constitutional foundations

reconciling a diversity of interests in a new Northern Territory constitution for the 21st century

compiled by Rick Gray

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Editorial Note

The papers in this publication were delivered at the Conference, Constitutional Foundations: Reconciling a Diversity of Interests in a new Northern Territory Constitution for the 21st Century, held in Darwin, in the Northern Territory of Australia on 4-6 September 1997. The papers reflect, inter alia, a wide range of opinions and positions on the Final Draft Constitution for the Northern Territory, that was tabled in the Northern Territory’s Legislative Assembly on 27 November 1996.

The Conference was organised by a joint effort, the main sponsors of which were:

- the Northern Territory Legislative Assembly’s Sessional Committee on Constitutional Development;
- the North Australia Research Unit of the Australian National University;
- the Faculty of Law of the Northern Territory University; and
- the Northern Territory Chapter of the Constitutional Centenary Foundation.

The papers in this publication also form the third part of a compendium of issues drawn from two earlier Conferences on Northern Territory Statehood and constitutional development¹. They confront and question the role of governments and citizens’ participation in the evolving process of constitutional development. In particular, they provide a focal point on issues that are pertinent to the Northern Territory’s claim for admission into the Australian federation as Australia’s seventh State.

The content, conclusions and views in this publication are those of the authors and are not necessarily those of the bodies that organised the Conference. Most papers were written by the speakers and distributed at the Conference. A few have been edited from the typescripts, but the majority of them are in the form that were presented at the Conference. Minor alterations have been made concerning uniformity and consistency in the publication’s presentation.

I am grateful to the authors for writing these papers, for the organisers initiating the Conference, the Working Committee which planned the Conference, the Conference Secretariat who ran the Conference and the North Australia Research Unit for the final word processing and coordinating production. In particular I would like to thank Graham Nicholson, Christine Fletcher, Jenny Blokland, Peter McNab, Pam Palmer, Janet Sincock, Yoga Harichandran and other staff of the Northern Territory Legislative Assembly who provided logistical support to the Conference.

Rick Gray
9 March 1998

¹ The Conference on Australia’s Seventh State in 1988, jointly organised by the Law Society of the Northern Territory and the North Australia Research Unit of the Australian National University, and the Constitutional Change in the 1990s Conference in 1992, organised by the Northern Territory Legislative Assembly’s Sessional Committee on Constitutional Development.
Keynote Address

THE HON. K J A ASCHE AC, QC

The Chief Justice, Territorians and welcome visitors. When the great fathers of our Australian Constitution gathered together to discuss and propound it, something had already happened which transcended the technical details of uniform customs, laws, common defence policy, freedom of movement, economic cohesion, a supreme court of appeal and the like. There were good sound practical reasons for these things but they could have just as easily been achieved by a confederation of separate independent national entities each preserving their own sovereignty and linked by treaties in the same way as the European Common Market is today. True, the colonies were not then independent nations; but there is no reason to suppose that, if they so wished, they would not ultimately have attained that stature from Great Britain; and indeed that was the path the New Zealanders ultimately chose, although they had taken part in the original moves towards federation. What made confederation unthinkable to the Australian colonies, was the growth of national identity.

In the late 19th century, it had become a blazing and amazing phenomenon. Our painters gave up trying to paint a scene that looked like an English countryside, our poets stopped talking about forests and glades and spoke of the bush and the scrub, and our authors started writing about loaded dogs, drovers wives, Eureka and Ned Kelly. Indeed if you think Republicanism is a new concept, you should read the Bulletin of the 1890’s or the very rude things that John Naughton of the Sydney Truth was saying about the royal family of the day. For that is the point. We had become different.

Federation came about because we knew we were Australians. Subsequently, and because we were Australians, we removed the two slots on our foundation - the White Australia Policy and the non-recognition of Aboriginal citizens.

The same process had occurred earlier and to a lesser but still significant extent in the States. And that is why they became separate colonies and later separate States. Some would argue that this was merely because the Imperial Government drew random lines on the map and gave them names; but this was clearly not so. The Imperial Government would have been perfectly happy to have left New South Wales as extending from Port Phillip to Cape York. It did not matter in London. But it mattered a great deal to people who had begun to think of themselves as different from those who lived in Sydney and its hinterland. They began to think of themselves as Victorians and Queenslanders and it was pressure from these people which caused the formation of Victoria and Queensland. Similarly the people of Tasmania, Western Australia and South Australia accepted their own loyalties and the fact that they had various local common bonds and these bonds bound them together. And so it is to this day, save possibly for North and Central Queensland (and enthusiasm for separate statehood in these areas seems to have abated) that the peoples of these separate states readily accept and take pride in their separate
identity and would fiercely resist any attempt to take it from them, and believe that in
various ways their own state has a special and different character which distinguishes it
from others. And this of course in no way affects their higher loyalty to our own great
and sovereign nation.

I hope I have therefore not made the point too laboriously. A group of people who
believed they had a separate identity became a nation. Within that nation separate groups
who believed that as well they had a separate identity within and subject to that nation
became States.

The question then for the Northern Territory is simple; has it too become a separate
entity within Australia, distinctive in its own right, recognised as such by other
Australians, and therefore ready to take its place as a separate and seventh State? And
the resounding answer must be ‘Yes’. We meet the tests.

I have been fortunate enough to travel through the length and breadth of the Territory.
And everywhere I have found enormous pride in the name ‘Territorian’. So conspicuous
is that pride that virtually everyone wishes the name ‘Northern Territory’ to remain so
that we can continue in that special and distinctive title. So far as the rest of Australia is
concerned, we have their good will and the Prime Minister and all the Premiers
acknowledge our right to Statehood.

Last year something occurred which made the bond stronger and united us in indignation.
I am not here taking sides about Euthanasia because that is irrelevant. Our parliament
had passed an Act and in the accepted practice it was up to those Territorians who
disapproved to try to get it repealed within the Territory Parliament. That is what they
tried to do, accepting it as a Territory matter and seeking, as was their democratic right,
to change the Law. But neither they nor those who approved of the law accepted that it
was the right of certain politicians in Canberra to lecture us, treat us like badly behaved
children and because we were a Territory and not a State, take from us the right to self-
determination which they had given us in 1978. Who were they to lecture a group of free
Australians on morality? What moral superiority did they have and what mandate from
their electors did they receive to do this? Well they did one thing. They made us feel
that if these ‘holier than thou’ hidalgos could control us, we had better start looking after
our own patch.

If we are to be a State, it seems inevitable that we must have a constitution. In a strict
legal sense, one view is that we could do without it, but no one would accept that. Every
other State has a constitution, the Commonwealth Constitution seems to require it, but
perhaps the most cogent and compelling reason is that Territorians will want to know
what they are getting.

For this reason the Sessional Committee on Constitutional Development has travelled
throughout the Territory seeking views, advice and comments from constitutional experts
but more importantly from the people. Their labours have been prodigious, painstaking
and herculean and it is appropriate here that we pay tribute to them. I have been supplied
with the six volumes of their report which in fact comprises ten books of some 200 to
300 pages in each. The report contains various debates, drafts, references to other
constitutions, discussion papers and transcripts of meetings of the committee with
interested individuals or groups throughout the Territory.
I note that the Committee at least up to November 1996, had held 64 public meetings and hearings, 87 deliberative meetings, had received 141 written submissions, and that approximately 300 people had given direct oral evidence to it. It is important to note that the Committee itself has always been bipartisan and composed of generally equal numbers of Government and Opposition representatives.

That leads to two observations. First that the draft constitution produced by the Committee is not the by-product of some overnight brainstorming by a couple of inspired inebriates. It has been carefully discussed and deliberated upon over several years; and you will find detailed reasons in the report for the phraseology, form and content of the constitutional document. So it must be taken seriously.

Second, the exhaustive work by the Committee should substantially cut down further delay. Let me enlarge on that a bit. The Committee’s aim is that the present draft constitution be presented to the Legislative Assembly and then put to a Territory Constitutional Convention which would consist of a majority of elected representatives with a balance nominated as representing special interests, for example trade unions.

After debate at the Convention, the Constitution, with such changes as the convention recommends, is to be again presented to Parliament and, if approved, presented to Territorians at a referendum. There is some debate as to whether the referendum should take place before or at the time of conferring of Statehood, but the warning I give (and I speak from experience) is that inevitably, and after all that consultation, and just before that matter is put to referendum, you will have cries of ‘we weren’t consulted’ or ‘we’re being rushed’ or ‘we want more time’. If you take any notice of this, after the opportunities already given, you will be lucky to get results by 3001 let alone 2001. Delaying drogons are a hardy breed quite capable of transmitting their genes to the third and fourth generation.

I turn therefore to the Draft Constitution, and make a number of somewhat random comments, more to stimulate discussion than to advocate any particular view; and am well aware that a number of speakers will explore these matters at much greater depth.

The first observation is that this constitution, if adopted, will be in many ways vastly different from any other State Constitution. There is of course nothing wrong in this; and indeed it should be expected that a new State should be innovative particularly a State as individual and young and bright and energetic and exciting and fascinating as the Northern Territory. So don’t be put off by new concepts; but it does mean that we should study them with particular care and make sure we understand them thoroughly and find no hidden traps. Although I speak against interest as a lawyer myself, I really would not like to see our Constitution turned into some sort of Eldorado for every constitutional lawyer in the country.

Of course there are many similarities with other constitutions, particularly in the general treatment of the duties and powers of the executive, legislative and judicial arms. There are certainly special features. For instance, this constitution is far more entrenched than other State Constitutions, that is, it cannot be amended except after a bill passed in Parliament has been approved at a referendum by a majority of electors. Most States do not have such a provision and, save for some limited special cases, their constitutions can be amended by simple legislation. If you add to the need for a referendum, the usual
inbuilt Australian instinct to vote no, you will appreciate that once adopted, the Constitution will be hard to change. Some will see that as an advantage, others not.

The concept of an 'Organic Law', - and you will find this throughout the draft constitution, is novel, at least to Australia. I assume it to be a law of such fundamental importance that it can only be passed by a larger than simple majority in parliament; and the committee gives alternatives of two thirds or three quarters. Once passed however, it can only be amended or repealed by the same process and if contained in the Constitution, for example the protection of Aboriginal land rights, it must go to referendum. An Organic Law in the constitution is therefore much like a constitutional guarantee in the American fashion. An Organic Law passed by parliament has a measure of permanence, perhaps of considerable permanence, because of the two thirds or three quarters vote required to amend it or repeal it. It is therefore an innovation or at least a check on the generally accepted rule that parliament cannot bind its successors. Furthermore I cannot refrain from making the comment that once you've got it you got it; because an Organic Law passed to abolish all future Organic Laws (except for of course those in the constitution) would itself be an Organic Law which could be repealed by a future Organic Law.

The Standing Committee on the Constitution that is set up to advise on the Constitution may not be a conspicuous innovation insofar as other State Parliaments would normally seek advice before constitutional amendments, but it gives a degree of permanence to the arrangement. The broad phrase that the members are to be drawn from members of parliament 'and other persons' leads one to query, how many? and what sort of persons? Clearly this is left to parliament and it will be an interesting exercise to see whether parliament would choose only those skilled in constitutional law or a broader cross-section of the public. Since its functions are restricted to considering amendments to the Constitution or Organic Laws it does not perhaps go as far as some submissions to the committee e.g 'citizens initiated referendums', have suggested.

