

ALICE SPRINGS — Wednesday, 5 July 1995

PUBLIC HEARING

PRESENT:—

Committee:

Mr Hatton (Chairman)

Mr T Baldwin

Mr P Mitchell

Officers assisting the committee:

Mr R Gray (Executive Officer)

Mr G Nicholson (Legal Adviser)

Appearing before the committee:

Mr John Richardson

Ms J Lee

Mr B Ivory

NOTE: This is an edited transcript.

ISSUED: 27 July 1995

NOTE: Mr Hatton's opening remarks were extremely difficult to decipher due to technical shortcomings in the recording of proceedings. The first 6 paragraphs of this transcript comprise an edited paraphrase of Mr Hatton's introductory remarks compiled from the audible fragments of the recorded proceedings.

Mr HATTON: This is a parliamentary committee comprising representatives from both sides of the parliament. It is unique in the sense that it is the only parliamentary committee with equal representation from both the government and the opposition, both of which have three members. Through unforeseen circumstances including sickness and other adversity, the Labor members of the committee have been unable to attend this hearing.

There were to have been five of us present in Alice Springs. Wes Lanhupuy has been unable to attend because of illness. The sixth member of the committee, John Bailey, will be catching up with the roadshow later during the cycle.

Our committee's terms of reference can be summarised as: firstly, to research what needs to be done for the Northern Territory to become a state; secondly, to prepare the draft of a Northern Territory constitution; and thirdly to make recommendations to the parliament concerning a Northern Territory constitution and the move towards statehood.

We have been working on this task for 10 years and it is fair to say that when we all started in a blaze of enthusiasm, none of us realised the complexity and detail that would have to be gone through to achieve that objective. Over the period we have produced a large number of discussion papers and interim reports on a range of issues, together with a series of ministerial statements and progress reports to the parliament.

Our purpose has been to try and get information to the community on different subjects, including issues such as recognition of Aboriginal customary law in the constitution or otherwise. Submissions have raised the issue of whether or not a bill of rights should be included in our constitution. Should we have provision for citizen-initiated referenda? That is a procedure where, if enough signatures are collected from the citizenry, parliament can be forced to pass a law on a particular matter. It gives more power to the people, if you like. Citizen recall can force the government to go to an

election at a particular time.

Other issues include the role of judges and the courts, and the overall direction of society within a framework of rules. How will our institutions shape the nature of this society in the future? The only way the structures can be created is through a framework for government - the constitution. The constitution is the foundation of law in any society. It is the law where the people have a final say in terms of governing themselves and protecting their rights.

The remaining recorded fragments of Mr Hatton's opening remarks were inaudible. The edited transcript then resumes as follows.

You could move from single member to multi-member electorates, and maybe back to single member electorates over time. Or you could lock in multi-member electorates, as in the Tasmanian situation. It is about choices and how much you want to entrench in your constitution.

We have written down the different choices for people to think about and comment on. I guess we all have our own views but we want the views of the people.

Should we have have a fixed term parliament or a partially fixed term parliament? For example, the parliament might be required to serve at least 3 years of a 4-year term. Do you lock in no limitations, no fixed term at all, as we have at the moment? It is something you can think about and read about. We are trying to draw out your views. We would like people to take away this document and think about the issues it discusses, so that they can come back to us with their views.

The document is brand new. All of the discussion papers and submissions over the last 10 years have come down to us producing that. But that will not be the end of the day. We hope to have this job completed by the end of this year or early next year. At that stage, we will walk into the parliament and table our draft constitution. At that stage, our committee will finish.

At the same time, the parliament already has before it a report on a Northern Territory Constitutional Convention. The process will continue like this.

We will prepare a draft constitution with all this background information. We will present that to parliament. The parliament will then create what is known as a Northern Territory Constitutional Convention. That is like a giant drafting committee of Territorians although it will have more power than a committee. Its job will be to go through this draft clause by clause and word by word if need be. It will be talked through and discussed in detail, and changed, accepted or rejected. The result of that process will then go to a referendum of all Territorians. The aim is to have that referendum held in 1998. That allows 2 years for the convention to build on our work to produce a document which it can confidently put to the Territory people.

