because this was put forward as an alternative that might get conservative support, it was deliberately drafted not to involve the High Court. In terms of the interstate commission, I would have confidence that if the Australian people voted to put this in, it would be extraordinarily hard for government not to legislate a voice.

Senator SIEWERT: It's down the track that you'd worry about it. I don't know when the last interstate commission meeting took place.

Dr Morris: It barely operated.

Senator SIEWERT: You would think the parliament would do something in the shorter term. It's the longer term—if they did it for a while and made sure everybody was happy for a while, and then slowly it fell off the agenda.

Dr Morris: The interstate commission was interesting because it was almost like another judiciary, and the states didn't like it, the Commonwealth didn't like it and the High Court didn't like it, and there was no constituency clamouring for it to exist. The difference would be that there would always be Indigenous people clamouring for it to exist and it would be, I suppose, the responsibility of all of us to ensure that the political pressure is there. But you're absolutely right: it is a constitutional guarantee that operates through political and moral force. It's still constitutional guarantee, but it is a constitutional guarantee that's adjudicated by parliament. There are lots of other clauses like that in the Constitution, and, apart from the interstate commission, parliament follows them all the time in its lawmaking procedures every day. So the hope would be that this would be like that—it would develop into part of Australia's lawmaking and policymaking processes that, if you're making laws about Indigenous people, you seek their advice, and this institution should exist for that function. I think a lot of weight would come from it being an institution of the Constitution, unlike bodies of the past that have just got struck down. But it is a noble compromise model.

Senator SIEWERT: I take your point.

Dr Morris: That's its purpose.

CHAIR: How do you deal with the question or the position that seems to have come from the government that an entity that's based entirely on race is not acceptable?

Dr Morris: That's a really tough one.

CHAIR: That's the position that's been put.

Dr Morris: Yes. One way is to think about Warren Mundine's approach, which is to constitutionalise the local First Nations voices rather than a national voice. When you think about what the local First Nations voices are, they could be like the native title organisations and things like that. It need not be race based in that sense. Depending on design, it could be about giving organisations a voice. As we know, a lot of native title organisations employ non-Indigenous people, so I think there is room in the legislative drafting there to get around that. But I think there needs to be pushback on the Prime Minister. There absolutely needs to be pushback on the Prime Minister on that, because this is about Indigenous recognition. It is about one group.

CHAIR: What are the conservatives doing about that?

Dr Morris: I don't know.

CHAIR: These are the people that you say are on the side of the proposition. What are they doing to put pressure on the Prime Minister in relation to the position that the government's taken?

Dr Morris: There've been a lot of conservatives out in the media advocating. Alan Jones was one that surprised me. I wasn't expecting him to be on *Q&A* saying the Prime Minister was wrong to reject this, so that was one good thing. I don't know what Julian Leeser's doing behind the scenes, but I think there's got to be pushback from all quarters on that.

The way to push back on it is: the Constitution gives parliament a special power to make laws about Indigenous people. The race power has only ever been used for Indigenous people. We all know we need Indigenous-specific laws, like the Native Title Act, so surely it's logical for the Constitution to also require that parliament hear First Nations voices when it exercises that special power. I think there's a good logic there. I know that that's a logic Julian Leeser has used many times when talking to me. He said, 'That's a good argument.' But there's got to be some pushback on the Liberal Party on that.

I was thinking about it the other day. It's this rise of libertarianism—the IPA-style argument. Really, we can't let them win. We can't let that style of argument win, because that means no recognition whatsoever.

CHAIR: All right. Sussan, do you have any questions?

Ms LEY: No—nice to see you again, Shireen.

Dr Morris: Hi. How're you going?

CHAIR: We thank you for your presentation and for attending.

Dr Morris: Thank you so much. Thanks for having me.

CHAIR: We look forward to the iterations of the various bits of work that are being done.

Dr Morris: Great.

CHAIR: Hopefully they will help inform this committee in its final deliberations. Thanks very much.

Ms BURNEY: Thank you.

Dr Morris: Thank you everyone. See you later. Bye.

CHAIR: I don't think there are any other matters, so I will close these sittings. But, before I do so, I thank the secretariat for your help and assistance throughout these hearings. Again, I thank all the senators and members who were able to attend over these last two days and for the work that you are continuing to do for us. Thanks very much.

Committee adjourned at 15:58