In so far as the Supreme Court is given an advisory jurisdiction on matters arising under the constitution, or involving its interpretation I would cautiously ask a number of questions.

A. If an advisory opinion is given by a single judge, it would be subject to reversal by the Court of Appeal if the legislation upon which advice was sought was subsequently challenged.

B. If given by the Full Court, that is 3 judges, it would not be impossible for that Full Court to change its mind on hearing further and perhaps fuller arguments from counsel opposing the legislation later. Alternatively a Full Court differently constituted might be of a different opinion.

C. A question asked seeking the advisory opinion would need to be very precisely drafted. A subsequent Act not on all fours with the original question may be therefore defeated.

D. In any event the High Court would not be bound by the opinion.

E. Would it not be better to take the opinion of leading Counsel?.
There are a whole raft of other issues which will obviously be debated today and tomorrow. For instance, the preamble, and whether and insofar it affects the interpretation of the constitution; the question of the patriation of Aboriginal land claims; the definition of ‘Aboriginal’ which I would prefer, at this stage at least, to leave to the Aboriginales themselves. These are just some of the questions that you will find a need to debate, and that is not in any way meant as a criticism of the extraordinary hard work of the Committee.

I repeat my admiration for the work already done by the Committee, but I remind you that we live in a part of Australia populated by the most diverse of peoples in a land full of challenge. She has no soft green pastures or verdant meadows. She is harsh, tough and demanding, as our pastoralists and Aboriginales and our miners know only too well. She has broken many, and will break more. But for those who will meet her on her own terms, she has rewards and treasures not only of material things but of the spiritual, and the beautiful, and we have the original inhabitants to guide us in this. Our children of all races are our greatest asset, and because they speak fluently the language of their parents or grandparents, they are our important and greatest ambassadors into the land to the North. We are the leading edge into the vast, rich and varied countries of Asia, and we know them well. There is a spirit of optimism here which is sometimes absent in the South, and a growing realisation that we will lead into the 21st century. It is a wonderful and marvellous feeling to be an Australian and a Territorian and when we become the Seventh State, we will certainly show them. I am pleased and honoured to open the conference.
Session 1

The Role and Importance of State Constitutions
The Role and Importance of State Constitutions

CHERYL SAUNDERS

Introduction
It is a pleasure to have been invited to speak to this important conference on Constitutional Foundations. The draft Constitution for the Northern Territory, which is the focal point of the conference represents more than ten years of work by the Sessional Committee on Constitutional Development, its staff and its advisers. The release of the Constitution is perfectly timed for the debate on Northern Territory statehood. Given the approach of the centenary and the debate on a republic it is well-placed to provoke thought about other Australian Constitutions as well.

The conference is sponsored by the Northern Territory University, the North Australia Research Unit, the Committee on Constitutional Development and the Constitutional Centenary Foundation. Speaking in my capacity as Deputy Chair may I say that the Foundation, as an institution, is delighted to be involved with the conference as well. There has been an active chapter of the Foundation in the Northern Territory for most of the decade. The Board of the Foundation is most appreciative of the support it has received from the Chapter and from the Northern Territory Government and Parliament.

I mention one instance of this support in particular. An important initiative of the Foundation has been the Schools Constitutional Convention program. It involves regional and State/Territory conventions around the country, culminating in a National Schools Constitutional Convention each year. The National Convention gives young Australians from every State and Territory an opportunity to exchange views about the Australian system of government, from their sometimes very different perspectives, in a way which can only be of great benefit to Australia in the long run. The Schools Convention program would be impossible without the active support of many people in the schools, in government and in the Foundation chapters. I would like to express my appreciation today, on behalf of the Foundation, for all the work done by so many in the Territory to enable Territory schools to participate each year and to participate so effectively.

My topic today is The Role and Importance of State Constitutions. I propose to begin by describing the various different ways in which State Constitutions are important in the Australian system of government. The second part of my paper suggests that, despite their significance, State Constitutions have been neglected and have fallen into disrepair. I conclude by asking whether the draft Constitution for a new State of the Northern Territory might be a catalyst for scrutiny of the older State Constitutions or even of the Commonwealth Constitution itself.
A revival of interest in State Constitutions in Australia would be consistent with developments elsewhere in the world. The unification of Germany resulted in the drafting and implementation of new Constitutions for each of the five former East German lander. The opportunity was taken as one would hope and expect, to produce modern instruments, suited to the needs of the times. The provinces of South Africa presently are drafting their own Constitutions, which are subject to scrutiny by the Constitutional Court for compliance with fundamental principles before they can take effect. The revival of interest in State Constitutions in the United States is well-documented. Writing in 1995, John Kincaid noted that forty of the fifty States had modernised their Constitutions in recent times and all had modernised their systems of government generally. Kincaid associates this development with the phenomenon described by other commentators as the "resurgence of the States" producing politics which are "reformed, reinvigorated [and] resourceful." A similar pattern of development in Australia would benefit not only Australian federalism but Australian democracy itself.

The Importance of State Constitutions

The proposition that State Constitutions are important is hardly startling. All Constitutions are important. The function of a Constitution is to set out and, in most cases to protect, the main institutions through which the community is governed and the fundamental principles by which these institutions and the members of the community are bound. Even where a Constitution does this imperfectly, it is a Constitution nonetheless.

Nor, with one qualification, is the Constitution of a State any less important than the Commonwealth Constitution itself. The qualification is that the Commonwealth Constitution is supreme and the Constitutions of the States must be consistent with it. That qualification aside, State Constitutions themselves represent fundamental law for

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5 Commonwealth Constitution section 106. There is no need to pursue here: the question whether there are any limits on the extent to which the Australian Constitution may be altered to amend the Constitution of a State. My own view is that the argument that there are limits is hard to sustain in the face of the literal words of section 128 and 106: and see Quick & Garran., Annotated Constitution of the Australian Commonwealth (1901) 990. Nevertheless the problems of people in accepting that a national majority and majorities. in four States may force a change to the Constitution of a dissenting State, should be noted. It may be that, in an appropriate case, these could find an implied limit to the alteration procedure in section 128. Any such limit would, however, affect the validity of the amendment to the Commonwealth Constitution. The superior status of that Constitution, as validly altered from time to time, thus would be preserved.
State communities and may, if entrenched, override all other inconsistent law and action. The size of the community is no criterion by which to judge the significance of a Constitution; but in any event, between them, State Constitutions provide the framework for government at the State level of most of Australia's eighteen million people.

Further, despite the practical erosion of State government through the financial dominance of the Commonwealth, the constitutional suitability of the States is substantial. Health, education, transport, criminal law, to name only a few, are provided and regulated through State institutions and government. Even activities, which have fallen under de facto federal control, of which universities are a prime example, in fact rely on State law, in the exercise of State constitutional authority. In consequence, they are subject to the accountability requirements of the State concerned, which themselves are quasi-constitutional in character: the Auditor-General, freedom of information, judicial review. One exception is the National Corporations scheme, with its bold experiment in 'federalisation' designed to give arrangements the characteristics of the exercise of Commonwealth power in all but the manner of alteration itself.

So much for generalisations. In what follows, I seek to be more specific, by considering the role and importance of State Constitutions symbolically, historically, practically and potentially.

**Symbolic Significance**

State Constitutions are symbols of Australian democracy. As they now stand, they symbolise relations between the institutions of State government and State communities, flawed though they may be for that purpose. But they symbolise also a central phase through which independent nationhood was achieved on the basis of constitutional democratic government in Australia. As the McCusker Committee noted in relation to Western Australia 'The State Constitution ... represents the achievement of self-government [for each State] and ... is the foundation on which [the States'] political institutions are based.'

The Australian colonies achieved self-government, nationhood and independence peacefully, gradually, without revolutionary moments. That was undoubtedly a blessing to their peoples, albeit at the expense of an occasion for acknowledgment that popular had replaced Imperial sovereignty, which may affect their descendants now. The absence of drama and crisis should not be allowed to overshadow the fact, however, that the colonists fought, verbally and politically, for the instalments of self-government and autonomy which they received in the nineteenth century, culminating in the enactment of the colonial Constitutions which became the Constitutions of the States. In at least three cases, moreover, the Constitutions represented a form of mild rebellion exceeding the authority which the colonists had been granted by the Imperial Parliament. This

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7 Johnston and Hotop, "Patches on an Old Garment or New Wineskins?" (1990) 20 Western Australian Law Review 428, 431.
symbolic function of State Constitutions is a reminder of the desire of State communities
to govern themselves and their ability to achieve it. If and when the Northern Territory
becomes Australia's seventh State, its Constitution will perform a similar function as
well.

**Historic Significance**

Viewed in this light, the symbolic significance of State Constitutions also constitutes
historic significance. But there is another sense in which State Constitution are
historically important as well. The Constitutions of the Australian colonies inevitably
were modelled on that of Britain, in broad outline. While they departed from the British
prototype in various ways, not least by being presented in written form, there seems to
have been a constitutional template for the Empire on which the colonists drew.
Nevertheless, as Paul Finn has shown, the particular form of parliamentary responsible
government developed in Australia, partly enshrined in State Constitutions, was
peculiarly adapted to Australian circumstances and needs. As time progressed, its
Australian character inevitably became more pronounced. These colonial constitutional
features in turn influenced the Commonwealth Constitution when it was drafted in the
1890s. The best known example is the historic compromise over the powers of the
Senate, modelled on the Constitution of South Australia and now embodied in section
53. But the colonial experience with the representatives of the Crown, with the role of
the Executive Council, with Upper Houses generally, with the appointment and removal
of judges, with the composition and operation of the Lower House of Parliament, with
the franchise and with the entitlement to stand for parliament, formed the assumptions on
which the Commonwealth Constitution was built.

**Practical Significance**

The Constitutions of the State are practically important because they provide a
framework of government for the States. It is as true of Australia as of the United States
that 'daily lives are governed much more directly by state rather than federal laws, as
enacted (and limited) pursuant to the provisions of the fifty State Constitutions'. These
considerations have caused American commentators to reflect on the 'incompleteness' of
the United States' Constitution superimposed, as in Australia, on Constitutions for
functioning systems of government which continued to exist. Thus John Kincaid:

Although the term 'American Constitution' is often used synonymously with
'Constitution of the United States' the operational American constitution consists of the

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10 Quick & Garran, *op cit.*, 672.
11 As indeed is evident from the number of sections in the Commonwealth Constitution which
adopted State constitutional rules for the Commonwealth "until Parliament otherwise provides".
12 Williams, "Comparative State Constitutional Law: A Research Agenda on Sub-National
federal Constitution and the 50 state constitutions. Together these 51 documents comprise a complex system of constitutional rule for a republic of republics.\textsuperscript{13}

The practical significance of State Constitutions varies inversely with the extent to which the Commonwealth Constitution prescribes national standards for State governance. Judged by this criterion, State Constitutions are very significant indeed. The framers of the Commonwealth Constitution were concerned principally to establish a federal system and to constitute the Commonwealth as a new level of government. In creating the federal system, they explicitly agreed:

"That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.\textsuperscript{14}"

In consequence, virtually the only inroads the Commonwealth Constitution makes into the Constitutions of the States is by reference to the common market to other undeniably national goals. The States may not discriminate against interstate trade and commerce, in a protectionist sense (section 92); they may not impose duties of customs or excise or grant bounties (section 90); they are precluded from coining money (section 115) or maintaining armed forces (section 114). In a gesture towards interstate mobility, the States may not treat residents of other States less favourably than they treat their own (section 117). The apparent inability of the States to engage in foreign relations is attributable to their colonial status at the time of federation, now reinforced by the Australia Acts, rather than to the Commonwealth Constitution itself.