Obviously, the structure of the convention and its representation is very important. How should it be made up? Who has a right to be there and who should not be there? Who is likely to be under-represented? How do we ensure that it is representative of such a diverse community as the Northern Territory. We are a very diverse community in many ways - geographically, racially, culturally and ethnically.

We believe that our recommendations achieve the result. We are suggesting that the convention comprise a mixture of elected and nominated people. The election would be conducted like a normal general election, except that there would be 10 electorates across the Northern Territory, each electing 5 members. Because the quota numbers would be low, smaller group interests would be likely to get some representation through the ballot box.

We are also saying that a quarter of the members - no more than a quarter but about 16 or 17 members - would be nominated from particular interest groups or minority groups within society. This would, for example, ensure Aboriginal representation, industry or employer representation, and employee or trade union representation. There could also be perhaps representation from ethnic organisations in the Northern Territory, the youth sector and the aged sector of the population.

We are looking for views on what sectors should be in that nominated category, to cover those who may not achieve representation through the ballot box. Who do you think should have their voice heard? The constitutional convention needs to reflect the Territory's diversity. That is what we want people to think about during the course of this year.

Give us your views and thoughts on that because we have to finalise recommendations to the parliament in the preparation of what will be known as the Northern Territory Constitutional Convention Act. We want that passed through parliament by early next year so that the election can occur towards the middle of next year and the convention can be working by the second half of next year.

The time is upon us. It is a time to get busy and to make decisions. That is really what we are doing now. We are saying: 'Look, we are doing all this work. Have a look. Please tell us if you think we are going down the right road'. We have to start making some decisions. Otherwise it will be the year 2101 by the time we start getting through the process and, frankly, we are not prepared to wait that long. We need to have a constitution in place by about 1998 so that we will have a clear expression of the views of Territorians about how they want the future Northern Territory to work.

We can then go to work in negotiations with the federal government of the day, to get the Self Government Act changed into the Northern Territory Constitution Act so it will be our constitution that governs our Territory rather than a document imposed from Canberra. Secondly, we can start to negotiate the transfer of powers and functions in order to achieve statehood in 2001. That would allow 2 or 3 years for the negotiation process to take place. We need to work hard at the process to get there. That is really what we are about. That is why we are here.

The document covers a lot of contentious issues. In the recommendations attached to the draft, although I believe this is not contentious, we have included a preamble. It is like the history of the Northern Territory and its evolution. For the first time in Australian history, a government constitution would recognise the prior occupation of Aboriginal people in Australia. I will read you the words:

Before the proclamation of the colony of New South Wales in 1788 and since time immemorial, all or most of the geographical area of Australia that now constitutes the Northern Territory of Australia was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and laws by which they lived and defined their relationships between each other, with the land and with their natural and spiritual environment.

It continues, describing various governmental arrangements for the administration of the Northern Territory, to the current day. It concludes in the following terms:

The people of the Northern Territory, voting at a referendum, have freely chosen to associate in accordance with this constitution as free, diverse yet equal citizens, and to be governed under it in accordance with democratic principles. Now therefore it is declared that this is the Constitution of the Northern Territory.

That is what we are working towards as part of the evolution, the history and the growth and development of the Territory.

We have dealt with other concepts in here, including what are known as organic laws. It is a new concept to Australia. We have heard of the common law, the law made by the courts. You know what an act of parliament is; they call that statutory law. You know what a constitution is; that is a law made by the people. Between an act of parliament and a constitution, you can have a higher standing act of parliament which is called an organic law. It is harder to make and harder to change but it is done by the parliament. The suggestion is that perhaps such acts might only be passed by a vote of two-thirds or three-quarters of the parliament, through 2 separate sessions of parliament by the same majority. Such acts would only be able to be amended the same way. So they would be much harder to change. Basically, you have to get bipartisan agreement in parliament to bring about change with the required majority.

Under such arrangements, it would be possible to say to the Aboriginal people: 'Look, the Northern Territory Land Rights Act should be a Northern Territory act of parliament. If we make it an organic law, that strengthens your security with the knowledge that no Northern Territory parliament is going to immediately repeal it straight after statehood is granted'. Without that sort of assurance, Aboriginal people will either not accept statehood or they will not accept the Land Rights Act being part of Northern Territory law. If it is not part of Northern Territory law, many of the existing complications and difficulties in relation to Aboriginal land rights will continue.