Otherwise, however, at least on its face, the Commonwealth Constitution leaves State Constitutions undisturbed. It makes no attempt to prescribe basic standards for State systems of government. It makes no attempt to prescribe a national "floor" of rights on which State communities may build if they wish, as in the United States.\textsuperscript{15} It discourages, but does not prohibit State electoral laws from discrimination against State residents on racial grounds (section 25).

It may be possible to layer certain mandatory feature of State systems of government from the fact that the Commonwealth Constitution mentions them in passing. There must be State Governors to issue writs for Senate elections under section 12. There must be a State Parliament to fill casual Senate vacancies under section 13. More significantly, there must be State courts to exercise federal jurisdiction and State prisons to accommodate federal prisoners.\textsuperscript{16} But with the exception of State courts, to which I return below, these provisions say nothing about the nature or standards of the State institutions of government. And in any event, they hardly constitute a deliberate design for governance at the State level.


\textsuperscript{14} Quick & Garran, \textit{op cit} 125.

\textsuperscript{15} Williams. \textit{op cit} 13.

\textsuperscript{16} Commonwealth Constitution sections 77(3), 120.
The impression thus given by the text of the Commonwealth Constitution is largely confirmed by recent decisions of the Court. Arguments that the Commonwealth Constitution provides basic standards with which State electoral boundaries must comply failed in McGinty.\textsuperscript{17} In Lange\textsuperscript{18} the Court recognised the freedom of political communication implied from provisions requiring both Houses of the Commonwealth Parliament to be ‘directly elected by the people’ and from the fight of the electorate to approve proposals for change to the Constitution may have implications for action at the State level. Whether this new doctrine applies to State legislation generally, however, or will have variable application depending on the circumstances is not presently clear.\textsuperscript{19}

State courts stand in a different position. Section 77(3) enables the Parliament to confer federal jurisdiction on State courts. Section 79 empowers the Parliament to prescribe the number of judges to exercise that jurisdiction. Otherwise, as a generalisation, the Commonwealth was to take the State courts as it found them. Since Kable\textsuperscript{20} however, it appears that the Constitution itself constrains the standards applicable to State courts, at least by requiring them to be constituted in a manner which is not incompatible with the exercise of federal jurisdiction. The implications of this doctrine beyond the extreme circumstances in Kable itself are still to be worked out. On any view, however, it is likely to enhance the status and, perhaps the independence of State courts to some degree.

Australia’s constitutional arrangements thus leave a great deal to State Constitutions and systems of government. The institutions of State government are left almost entirely to the States as far as the Commonwealth Constitution is concerned. State judges, ministers, parliaments and senior bureaucrats also enjoy a degree of protection from Commonwealth law, under implications drawn by the Court from the federal character of the Constitution.\textsuperscript{21} The Commonwealth Constitution imposes no national standards for the relations between governments and people, leaving those matters to State Constitutions as well, if they are to be constitutionalised at all.\textsuperscript{22} The limited restrictions on Commonwealth power under the Commonwealth Constitution also tend not to apply to the States. The guarantees of just terms for the acquisition of property (section 51931): trial by jury for indictable offences (section 80): and freedom of religion (section 117) are the principal examples.

In two other respects, State Constitutions bear more responsibility than do their counterparts elsewhere. On federation, the State level of government had full authority to deal with relations with Australia’s indigenous peoples. Since the Aborigines Referendum of 1967, that authority has been shared with the Commonwealth government.

\textsuperscript{17} McGinty v Western Australia (1996) 70 ALJR 200.
\textsuperscript{18} Lange v Australian Broadcasting Commission (High Court, July 1997).
\textsuperscript{19} The point was not resolved in Lange
\textsuperscript{20} Kable v DPP (1996) 70 ALJR 814.
\textsuperscript{21} The Australian Education Union: Ex Parte Victoria (1995) 184 CLR 188.
\textsuperscript{22} Commonwealth legislation based on the external affairs power may implement international human rights instruments to which Australia is a party, the power has been exercised to only a limited extent, however.
and Parliament. State power over indigenous peoples waxes and wanes with Commonwealth involvement. To the extent that the Commonwealth withdraws from indigenous affairs including, to take a topical example, the protection of native title, State Constitutions become correspondingly more important. The position in Australia is contrasted with that of the United States, where the Indian peoples enjoy an exclusive relationship with the federal level of government alone.  

Secondly, despite an intermittent campaign over twenty-five years, local government is entirely the responsibility of the States. An earlier phase of the campaign saw recognition of local government in State Constitutions, sometimes with entrenched status, but always in the most general of terms. As Australia approaches its centenary, pressure for the recognition of local government in the Commonwealth Constitution, directly, or indirectly, has been renewed. The outcome of that debate ultimately may depend on how well State Constitutions perform their role, in the sense of providing a regime for local government which is both defensible and broadly accepted.

The present point is to demonstrate the significance of State Constitutions. There is a question, of course whether the current distribution of functions between Commonwealth and State Constitutions is appropriate. Because of the circumstances in which the Commonwealth Constitution was drafted, Australians have never directly confronted the question whether their national Constitution should reflect basic values and institutional standards which Australians have in common. The occasion for such a debate may arise if the republican movement proceeds. One issue to be determined, in that event, is whether the republican character of all Australian governments should be prescribed in the Commonwealth Constitution, or whether the regime to operate at the State level should be left to the State Constitutions alone. Adoption of the latter option, would, of course, further emphasise the practical significance of State Constitutions.

**Potential Significance**

Finally, State Constitutions are potentially important, not only for the members or the respective State communities but for the national community as well. Their significance in this respect derives partly from what Justice Brandeis described as 'one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory: and try novel social and economic experiments without risk to the rest of the country'.  

In similar vein the Swiss cantons have been described as:

"The democratic workshops of Europe. On their twenty-five anvils are hammered out almost every conceivable experiment in political mechanics; and if a particular experiment proves successful, it is adopted by one canton after another, until it ultimately receives a definite consecration by becoming part of the federal Constitution, which is, indeed. largely, moulded cantonal experience."  

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23 Brennan, Securing a Bountiful Place for Aborigines & Torres Strait Islanders in a Modern Free and Tolerant Australia, 9.

24 New State Ice Co v Liebmann 285 US 262, 311 (1932)

The Australian States and Territories already have a reasonable record in constitutional experimentation. The partial fixed term for the Lower House of Parliament, designed by Victoria in 1984\textsuperscript{26} was adopted by South Australia\textsuperscript{27} and extended into a fully fixed term by New South Wales.\textsuperscript{28} A variety of different models now is in place for Upper Houses. New South Wales recently put in place a constitutional mechanism to enable the reorganisation of courts without jeopardising judicial independence.\textsuperscript{29} Victoria has adopted a procedure for securing greater accountability of government for proposed legislation to oust the jurisdiction of the courts.\textsuperscript{30} The Self-Government Act of the Australian Capital Territory limits the need for a separate Head of State and may be of interest to the other States if Australia decides to move to a republic\textsuperscript{31}. Clearly, the capacity of State Constitutions to perform this experimental role is enhanced by the virtual absence of restrictions on State Constitutions in the national Constitution.

At a more fundamental level also, State Constitutions have a significant role to play. As we approach the twenty-first century it is becoming increasingly clear throughout the world, as well as in Australia, that the traditional institutions and practices of government need renovation if they are to retain the trust, commitment and respect of the people who they are designed to serve. There is a continuation of reasons for this: larger and less homogeneous societies; more complex (sometimes intractable) problems for governments to resolve; the capture of democratic institutions by party machines; complacent communities. In part the phenomenon may be the end product of ad hoc constitutional evolution for too long. Whatever the cause, the effect is clear: substantial and growing disaffection with government on the part of communities, only partly obscured by such compulsory voting and a high degree of sensitivity to opinion polls.

As it happens, this crisis in democratic systems coincides with a world-wide trend to devolution, in government as in many other aspects of life. This has been chronicled most extensively in the United States, but is occurring elsewhere also. In the expectation that a similar trend will sooner or later manifest itself in Australia, State (and for that matter local) communities have the opportunity to experiment with and build new democratic systems to meet the different needs of today. Success in such an enterprise would be a boon for Australia overall. But the converse also is true. If the opportunity is missed and we allow State systems and the regard in which they are held to deteriorate, the status of government generally also will fall.

\textsuperscript{26} Constitution Act 1975, section 8.
\textsuperscript{27} Constitution Act 1934, section 28A.
\textsuperscript{28} Constitution Act 1902, section 24.
\textsuperscript{29} Constitution Act 1902, Part 9
\textsuperscript{30} Constitution Act 1975, section 84.
The State of State Constitutions

It will be apparent from what I have said that I take the view that for every political community there are fundamental rules of a constitutional nature. Those rules derive their authority from the implied consent of the people of the community concerned. At the very least, they establish institutions through which people are prepared to be governed and provide directions for those institutions in a general way. They may do more, and lay down principles by which the institutions and the community itself are to be guided. Over the course of the twentieth century it became the norm for these rules to be included in a written Constitution, for clarity, for greater security and as an expression of the intent of the community, exercised directly or through its representatives.

The content of a Constitution is a matter for the community itself to determine directly or through its representatives by reference to the significance it attaches to particular institutions and principles and its assessment of their lasting value. This does not mean, however, that a Constitution should endure for all time. On the contrary, to perform its allotted role in the democratic system it will need review from time to time in a manner consistent with its status as fundamental law. This will complement, but not substitute for evolution of the Constitution through judicial review, to assist it to achieve its purposes, as the circumstances of the community change.

Given the role of Constitutions and the particular significance of State Constitutions, the current state of the latter is a cause for some concern. While each State Constitution is different in many respects, the following broad generalisations apply to all. They fall into three categories: the style of the State Constitutions, their content and their status.

There is a fine line between Constitution and statute in format and drafting. All Constitutions are technical in part. Australians are not flamboyant in law or government, and it would be unreasonable to expect their Constitutions to be very different. Even so, however, the Australian State Constitutions lack constitutional style. There is nothing to distinguish them in tone or level of principle from other legislation. Some have introductory preambles.\(^{32}\) Even these however, are a bare factual statement of the circumstances of the enactment of the Constitution or its consolidation with other laws. They say nothing about the purpose or goals of the Constitution or about the values on which it is based.

In content also, State Constitutions are still essentially the instruments enacted in the nineteenth century in response to British enabling legislation. Most have been re-enacted since, but largely for the purpose of consolidation with subsequent amendments. Some still are not consolidated at all.\(^{33}\) New parts have been added to particular Constitutions in response to particular issues. Recognition of local government is one example. In both New South Wales and Victoria, more recent additions deal with the courts. Many specific amendments have been made. But much of this has been ad hoc. There have been comprehensive reviews of individual State Constitutions from time to time, which have reconsidered their contents and style. None has resulted in significant change although this may yet happen.

\(^{32}\) Victoria, Western Australia.

\(^{33}\) Queensland, Western Australia.
Nevertheless, it may be fair to say that none of the existing State Constitutions reflects a considered view of the desirable content of a Constitution of a modern State in the Australian federation. Similarly, none reflects a deliberative decision to include particular rules or principles in the State rather than national Constitution, or vice versa. In some cases the result is startling, as with section 59 of the Constitution of Western Australia which purports to authorise the State ‘to impose and levy such duties of customs as to it may sum fit’; an authority clearly inconsistent with the Commonwealth Constitution. More generally, however, the result is a pattern of Constitutions which deal in detail with the Parliament, very briefly with the Executive and occasionally with other institutions as well. To late twentieth century eyes they do not seem to correspond with the actual and potential importance of State Constitutions for State communities.

The third generalisation about the Constitutions of the Australian States concerns their status.

The State Constitutions were originally enacted by the Legislative Councils of the respective colonies, under British legislation which authorised them to establish bicameral legislatures. Where the colonists exceeded their authority, further British legislation was required, to which the final Constitution was scheduled. The Legislative Councils of each colony were the most representative institutions at the time. The process did not involve the wider community, however.

The power given to the colonists to design their own Constitutions, within limits, included the capacity to amend them. This authority was clarified in the Colonial Laws Validity Act 1865, after a dispute had arisen in South Australia about the scope of colonial power in this regard. Section 5 of this Act confirmed that the colonies had ‘full power to make laws respecting the constitution, powers and procedure’ of their legislatures, subject to the proviso that ‘such laws shall have been passed in such manner and form as may from time to time be required’.

The proviso subsequently became understood as a description of the circumstances in which the colonies could entrench parts of their constitutions. Whether some broader capacity to entrench exists as well, remains an unresolved question. If it does (and surely it must), there is a question about the basis for it. A simple answer might do no more than point to the character of a Constitution, as fundamental law. A more complex one, designed to confront the principle of parliamentary sovereignty, would hold that a legislature has power to redefine itself for particular purposes.

In any event, in practice, different parts of State Constitutions are entrenched, and in different ways. The procedures vary from requirements for an absolute majority at designated stages of passage of an amending Bill, to a two-thirds majority, to approval at referendum. In no case is the whole State Constitution entrenched. The bicameral (or

34 Australian Constitutions Act (no. 2) 1850.
35 New South Wales, Victoria, Western Australia.
36 Lumb, op cit 109-112.
in the case of Queensland, unicameral) nature of the Parliament, the office of State Governor, local government, the jurisdiction of the Supreme Court, receive special protection in different Constitutions, reflecting political battles and pressures of the time, rather than an assessment of the parts of the Constitution which most require protection of this kind.

Viewed in this light, whatever their current significance, State Constitutions draw their authority from the British Parliament, rather than from the people of the State. They constitute fundamental law of the State concerned only to the extent that they are entrenched. The pattern of entrenchment is limited and patchy. There is some uncertainty about the source of authority of the States to fully entrench their Constitutions beyond provisions dealing with ‘the Constitution, powers and procedures’ of the legislature. This is limitation is linked, historically and conceptually, with the imperial authority under which the Constitutions originally were enacted.

This unsatisfactory situation may have been altered by one of two subsequent events, separately or in combination.

The first is the enactment of the Commonwealth Constitution itself. Section 106 of that Constitution continues State Constitutions ‘as at the establishment of the Commonwealth... until altered in accordance with the Constitution of the State.’ There has been conflicting authority on the extent to which section 106 now provides the basis for State Constitutions or merely preserves and reinforces them. Much of the speculation on the issue is directed to the question whether State Constitutions can be amended by national majorities under section 128. My own view is that section 128 can be used for the purpose whatever the significance of section 106, subject to the limitations in section 128 itself and, perhaps, to federal immunities principles.

The question whether State Constitutions draw their authority from section 106 may, however, affect the scope of the power of entrenchment. If section 106 is the sole or principal authority, it may be possible to read literally the injunction in the section that State Constitutions can be altered only in accordance with the procedures which they prescribe. On this view, the restrictions in the colonial Laws Validity Act are less relevant. If section 106 merely continues State Constitutions, however, the source of power to entrench becomes a more pressing concern. In this case, it is possible to argue that section 106 requires compliance only with manner and form provisions already validity imposed.

The second supervening event is the passage of the Australia Acts by Britain and Australia in 1986. These are relevant in at least two respects. First, they make clear in section 1, that Britain can not legislate for Australia. But they also restate the substance of section 5 of the Colonial Laws Validity Act, which now becomes section 6 of the Australia Acts.

The final formal severance of British legislative authority over Australia has provoked suggestions, adopted by some Justices of the High Court, that the Commonwealth

Constitution now draws its authority from the sovereignty of the Australian people rather than from the British Parliament by which it originally was enacted. This analysis is assisted by the popular character of the process by which the Commonwealth Constitution was enacted, reflected in the preamble to the Commonwealth of Australia Constitution Act. It is assisted also by the referendum requirement for constitutional change. These factors are not present in the case of the States, or to only a limited degree. Nevertheless, it may be possible to argue that State Constitutions too, now draw their authority from the people of the State.  

This is clearly consistent with principle and it fills the vacuum left by British withdrawal. The only alternative, that State Constitutions draw their authority from the Australian people as a whole, through the medium of section 106 is inconsistent with the role which State Constitutions are required to play and the limited restraints placed on them by the national instrument.

The conclusion that the Constitutions of the States draw authority from the people of the State would reinforce the argument for a broad capacity to entrench, beyond the bounds laid down in the Colonial Laws Validity Act and preserved in the Australia Acts. Nevertheless, the presence of the Australia Acts means the matter is not free from doubt. With hindsight, this is another legacy of the secrecy and lack of vision which accompanied the design and passage of those Acts. It might be appropriate in due course for section 6 to be repealed. It would be preferable first, however, to reinforce the character of State Constitutions as the fundamental law for their respective States, drawing authority from their acceptance by the people of the State.

The Constitution of the Northern Territory as Catalyst

The shortcomings of State Constitutions are not surprising, in the light of their history. Nor they a matter for recrimination. State Constitutions are the natural products of early beginnings. The occasion to reconsider and revise their systemic role has not so far arisen. Federation itself did not provide the moment: it was too early and the framers were preoccupied with other things. There was no one glorious moment of Australian independence, which might have provoked reflection of this kind. The Australia Acts marked the end of the process of independence, of course, but so long after the real shift in power had occurred that a potential founding moment became submerged in legal form.

The centenary of federation offers an opportunity for reflection, however. The primary focus of the centenary need not be the Commonwealth Constitution alone. It may extend more generally to the way in which Australians are governed, including the Constitutions of the States. And, indeed, there has been action already. All States have conducted an enquiry of some kind into the potential impact of the republic on State Constitutions. There will be much more talk about the State and a republic in connection with the elected Convention next year. And there have been wider reviews as well: the Electoral

40 Besand, "Two Nations, Two Destinies" (1990) 20 University of Western Australia Law Review, 309, 310.
and Administrative Review Commission in Queensland; the Commission on Government in Western Australia; most recently, the Nixon Report in Tasmania.

Reports are one thing, however, and action another. So far, with the possible exception of the public, debate on Australian governance in the approach to the centenary has been a fairly desultory affair. The new Constitution for the Northern Territory has the potential to stimulate wider interest in State Constitutions, in several different ways.

First, at the level of process. The procedures adopted by the Committee have extended beyond consideration in the Parliament to consultation with the community more broadly. The Committee's report calls for a convention and a Territory referendum before the final decision is made.\(^41\) Later papers in this conference will consider these procedures more closely and provide an assessment of them. In general terms, however, it is fair to say that this approach to constitutional design would give the Constitution of a new State of the Northern Territory a popular base which other State Constitutions presently lack.

Secondly, again at the level of general principle, the Northern Territory Constitution provides a model on which the Constitutions of other States might draw. Those involved in its drafting have been conscious of the significance of their mission. In his opening statement the Chairman refers to the need for a 'vision of where the Territory will be in the next hundred years or so'.\(^42\) The draft preamble to the Constitution seeks to reflect this, and to state some of the principle values on which the Constitution is based.\(^43\) The Report emphasises equity: between all Territorians and between the people of the rest of Australia.\(^44\) It directly addresses the position of the indigenous peoples within the Territory and recognises the role which the Constitution might play in securing indigenous rights, made all the more important in the historical context.\(^45\) The draft makes explicit provision for the circumstances of other communities to reflect the 'special multicultural nature of the Territory'\(^46\) as well. The entire Constitution would be entrenched, by referendum, consistently with the expectations Australians now have of the procedure for constitutional change.\(^47\)

In other more specific ways, the Northern Territory Constitution offers food for thought. The Committee has addressed itself specifically to the question of that appropriate content of a State Constitution, even to the point of developing a third category, of organic laws as a form for lesser constitutional institutions and rules.\(^48\) It has proposed an interesting experiment as an alternative to citizens' initiated referendums, under which

\(^{41}\) Report 5.15.
\(^{42}\) Report 1.1.
\(^{43}\) Report 5.3.
\(^{44}\) Report, 1.1, 5.2.
\(^{45}\) Report 4.3.
\(^{46}\) Report 5.12.
\(^{47}\) Report 5.4.
\(^{48}\) Report 5.5.
a proportion of citizens would be able to require the Standing Committee to consider specific proposals for amendment of the Constitution or organic law. It has gone further down the path of codifying conventions than any other Constitution in Australia with recommendations which may be of considerable interest as the debate on the republic proceeds. The draft provides for advisory opinions and entrenches judicial review. It avoids the pitfall of dual citizenship in candidature for elections to the Northern Territory Assembly.

This is not to suggest that the draft is perfect. There may still be room for improvement in, for example, the simplicity of its wording, an explicit reference to political rights, the incorporation of independent constitutional agencies such as an Electoral Commission or Auditor-General. These are issues on which we will hear a variety of opinions over the next few days. Whatever the verdict, however, in both process and content the draft Constitution for the Northern Territory more nearly meets the prototype of a Constitution on the eve of the twenty-first century than do those of the Original States which have been in existence for so much longer.