A similar situation pertains to protection of Aboriginal sacred sites. The document suggests that Aboriginal customary law be recognised as a source of law with the same standing as the British common law. Certainly, this power has the capacity to be overridden by an act of parliament. However, it is recognised as a basis of law for those people who regard themselves as being bound by Aboriginal law.

There are some things to think about. The document makes some suggestions about how these things can be achieved. We have sought very strongly to find a balance for all Territorians rather than for one side or the other. We want all Territorians to be able to say: 'Yes, that sounds fair.' When we reach a point where you think it is basically fair, we would suggest that we are probably getting it right. If you think it is unfair or unbalanced, we need to hear that. The document is being circulated so that you can express your views about these things, before we finalise a draft constitution that will go through the convention stage.

There are some thoughts. There are other things. This year, we will be preparing further documents on such issues as the inclusion of a bill of rights in the constitution and whether the right to have local government should be a constitutional right of Territorians. We have just produced a discussion paper on the constitutional recognition of local government. There is a series of ways in which that can be done and a range of choices. Those are set out in the discussion paper.

It is not hard reading. You can see what they do in other parts of Australia so far as recognition is concerned. You can make up your minds about where we should be sitting in that spectrum, from no recognition to locking it in so that you must have it whether you like it or not. When you write your constitution, you have a chance to make those choices. That is what this process is about.

We need to have our constitution in place. We need to assure Territorians and be assured that the future Northern Territory will be built on the rules that the Northern Territory people want. That is why we need that constitution in place before we become a state. We need your help to be part of that.

Phil or Tim, would you like to add anything?

Mr BALDWIN: I think you have covered it pretty well, Steve.

Mr HATTON: I am happy to hear any comments you might wish to make. Please ask questions and make whatever comments you like. I am really trying not to frighten you off the task. I am trying to do the opposite. Really it is not that hard. As they say, if you have to eat an elephant, the best way is to do it one mouthful at a time. There are lots of little mouthfuls to think about in there.

Ms LEE: Once the convention is set up, would they be taking further submissions or is this really the only time?

Mr HATTON: No. I would hope that the convention will do that, but it will be beyond our power and control. Members of the convention will be in control of their own destiny. They will be encouraged to take submissions. They will be encouraged, as the elected representatives from regions or nominees from organisations, to be going back and talking to their constituencies, to be providing feedback to their own electorates. They can then bring forward a range of views when the convention meets. It would be like another parliament with one law to prepare.

Mr RICHARDSON: You said it takes two-thirds or three-quarters of the parliament to change organic law. How concrete is the constitution? What percentage of the people will be required to change it?

Mr HATTON: It will be your choice. We have not drafted that clause yet but we are happy to take submissions on it. You could say a simple majority of people or you could require special majorities. You could have a special majority for some provisions with a simple majority of 50% plus 1 for other provisions. Most constitutions in the world can be amended by a vote of a majority of people. However, as you know, historical attempts to vary the Australian constitution show that people are very conservative about playing around with this foundation law. They want to be absolutely sure that they know what it is about and that they are comfortable that any change will be for the better. The only thing governments can do is suggest changes.

In terms of varying the constitution, there is another thing you might want to think about. I think about it a lot in terms of the federal constitution. Should the people have a right, if they get a big enough petition, to force a referendum to amend the constitution? Or should you leave it to the politicians to decide what will be put up for amendment and when? It is your law. Maybe you would want to write in an ability for the citizenry to force a matter to be taken to the people for a vote on changing the constitution.

All I can say is, this is your way. You put the fence around government, all right? Without a constitution, governments are all-powerful. They can do what they like how they like. The constitution is the people's rule that limits and directs the power of government. That is what it is. We can exist without a constitution. Britain does not have a written constitution

but there are no legal limits on the government. I know that is not technically correct, Graham. It has almost effectively evolved into a constitution now, hasn't it?

Mr NICHOLSON: I think since they have entered the European market, they have ...

Mr HATTON: Yes, but prior to that certainly.