49 Report 5.8
50 Report 5.9.
51 Report 5.10.
52 Report 8.90.
Democracy and the New Northern Territory Constitution

The March to Statehood

STEVE HATTON

The Northern Territory has had a very chequered and disadvantaged constitutional history. Even today it and Territorians remain deprived of many of the normal democratic entitlements taken for granted by Australians resident elsewhere in this country. This includes the fact that, unlike the States, we still do not have our own democratic Constitution under which the principle of representative democracy in the Northern Territory is enshrined and protected. What democratic rights we do have continue to exist only at the absolute discretion of the Commonwealth Parliament and Government, and can be eroded or taken away as those institutions think fit. I will illustrate the reality of this constitutional fact later.

But let me first turn briefly to our constitutional history, as it will assist in helping you to appreciate why more and more and more Territorians are becoming agitated about the situation we find ourselves in, and the lack of action over many years to remedy this democratic deficit in our nation.

The Northern Territory, upon the non-Aboriginal settlement of this country, began as a part of the Colony of New South Wales, although apart from a few small outposts, it was inhabited by Aboriginals only. In 1863, by Royal Letters Patent, it was annexed to and became part of the Province of South Australia. By that time, South Australia had become a self-governing colony, having already adopted its own Constitution which was assented to by the Queen in 1856. Under that Constitution\(^1\), a bicameral Parliament had been established for the Province, with power to legislate generally for the Province, subject to the normal Royal prerogatives of reservation and disallowance of that legislation. There was full male franchise at 21 years of age for the House of Assembly, later extended to female adult franchise. The franchise for the Legislative Council was limited to males at 21 years of age with certain property qualifications, later becoming full adult franchise (including for females at 21 years of age). The South Australian Parliament had full power to repeal or alter the Constitution Act on an absolute majority vote of all members of both Houses, subject to the requirement of reservation and Royal assent. This democratic franchise for both males, and later females, was in turn extended to the Northern Territory after its annexation to the Province in 1863, with a Northern Territory member being elected to the South Australian Parliament. The Constitution Act incorporated the principle of responsible government, with certain Ministers being

\(^1\) Constitution Act No. 2 of 1855-6 (South Australia)
chosen from and accountable to the South Australian Parliament. It also guaranteed the 
tenure of South Australian Supreme Court Judges on good behaviour, removable only 
upon address in both Houses of Parliament. That Court had jurisdiction extending to the 
Northern Territory from 1863. In other respects, the South Australian Constitution was 
very much a 'minimalist' Constitution on the typical 19th Century colonial model.

When South Australians voted to become a part of the new federal Commonwealth on 
the basis of the new national Constitution adopted at the Australasian Constitutional 
Conventions of the 1890's, adult Territorians also participated with South Australians in 
the vote. The new status of the Northern Territory as being part of a State in the 
federation is reflected in the sixth section to the Imperial Commonwealth of Australia 
Constitution Act of 1900, reciting that the term 'the States' includes 'the northern 
territory of South Australia', and the first Preamble to that Act, reciting that the people of 
South Australia (which included those in the Northern Territory) and other colonies had 
agreed to unite in one indissoluble federal Commonwealth. Thus the Northern Territory 
became a part of the new State of South Australia upon federation in January 1901, and 
Territorians were thereafter entitled to all the constitutional rights of residents of that 
State under the new national Constitution. This included the guaranteed democratic 
representation as a matter of constitutional right for 'Original States' under that 
Constitution in both the Senate and the House of Representatives, plus a constitutional 
right to vote in any national referenda. Territorians also continued to enjoy the 
democratic rights guaranteed by the existing Constitution Act of South Australia, as 
continued in force, subject to the national Constitution, by section 106 of that latter 
Constitution²

However all these democratic rights came to an end for Territorians when South 
Australia, by Agreement ratified in legislation³, surrendered the Northern Territory to the 
Commonwealth, effective on 1 January 1911. The Territory then came under the 
exclusive jurisdiction of the Commonwealth as a territory of the Commonwealth. As a 
consequence, the Northern Territory became subject to the exclusive legislative powers 
of the Commonwealth Parliament under section 122 of the national Constitution, 
virtually unlimited by subject matter.⁴ The Northern Territory became in effect a 
Commonwealth dependency or 'fiefdom'.

² Section 106 provides:

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, 
continue as at the establishment of the Commonwealth, or as at the admission or establishment 
of the State, as the case may be, until altered in accordance with the Constitution of the State."

³ Northern Territory Surrender Act of 1907 (South Australia), Northern Territory Acceptance 
Act 1910 (Commonwealth). The Agreement is scheduled in both these Acts.

⁴ Section 122 provides:

"The Parliament may make laws for the government of any territory surrendered by any State to 
and accepted by the Commonwealth, or of any territory placed by the Queen under the authority 
of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may 
allow the representation of such territory in either House of the Parliament to the extent and on 
the terms which it thinks fit.".
The South Australian Constitution Act of 1855-6 as amended was repealed and reenacted by the South Australian Parliament in similar terms in 1934, but this new Constitution Act has never had any operation in the Northern Territory. The repealed Constitution Act necessarily ceased to have any effect in the Northern Territory from 1911. From that time onwards, the Northern Territory has had no Constitution of its own, and it and Territorians have been deprived of most of the rights of other Australians under the national Constitution.

The Northern Territory continues today to be a Commonwealth territory, fully subject to section 122 of the national Constitution. This has not altered with the grant of Self-government to the Northern Territory in 1978. This was recently illustrated when the Legislative Assembly enacted the Rights of the Terminally Ill Act, the validity of which was upheld by the Court of Appeal of the Northern Territory Supreme Court, only to be prospectively over-ruled by the Euthanasia Laws Act 1996 of the Commonwealth Parliament. Such a Commonwealth Act could not constitutionally be enacted in respect of a State and was therefore limited in operation to the Northern Territory, to the ACT and to Norfolk Island. Clearly, as a result, the Commonwealth does not consider it is bound even by convention to uphold the democratic principles of Self-government which it has itself established in the territories. It is not constitutionally restrained to do so.

Some limited democratic rights have been recaptured by Territorians since 1911, but only by a slow and persistent campaign of agitation by leading Territorians, and then only by an exercise of the Commonwealth’s discretionary powers. A Northern Territory Legislative Council with a minority of elected members was first established as late as 1947 (the States had similar legislatures in the first half of the 19th Century). That Territory legislature only became the fully elected Legislative Assembly as late as 1974. However any of its laws can still be overridden later by Act of the Commonwealth Parliament, as illustrated in the Euthanasia case. In addition, the Governor-General retains a general power of disallowance of Territory laws.

The Northern Territory was given a grant of Self-governing powers in 1978 by an ordinary Act of the Commonwealth Parliament, with its own Ministers of the Territory chosen from the Legislative Assembly. But the powers of those Ministers are limited by the terms of ordinary Commonwealth Regulations made by the Governor-General on the advice of his Commonwealth Ministers.

The Northern Territory has in more recent times been given limited representation in the Senate (2 Senators) and the House of Representatives (1 member), with full voting rights, by an ordinary Act of the Commonwealth Parliament, but this legislation had to survive two challenges in the High Court\(^5\). This representation is not constitutionally guaranteed, unlike the position in the States.

It took a successful national referendum in 1977, to amend section 128 of the national Constitution for Territorians to recover any form of democratic vote in any later referendum to change that national Constitution. Even now, Territorians only have such a vote in referenda if the Commonwealth Parliament chooses to allow the representation.

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5 1st Territories Representation case (1975) 134 CLR 201, 2nd Territories Representation case (1977) 139 CLR 585.
of that Territory in the House of Representatives, and the vote of Territorians is then only counted in the required national majority, and not in the requirement for a majority in a majority of States.

Because the Northern Territory is still not a State, it does not have its own Constitution protected by section 106 of the national Constitution. The national Constitution does not specify that a State, including a new State, must have in place a written document described as the "Constitution" of that State. However section 106 of the national Constitution does contemplate that if there is such a State Constitution, that it will be constitutionally protected on an ongoing basis, subject to the national Constitution and subject to any alteration of that State constitution by the State in accordance with the mechanisms in that State constitution. In recent years this section, together with the implied constitutional doctrine that prevents the Commonwealth from attacking the very existence or the vital functions of a State or from discriminating against a State, have been used in the High Court on several occasions to strike down Commonwealth legislation. They are important protections of representative democracy in the States. There is not such parallel constitutional protection in the Northern Territory, even with Self-government.

While I am not a constitutional expert, it seems clear that section 106 provides a qualified but important protection to a State and its own Constitution, and accordingly a guarantee of the democratic principle. All Australian States presently have their own State Constitutions which incorporate the principle of representative democracy and responsible government to varying degrees.

The Northern Territory legislature took the view as early as 1985 that if the Northern Territory was to become a new State in the federation, it should have its own, home-grown Territory Constitution as the basic law of the new State. The bipartisan Sessional Committee of the Legislative Assembly on Constitutional Development, of which I am the Chairperson, was established by resolution of the Legislative Assembly in that year with the brief, among other things, to prepare such a new State Constitution. That

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6 The relevant provisions of the original Terms of Reference of the Sessional Committee (formerly a Select Committee) on Constitutional Development specified as follows:

"Whereas this Assembly is of the opinion that when the Northern Territory of Australia becomes a new State it should do so as a member of the federation on terms resulting in equality with the other States with its people having the same constitutional rights, privileges, entitlements and responsibilities as the people of the existing States;

And Whereas in so far as it is constitutionally possible the equality should apply as on the date of the grant of Statehood to the new State;

And Whereas it is necessary to draft a new State constitution;

(1) A Select Committee be established to inquire into, report and make recommendations to the Legislative Assembly on:

(A) A constitution for the new state and the principles upon which it should be drawn, including:

(I) legislative power;

(II) executive powers;

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Committee has always consisted of equal numbers Government and Opposition members and has worked cooperatively and constructively on this project for twelve years. The Terms of Reference specify that the Northern Territory should become a new State on terms of equality with existing States, and directs the Committee to enquire into, report and make recommendations to the Legislative Assembly on a constitution for the new State, the principles upon which it should be drawn and the method of its adoption and approval by or on behalf of the people of the Northern Territory.

The Sessional Committee has embarked on a long process of preparing a recommended draft of a new State Constitution in consultation with the people of the Northern Territory. It has been an open, participatory exercise. The Committee has reached out to all sections of the Territory community in carrying out this task insofar as this has been possible within the limits of its budget. This has included extensive consultation with Aboriginal Territorians in their own communities, and often in their own languages. These consultations are continuing. This work resulted in the preparation of a final Draft Constitution for the Northern Territory, which was included in the Report of the Committee entitled 'Foundations for a Common Future', and tabled in the Legislative Assembly in December 1996. A copy of that final Draft has been made available at this Conference and I commend it to your consideration. It is not possible at this time to discuss its contents in detail, but it very much reflects the special situation of the Northern Territory with its diverse, multicultural population. In addition, it seeks to solidly entrench the democratic principle in Northern Territory law through a representative new State Parliament, in a manner that would not be possible to later change without extensive inquiry and debate plus a majority vote of Territorians in a Territory referendum.

This Draft Constitution is presently awaiting further debate in the Legislative Assembly and a decision on whether to hold a Territory Constitutional Convention to consider and adopt that final Draft. It would then be voted upon and submitted to the Commonwealth for adoption as part of the grant of Statehood. The Sessional Committee has previously recommended that such a Territory Constitutional Convention be held.  

If this proposed Northern Territory Constitution was to be implemented as recommended, with its entrenched democratic principles, as part of a grant of Statehood to the Northern Territory, and if this was to be accompanied by a significant grant of federal representation to the new State in the national Parliament, perhaps based on a formula that would result in eventual equality of representation with the existing States, then this would in my view complete the democratic reinstatement of the Northern Territory and its residents. The constitutional map of Australia would be completed, and Territorians would reacquire their democratic birth rights on a par with other Australians.

(III) judicial powers; and

(IV) the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory; and

(B) The issues, conditions and procedures pertinent to the entry of the Northern Territory into the federation as a new state.

7 Interim Report No. 1, A Northern Territory Constitutional Convention, February 1995.
I place great importance on the place of a new, home-grown State Constitution in this process. Such a document, plus the existing national Constitution, can form the framework on which can be based a free and democratic Territory society for the future. It is entirely conceivable that the adoption of a new State Constitution for the Northern Territory, framed to meet the needs and aspirations of Territorians into the 21st Century, will lead to a resurgence of interest in State constitutional law (much as has happened in the USA) and to a reinforcement of the principles of federalism in Australia. If I have been able to make some small contribution to this process I will be thankful.
Administering a Region or Governing a People?

*Federalism as a Safety Net in the Northern Territory*

**Christine Fletcher**

This paper argues that federalism provides the Territory with its strongest chance for increasing its regional authority. Federal institutions - those set up specifically to cater to the different levels of government - are the only ones that provide regional governments with the type of principles that allow regional communities, such as the Northern Territory, to claim the right to exercise political and economic autonomy. Over the years, the system of government that now operates in the Northern Territory has been shaped by a combination of local interests, national institutions and commonwealth public administration. The Territory will always have to live within limits imposed on it by other governments but the fact that the Territory has been welcomed into the federal fold of commonwealth-state relations is evidence that the principles of federalism have already provided it with an institutional base on which to consolidate its membership.

The position of the Territory within the federation can be best understood by explaining how the principles of federalism actually work, why the system holds together and why Territory statehood is likely to be based on a more limited type of power to that enjoyed by the other states. The first part of the paper illustrates the connection between the development of the Northern Territory as an administrative region and its emergence as a member of the federation with state-like functions.

If the size of public management structures are a measure, the Territory is in the major league with the commonwealth and couldn't survive without commonwealth support, both in administrative and financial terms. The commonwealth is a team player with the states - the states and the commonwealth have a role in keeping the Territory political and economically buoyant. For example, although the Territory lacks the constitutional power of the states, it has their endorsement and support as a member of the federation. That support is reflected in the Territory's direct participation in the various federal structures which were established because of the pressures between state and commonwealth governments - for example, Premiers Conferences, Council of Australian Governments (COAG), Commonwealth Grants Commission processes and so on. In the case of COAG, that emerged because the states felt that, after Bob Hawke's new federalism process was discarded by Paul Keating, many of the political and economic structures under state jurisdiction began to be eroded (see Fletcher & Walsh 1992). By similar measure, the fact that the Territory's financial base is limited and its constitutional base controlled by the commonwealth, gives it an uncertain future as a
fully developed state with the type of claims to sub-national sovereignty that federalism guarantees the other members of the federation.

Sovereignty at a sub-national level is one of the most interesting features of a federal system. Sub-national sovereignty is seen as the essence for preserving community diversity and is historically rooted in the design of state and federal constitutionalism, both in Australia and in the United States (Elazar 1987). It is at the centre of the federal principle. The federal principle contains the formulae for the organisation of power – diversity and the question of how the federal principle affects the future of the Northern Territory is explained in the second part of this paper.

**Governance in the Northern Territory**

From the first decade of the 20th century, the commonwealth government has been attempting to provide the Territory with an economic framework strong enough for the region to find its own form of administrative independence. In the first few years, the commonwealth itself was barely a government – small, with an enormous appetite for expansion but, hardly capable of regionalising itself as far away as the Northern Territory or Western Australia. Dozens of reports, beginning seriously with the Northern Australia Development Committee led by H.C. Coombs in 1946 and culminating in Wran's Report of the Committee of Darwin, 1995, have compiled data and sought answers which would provide the key to the Northern Territory's future - pastoral, mineral, industrial, tourism, transport, fishing, Aboriginal, Asia relations and all of the above. Recognised for its geographic strategic value and its potential for cattle production but, by the same token, distant from the southern capitals, the Territory was typically seen as inaccessible, a frontier, climatically inhospitable and unique for its relatively large Aboriginal population. In the early days of federation these features of the Territory posed a puzzle for governments and people who saw the north as irrelevant to the economic future of Australia, too costly and difficult to administer but too important for defence purposes to ignore.

Lack of physical infrastructure, poor roads and a shortage of capital expenditure deterred private investment. At the time, the only institutions of any substance were the ancient Aboriginal linkages that cut across regional Australia throughout the entire north but European Australians were largely unaware of those. Also, because Aborigines had not invested in any obvious physical infrastructure on the land they were officially treated as *persona non grata* and considered to be a nuisance. The only northern structures that governments could relate to were regulations that gave effect to the equally remote state borders of Queensland and Western Australia.¹

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¹ Administrative structures in the states were an early part of regional development - even in the more isolated regions of Western Australia, and South Australia, local road boards and district boards were operating. Boards and statutory authorities were destined to become part of the framework of government, particularly in the early 20th century (Sawer 1967). In colonial Australia, boards sometimes existing in name only but, according to Finn (1987), with Britain as the colonial model, 'In all shapes and sizes boards and statutory authorities – national and local, adjudicatory and regulatory, performing public works and providing public services – dotted the nineteenth-century administrative landscape (p25)'.

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Session 1
In the absence of physical structures of government in the Territory, dozens of legislative provisions were passed in the decades that followed the transfer of powers from South Australia to the commonwealth – the Northern Territory Acceptance Act 1910. The Northern Territory (Administration) Act 1910 and the Northern Territory Representation Act 1922-1925 and, in 1926, the commonwealth passed the Northern Australia Act. Australia's white populations elsewhere were represented through state parliaments with the authority of state constitutions but, in the Territory, it was several decades before commonwealth legislation translated into local democratic institutions or public utilities. The Northern Australia Act 1926 was designed to address this problem by providing a strategic framework for managing regional development in the northern and central parts of the Territory. These sort of structures, if successful, would inevitably provide the ballast for supporting the emergence of political institutions and local constituencies.  

Of course, history would have taken a different turn if electoral structures in Territory had matured at the rate of those in the states – perhaps, if Aboriginal people been given the right vote at the same time as the rest of Australia, and been armed with an understanding of western institutions, particularly how to exercise voting rights, the Territory might have been governed by an executive with an Aboriginal majority. Overall, political representation for the people of the Northern Territory was limited. Territorians were prevented from voting in the multi-member constituency of the Senate until self-government and the value of their vote remains less than that of their state counterparts – bearing in mind that the constituents of the Senate are states, not people. This is not so much an outcome of the inequities of citizenship but a clear statement that the regional jurisdiction of the Territory is less equal than the jurisdictions of the states.

The Growth of Bureaucracy and the Effects of Commonwealth Dominance

The rate of expansion of public bureaucracy in the Territory is disproportionate to the rest of Australia (see Heatley 1996). For example, the significance of the role of public bureaucracy in the Northern Territory can be seen in the increase, and periodic decline, in size of public administration and defence in the Northern Territory over the two decades since self-government in 1978 (ABS 1997). Over half a century of commonwealth administration and management of the Northern Territory has conditioned the development of the Territory and led to the evolution of a public sector.

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2 The commonwealth's system of administration was based on the separate management of Central and North Australia. Regional Advisory Councils were established, providing the basis for the Executive Council, the Legislative Council and, by 1978, self-government through the Legislative Assembly.

3 Territory democracy experienced periods of public dissent – among the most notable was the Darwin 'Rebellion' in 1918 (see Clements 1996). The basis for public disturbance was the aged-old 'no taxation without representation'.

4 Heatley (1996) provides a comprehensive account of administrative development and also the political style of Territory leadership over the years.
which, measured as a percentage of GDP, remains double the size of the national average.\(^5\)

In the graph attached to this paper we see that the percentage of government administration and defence as a percentage of GDP is relatively high but has substantially declined since the first data was made available for 1983-84. In 1991-92, there was a further increase in the size of government administration due to increased defence activity. This was followed by a leveling out of the expansion in 1994-95 (but remains almost twice that of the national average). The Australian average was approximately 3.5% in 94-95: the Northern Territory was around 6.3% for the same period – down from 7.3% in 93-94.

The Public Service Act passed in 1978 gave the Northern Territory the distinction of claiming the first new public service since federation in 1901 (Hawkes 1995)\(^6\). However, the passage of the Northern Territory legislation did not diminish the role of the commonwealth public service. The impact of the commonwealth’s administrative role in the Territory is difficult to measure, other than number of people and size of budgets but we know, for instance, that financially the commonwealth has dominated certain policy sectors in the Northern Territory and elsewhere – Aboriginal and Torres Strait Islander affairs is an example. But we know also that commonwealth grants in such sectors are influenced directly by intergovernmental arrangements between the commonwealth and each individual state. Hence, any serious attempts to evaluate the role of the commonwealth in Territory Aboriginal affairs would have to take account of other factors – past commonwealth laws, Territory, expenditure, Aboriginal land tenure, Local government, and so on.

Also, commonwealth per capita expenditure is much higher in the Territory relative to the states, and commonwealth own expenditure adds substantially to the shape of bureaucracy in the Territory.\(^7\) According to tables prepared in the office of Senator Grant Tambling (1996/97) commonwealth operating costs for its own departments and agencies in the Northern Territory (including program budgets) for 1996/97 totalled $1,320,040,834. Territory expenditure for the same period totaled $1,228,342,000. This amount includes grants from the commonwealth and presumably Territory own source revenue.\(^8\) The question of how this might affect the shape and organisation of government in the Territory is an interesting one which has yet to be seriously tackled. Also, although the Territory is unique among the states the principles by which the Territory is governed are typically federal.

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\(^5\) For an account of the percentage of public servants (commonwealth, state and local), see Heatley (1996).

\(^6\) Further data will be available after the end of August 1997 when the national accounts are released.

\(^7\) For examples of Commonwealth expenditure, see the chapter by Bob Searle (1997) in C. Fletcher (ed), Federalism in the Northern Territory: Options for Fiscal Maturity, published by NARU, Darwin.

\(^8\) The current Table was made available by Senator Tambling’s office.
Federalism and the Northern Territory

A federal system not only creates different levels of government but it also establishes a maze of intergovernmental networks that cut across almost all jurisdictions – multiple governments and agencies, self-governing communities, semi-autonomous legislatures, state judicial systems and so on, give states access to national issues and, in principle, they have the right to accept or reject centralised or uniform policies. It is because of these principles that the Northern Territory has been able to model itself into a state-like image. The principles of federalism have allowed the Territory to overcome the impediments of centralised administration and anchor itself into a position from where it can claim political alignment with the states.