Most states only have a 3-page document which they call a constitution. In some states, and I think New South Wales is one of them, the parliament can amend the constitution.

Mr NICHOLSON: Most state parliaments.

Mr HATTON: Most state parliaments, in fact, can do that. They do not even need a vote from the people to change the constitution. Do you think that is satisfactory? I do not.

Mr NICHOLSON: They do have some entrenched provisions. It is not the whole constitution.

Mr HATTON: We are seeking the people's views on such matters. It has to be your law, not mine. It will be my law as part of the Territory, but it will not be my law as a politician. It will be the rules by which I have to act. That is what it is.

Mr IVORY: Now that you have the draft exposure document, has any thought gone into how minority groups might be consulted in terms of providing feedback? I am thinking of Aboriginal groups in particular.

Mr HATTON: We will in fact be taking subcommittees of this committee on a roadshow, if you like, travelling around major communities throughout the Territory during the next 6 months. How many communities are we visiting, Rick?

Mr GRAY: We have not decided yet.

Mr HATTON: But there will be a lot - probably 60 or 70 communities or more. We will be trying to draw people from outstations in to major communities for those meetings.

Mr IVORY: Will you be providing access to interpreters or ...

Mr HATTON: Yes. We would adopt the same process as before, having interpreters available and the freedom to be able to speak in language so that people do not feel constrained because they are not comfortable about speaking in English. We want to hear from people.

Mr RICHARDSON: I have a question about the bill of rights. If a bill of rights was brought into effect, would it actually be part of the constitution or would it be separate?

Mr HATTON: It could be. It is possible for it to be part of the constitution. That is part of what the discussion is about. Should it be inside your constitution? Should you have it as an organic law? Should you have it as an act of parliament?

Mr RICHARDSON: Or should you have it?

Mr HATTON: Or should you have it at all? Should you rely on the traditions of the common law, from which most of our rights evolve? That is one of the questions we are asking people. If you said you wanted a bill of rights, what would you put in it? That is the other question.

There is a discussion paper on that question. It talks about those sort of things. It looks thick but it is not really that frightening. It talks about the pros and cons of different ideas like freedom of association, freedom of speech and so on. We are already suggesting things like the protection of the right to vote by secret ballot and so forth. Graham, would you like to just talk about the sort of things that are in there?

Mr NICHOLSON: Yes, Mr Chairman. Most of the document consists of examples from other countries. It is really not such such a heavy document to read. It discusses various options in terms of constitutional law, organic law, ordinary statute and so forth. It also details the sorts of provisions which might be considered for inclusion in the constitution. Bills of rights are not uniform. They vary from country to country. Some countries have very wide provisions and some have quite narrow provisions. Most countries now have some form of a bill of rights. Australia is an exception to that rule.

Mr HATTON: The sort of things that are talked about in here are: the right to life; torture, cruel or inhuman or degrading treatment or punishment; slavery; rights to liberty and security of a person; the rights of detainees; imprisonment for contractual defaults; freedom of movement; the right to a fair trial; retrospective offences and penalties; the right to privacy; freedom of thought, conscience and religion; freedom of expression; freedom of assembly; freedom of association; the right to participate in public affairs; non-discrimination and equal protection of the law; the right to own property; the right to fair compensation for arbitrary deprivation of property; the right to freedom from arbitrary or unreasonable searches, entry and seizures; equality of the sexes; the rights of the child; the right to petition government; the right to trial by jury; the right to freedom of information; language and cultural rights of minorities; administrative rights and natural justice; and the right to education. It raises those sorts of questions.

You might say that you do not need some of those things in a bill of rights. However, there might be other areas where you might say: 'Well, it would not matter what circumstance existed, I would never want a government to have the ability to interfere with these rights of mine.' If you feel strongly that under no circumstances should any government be in any way able to limit or control certain individual or collective rights, you ensure that the constitution contains an appropriate limitation. That is what a constitution is about. It is part of the fence you build around government. Different people have different ideas about such matters and that is why we really need to get feedback on it. I can tell you that there are different views within the committee. There are a few things to think about, aren't there?

Do any of the ladies have any issues to raise or questions to ask?

A witness: Not yet.

Mr HATTON: Okay, we might bring the recorded session to an end here.