The Northern Territory receives its full entitlement at Premiers Conferences, bargains with the Commonwealth Grants Commission for its general purpose grants, collects revenues, receives state and commonwealth recognition through its local government system and generally behaves like a very ‘small’ state. But, the commonwealth can pass moral judgment on the Territory in a way not experienced by the states (note the NT Voluntary Euthanasia Act). The Territory is a full member of the federation but with diminished powers. There are no conditions in the constitution that require the Territories to necessarily achieve a certain level of economic growth or reach a point of local political strength before they can be classed as part of the federation. The conditions enjoyed by the Northern Territory are linked to the benevolence of the other members of the federation and, by the same token, the rights denied the Territory are because of constitutional reliance on the commonwealth and economic dependence on the states. The Territory is shaped by the representation of its constituents and by whether or not the commonwealth and the other states believe that it has attained a certain level of institutional maturity.

The Territory aligns itself to the states and commonwealth governments in an effort to fulfil its own needs and partner its way into schemes – Territory dealings in Indonesia is one example; its MOU with South Australia and Tasmania, and recent railway partnership with South Australia and the commonwealth – and there are other examples. From a democratic perspective, the Territory’s own institutional behaviour is judged by political precedents elsewhere within the system (like, allowing for free political association and passing legislation to positively encourage public scrutiny, etc). Meanwhile, as the Andrew’s Bill illustrated, the citizens of the Northern Territory have the peculiar status of being protected from themselves if the commonwealth parliament thinks they might have made an error of judgement. This experience is peculiar to the Territory, not the states.⁹

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⁹ State and territory governments are responsible for providing people with their essential services. But, since the co-responsibility stems from a set of powers which is explained as ‘plenary’ powers in the commonwealth constitution (see Sawer 1967). In the reality of day-to-day government, the text of state constitutions formally endorses all political, administrative and economic activity in each state. For example, electoral functions, local government, land, and the provision of goods and service, powers are contained within the text of state constitutions. Obviously, the commonwealth constitution provides the fundamental framework for the system but, as Lumb reminds us, the constitution protects the states from abolition, limits the totality of its own centralising tendencies and, while it has the effect of federating the
Is Federalism a Tolerant System?

The Northern Territory, and Darwin, can claim one of the most multicultural societies on mainland Australia. For example, on current estimates, per capita, there are more Aboriginal and Torres Strait islander people living in the Northern Territory than elsewhere in Australia. Using language as an indication of diversity, English speakers dominate in the home environment but then, according to the ABS Census data, Aboriginal languages, as a percentage overall are second only to English in the Northern Territory. In Darwin, Aboriginal languages per household are followed, in large margin by Greek and then Chinese (includes PRC, Taiwan and HK).\(^{10}\) The languages of our nearest neighbours – Indonesian, Portuguese and Filipino – are spoken in three times as many households in Darwin than in the rest of Australia (ABS 1997).

<table>
<thead>
<tr>
<th>Language Spoken at home, Darwin, Northern Territory and Australia Persons aged 5 years and over</th>
<th>Darwin</th>
<th>Northern Territory</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>English</td>
<td>77.5</td>
<td>68.4</td>
<td>81.2</td>
</tr>
<tr>
<td>Aboriginal</td>
<td>1.3</td>
<td>14.5</td>
<td>0.3</td>
</tr>
<tr>
<td>Greek</td>
<td>3.0</td>
<td>1.5</td>
<td>1.9</td>
</tr>
<tr>
<td>Chinese</td>
<td>2.3</td>
<td>1.1</td>
<td>2.4</td>
</tr>
<tr>
<td>Tagalog (Filipino)</td>
<td>1.0</td>
<td>0.6</td>
<td>0.5</td>
</tr>
<tr>
<td>Italian</td>
<td>0.8</td>
<td>0.5</td>
<td>2.7</td>
</tr>
<tr>
<td>Portuguese</td>
<td>0.7</td>
<td>0.3</td>
<td>0.1</td>
</tr>
<tr>
<td>Indonesian</td>
<td>0.7</td>
<td>0.3</td>
<td>0.2</td>
</tr>
<tr>
<td>Other</td>
<td>12.7</td>
<td>12.8</td>
<td>10.7</td>
</tr>
</tbody>
</table>

Source: 1996 Census Community Profiles, Australian Bureau of Statistics

The culture of the Territory is much more than the sum of the culture of people that inhabit the region, although the multicultural nature of the Territory is especially characterised by the way that the indigenous peoples shape the region. Political cultures are comprised of attitudes, of the trappings of colonialism, of the affect of the advocates of the ‘white Australia’ period, and of the formation of the Territory during its administrative expansion which some people have identified as a culture of public administration in the Territory. Like all other communities that make up the federal system in Australia, the Northern Territory has special position among the states and the ACT as a member of the federation - not perhaps not a ‘full’ state but, nonetheless, more than an associate member.

\(^{10}\) Data on the Indonesian language is not included in ABS data because, at a national level, it is not considered significant.
Political, social, ethnic and religious tolerance is a feature of western government generally and liberal federal systems in particular although, there have been scholars who have argued vehemently that federalism was intolerant. Riker (1964), for example, believed that federalism was to blame for racism during the civil rights era – he pointed to the circumstances experienced by black people in southern states. Later, he disproved his theory (Riker 1982).

Tolerance was not, however, a feature of European settlement in Australia – a factor which had nothing to do with federalism. Europeans in the Territory based their political institutions on the principles of western values that they brought with them from Britain (see Finn 1987 & also Huntington 1981). They wanted to exclude any other peoples from changing the civic culture that those institutions represented. They were eager to maintain their anglo-celtic identity. This is obvious by the continuous flirtation with racism and the maintenance of the white Australia policy across Australia throughout the 20th century (see Birrell). In the Northern Territory, things were a little different because, in the early days, the Aborigines were in the majority. But, ideas of racial superiority gained currency as Territory institutions began to take shape. According to the Report of the Board of Inquiry appointed to inquire into the Land and Land Industries of the Northern Territory of Australia (known as the Payne and Fletcher Inquiry 1937).

In undertaking to maintain the northern portions of this Continent as a heritage for the white race, Australia is committed to an heroic task, the like of which have no parallel in the history of mankind. This task cannot succeed unless the populous parts of Australia are prepared to make some definite and sustained contribution to the Territory's welfare. Our great ideal of a "White Australia" is worth living, striving and paying for (Report, paragraph no 405, p.65).

At the time of the report, the white population of the Northern Territory was 3,800 and, with unintended insight, the report predicted that the Territory would most likely always be under the control of the Commonwealth.

**Divided Sovereignty**

If the principles of federalism are based on divided sovereignty how can federalism lead to unity? In Australia, federal principles were adopted because federalism was believed to be the only system of government with a framework that could be used to unify the different colonial systems that had engraved their political hallmarks onto their government institutions. A more consensual term for this, 'popular sovereignty', was conceived by Elazar (1967) in the United States. Divided sovereignty sometimes invites an emotional response because it highlights that each state, rich or poor, is guaranteed constitutional authority and the commonwealth cannot remove the states from their jurisdiction. The Northern Territory cannot claim to have that sort of exclusive sovereignty but, nonetheless, the fact that it can band together with the states whenever their jurisdiction is threatened gives its regional image a boost.

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11 Hawkes (1995) provides an evaluation of key legislative provisions on which the Northern Territory public sector reform has been based - including the *Public Sector Employment and Management Act 1993* and the *Anti-Discrimination Act 1993.*
Sawer (1968), in his assessment of judicial review in Australia, points out that, in many of the early proceedings, the American federal system was used as a guide by judges in their deliberations over matters of governmental autonomy — the issue became more complicated because states used the Privy Council appeal process before the Australia Act 1986. For the Northern Territory, the question of constitutional sovereignty leads to section 122 of the commonwealth constitution. The question of whether the Territory can exercise popular sovereignty cannot be easily resolved nor can it be simply dismissed.

**Government Principles and Doctrines**

Public bureaucracy in western systems is organised by government according to the various principles on which different societies choose to be governed (see Sturgess 1996). In Australia, governing principles are a combination of the Westminster traditions coupled, in 1901, to the traditions of federalism. In essence, Australia is a parliamentary federation. Federalism has received little support from students of government. For most of the 20th century, efforts have been concentrated on our Westminster parliamentary characteristics (see Crisp). Federalism was either ignored or else misrepresented by people who failed to understand the basis of shared jurisdictions a common feature of federalism. As a consequence, federalism began to be seen by some as a hindrance to commonwealth centralised decision-making — which is precisely what the architects of the federal principle intended!

Before the war and then more recently, federalism was denounced as a conservative force which hampered social progression (Greenwood 1940, Hawke 1979, Davidson 1997). In its place, critics wanted responsible government to be the property of the commonwealth, not the states — a single centralised parliamentary government was seen as more cost efficient and ideologically more sound than federalism. The fact that such a system would iron out regional cultural diversity, ignore regional differences, encourage a majoritarian approach and give a single majority government the freedom to make decisions within a uniform set of objectives appears to have been irrelevant. Since most of the population lived in New South Wales and Victoria, the direction of national politics would then be driven exclusively by those states.

The fundamental purpose of having a federal system is to divide power amongst the constituent governments and contain the spread of centralisation — this leads to a situation where many policy sectors are shared by different jurisdiction or, to put it another way, where policy functions overlap. The anti-federal model, and one common in unitary systems of government, such as Britain, is that centralised planning takes place through an unresponsive hierarchical organisation rather than through non-centralised networks of a matrix-style processes which characterise the federal form of 'national' decision-making (see Elazar 1997). Without federalism, there would be one central

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12 See Galligan for various other permutations of this.

13 Some, such as Hackert, believed that by combining institutions from a parliamentary system, in which there was a clear line of responsibility from the government to the people, with those of a federal system, policy linkages would cut across such a variety of different jurisdictions and lead, ultimately, to the destruction of the governing principles.
parliament in Canberra. The most likely scenario for the Territory is that the majority of members in the Territory legislature would be either appointed by Canberra (Hong Kong now has a similar model) or relegated to the status of a local/regional council which also would be controlled by the commonwealth.

Factors that have contributed to negative perceptions of federalism have their roots in the image of the states, either the historical portrayal of the states by national governments or else the public persona of the state premiers themselves. Certainly, perceptions that the states were backward and led by a groups of unsophisticated leaders seemed to affect their image over the long term and, coupled with observations of the crudity of state parliamentary behaviour and of state premiers, led one observer of the Premiers meeting in 1927 to describe the premiers as,

a gathering of the genteel poor at a distribution of rations ... trying so hard to feel dignified and stable (Hancock 1930, p92).

Nor were federal principles clearly defended by the state governments. State leaders failed to protect the future of their state financial base from erosion. Centralisation was assisted by the commonwealth's ability to constantly realign itself alongside the jurisdiction of the states. In many policy sectors it has been able to do this by buying its way into state jurisdiction.

Competition over jurisdiction is a perfectly normal function of commonwealth-state relations except that, with current financial relations, the commonwealth can avoid having to take responsibility for its own actions. The question of responsibility is at the forefront of the criticism about the federal system in general. Critics of federalism constantly point to the confusion over roles and responsibilities. Comparatively, unitary systems are easier to define than federal systems – federalism invites more participation, more parliaments and, from a national perspective (but not necessarily from a regional viewpoint) a crowding of issues and a sense of confused responsibility. It should be noted that confusion over responsibility is also produced by privatisation and contracting out – in some cases (Ambulance sector in Victoria; the demolition of the old Canberra Hospital, ACT) many traditional fundamental Westminster principles of public governance are clouded, not by crowded jurisdictions, but by confusion over how to maintain and improve accountability in the transfer of government functions from the public to the private domain.\(^{14}\) The crux of the problem of responsibility, however, lies in the balance of power in commonwealth-state relations - the fact that the commonwealth raises most of the revenue and yet the states have most of the responsibility for providing services.

\(^{14}\) At the time Australia federated, theories about how federalism actually works focused solely on the legalities of divided sovereignty (including the division of financial powers) in the United States and Canada. Australian framers borrowed selectively from the mechanics which were used to support American institution-building. According to Warden's thesis, the framers they referred regularly to Lord Bryce's critical account of federalism in the United States. Bryce was not only critical of the divided sovereignty but his perceptions were filtered through concepts of unitary systems – Bryce was British and, since America and Canada were the only practical examples of what federalism was all about, the Westminster model appealed to him as the most reliable and trusted model of western liberal democracy. One which had values that Bryce recognised.
'Who Shall be Master – the States or the Commonwealth?'
(Alfred Deakin, 1901)

Federalism as the Organising Principle

Deakin gloomily foreshadowed the end of federal relationship between his government and those of the states even before the close of the first decade.

After the decade they (the states) will be able to claim nothing as of rights, and must be content with any amount the federal Parliament chooses to spare them. Subject therefore to the consent of the voters of Australia the independence of our States is doomed (in Prest & Mathews, 1980, p 16).

A core feature of the federal principle is the way it unites all of the governments under one constitution – the whole idea was to construct a flexible constitutional framework strong enough to cope with competing regional political pressures. Only the federal principle contains the formulae for dividing constitutional authority, sovereignty and administration, among a variety of different jurisdictions. By contrast, the tradition of Westminster parliamentary systems is based on principles that channel power from the people (the majority) to the parliament - hence the term parliamentary sovereignty or, the sovereignty of the people. This conflicts with the federal principle because, in federated systems, sovereignty is shared. Elazar terms this popular sovereignty because there can be no single central authority with the power to subsume the powers of the states.

Conclusion

Agitation by regions for new states and for secession has a long political history in Australia. In the past, the general problem was the failure of the commonwealth to understand the basic doctrine of federalism. The essence of that doctrine is contained in the Western Australian Secessionist Act 1934 – and is as relevant to the Territory’s bid for statehood today as it was for the Western Australian’s in 1934.

‘The success of Federation itself must depend on the success of every State in it’
(Holder 1897, cited in The Case of the People of Western Australia, 1934, The Secession Referendum Act, 1932, and The Secession Act, 1934).

The Territory is a very large region with a small population. Distance, cultural diversity and historical experiences tell us that governments need to encourage the creation of as many channels of political communication as possible if the basis for negotiating statehood is to be acceptable to all the people of the Territory. Access to government and participation in the process of governance itself requires particular innovation and equity in institution building.

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15 Movement for secession in some regions of Australia developed for related reasons and some, such as the Riverina region of New South Wales and, also New England, were carried over from the 19th century. Riverina communities wanted to integrate with Melbourne rather than Sydney, mainly for the purpose of overcoming the customs barrier between New South Wales and Victoria. As early as 1851, the community of Moreton Bay argued over the borders between Queensland and New South Wales (CAB).
Australia is a stable system of government. The principles of federalism are embodied in the constitutional framework and, also, in the political process. The acceptance of these principles is reflected in the shared power arrangements that exist between the different states, territories and the commonwealth. From a political angle, the ambiguities of shared authority allows regional communities a range of opportunities to explore the concepts of self-government. For the Northern Territory, the period of self-government has been relatively short and yet its experience as an administrative region covers three-quarters of a century.

As an administrative region, the Territory system had the dual purpose of meeting the needs of the regional community and the interest of the national government. The Territory now finds itself, at a relatively mature age, constrained by the elementary rules of the commonwealth – in constitutional terms, the Territory is one of many other Territories – in political terms, the Territory belongs to the same club as the states. Financially, the Territory could not survive without either the commonwealth or the states – the likely outcome for the Territory's autonomy will be, as always, that it has to reach a compromise with the other governments.
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Session 2

Respect and Recognition First

Reconciling a Diversity of Interests in a New Northern Territory Constitution for the 21st Century

GATJIL DJERRKURA

Chair, the Honourable Austin Asche, Distinguished Guests, Ladies and Gentlemen. I would first like to pay my respects to the LARRAKIA people, who are the traditional owners of this land we're on today.

The title of this conference "reconciling a diversity of interests", is an interesting one. In order for this to happen there must be between them the real basis of reconciling all their interests: an ability for those diverse interests to communicate on the basis that there is an appropriate recognition of each other's rights and aspirations and mutual respect.

The fact is that, according to the 1996 Census, Indigenous Australians make up more than a quarter of the NT's population. This is a much higher percentage than for any other State or territory in the country. What that means is that it is imperative that any constitutional reform does more than "reconcile a diversity of interests": it must go further and both recognise and address our needs.

For that to happen, then first there has to be a major change in the NT's political discourse. And I'm sorry to say that I haven't seen any evidence in recent weeks that anything's changed. As an Aboriginal person, I've just had to suffer yet another Territory election campaign in which the government has ruthlessly and cynically played "the race card" with complete disregard for its impact on Aboriginal peoples and on our relationship with our non-indigenous neighbours.

Even outside the heat of an election campaign, we're constantly told that we're holding up economic development if we want to be involved in making decisions about the use of our land. Our respected leaders are abused as "whingeing, carping blacks". Aren't we "Territorians" too.

We're accused of living in the past if we ask for an official government apology for their abuse of the thousands of members of the Stolen Generation and their lost families. We're the subtext behind the very vocal promotion of a tougher approach to law and order. Our young people who offend against the laws of property will face mandatory jailing and, if that wasn't bad enough, look like losing the right to remain silent and can be sent to a jail which is so far away as to make family visits totally impossible.

And on top of all that, there's barely a voice raised in the NT to support our rights. Our organisations, naturally, have kept up the struggle as they always do and we're doing it on our own. But in mainstream politics, it seems to many of us that people of good will are
not speaking up any more. So our rights and our aspirations are painted as the only threat to the orderly progress of the Northern Territory towards self-government and a real economy.

I have to say that I am worried - and I don't think I'm the only one who feels this - that we are putting the cart before the horse by discussing model constitutions for NT Statehood before we've fully considered the question of becoming a State.

I am also worried that the Statehood juggernaut has gained added momentum from the predictable CLP victory last weekend. It was a victory that will be interpreted as an endorsement for the Statehood push when it's nowhere near as simple as that. Statehood is not simply an automatic entitlement; it is a privilege. It won't be attained by chest-beating; we have to be able to display our maturity as a community and I'm afraid we're nowhere near that yet.

The realisation of such a major change in constitutional status depends on the resolution of a number of complex political, legal, social, cultural, economic and administrative issues. The position of Indigenous peoples - given that we make up a significant percentage of the NT's population - is one of the central issues.

But the fact is that I don't have much confidence that our position has any recognition or respect. Nevertheless, I'm more than happy to discuss options for the future: I can't think of any Indigenous person who isn't. And I really think it's important that we take our time so we're all satisfied that we've debated the issues fully. But you can't discuss the future without looking at the present.

The most important question for me right now is this: by generally accepted measures, can we say that the Aboriginal peoples of the NT are significantly disadvantaged in comparison with the Territory's non-Aboriginal peoples? The only possible answer to this is an emphatic "YES". We are clearly at a significant disadvantage if our lawful rights and aspirations are being used to divide us from our neighbours and fellow citizens. But the real story of Aboriginal disadvantage is to be found in the social indicators. And that's the story we get if we also ask whether there is any clear evidence that the Territory's current system of law and governance is unwilling or unable to deal with Aboriginal peoples in ways that allow us reasonable access to and equitable distribution of the resources available.

How can this be in a modern State? My analysis is that such a catalogue of disadvantages is only possible where there is an absolute lack of recognition of Indigenous peoples and a corresponding over reliance to the point of folly on unworkable policies.

By that I mean that the Commonwealth Constitution completely fails to recognise Indigenous peoples and contains no set of values which could guide the relationship between us and non-Indigenous Australians. The people who wrote the Constitution were not guided by the same principles that the first governors were, which was to acknowledge Indigenous rights and treat fairly with our people. It is the very absence of these values and principles, I believe which has allowed governments to set policies which have resulted in Indigenous peoples being mistreated at worst and marginalised at best.
Our solution to this starts with the fight for our rights to be entrenched in the new Constitution as an essential factor in the viability of a new Northern Territory, just as we're fighting to get the new Commonwealth Constitution to recognise us. It is not just appropriate: it is essential if we are to live together in a climate of mutual respect and understanding. One of the significant result of the lack of recognition of Indigenous Australians is, I believe, the inability of non-indigenous Australians to come to terms with the concept of our common law rights.

We would like to live alongside the other peoples of the NT without feeling that they are threatened by our differences. We want the new Territory to be a celebration of diversity. But it can't be that without respect and recognition. This conference gives us an important opportunity to admit that what's been happening in the NT hasn't worked all that well. If we can at least admit that, we're well on the way to acknowledging that for the sake of harmony and progress we have to find a better, fairer and more respectful way to govern ourselves.

What should a Constitution provide? How can a new NT Constitution appropriately recognise and respect Indigenous peoples?

Any Constitution should at least offer a workable framework for government. The rules of the Constitution should obviously deal with the composition and powers of the parliament, the government and the courts. Modern constitutions include recognition of and guarantees for the rights and freedoms of individuals and groups. The latter we call collective rights. But recognition of the concept of collective rights is particularly important for Indigenous peoples.

Therefore a new Constitution for the NT must go further and set rules for the relationships between Indigenous peoples and government.

I think that means the new Constitution has to recognise reality and deal with it. And the reality is that there is no single bloc of Aboriginal people in the NT: rather there are diverse groups of Aboriginal peoples. About 60 per cent of these peoples don't live in towns and they don't want to. Many of them don't even want to live in the communities that were created by past government policies or through missions. They simply want to live on their own land in a way which is compatible with their beliefs. They want support for their laws and systems of authority, their spiritual beliefs and cultural practices.

Aboriginal peoples don't regard these simply as "wants", but as traditional rights by our own law that we have never ceded. To our way of thinking, we also have a common law right to exercise these rights. Our rights to maintain our land, law, language, beliefs and systems of authority must therefore be entrenched in the Constitution. This is the only way these rights can be protected from governments that might be tempted to make laws against our interests for their own short-term advantage.

I note, that the Exposure Draft of the proposed NT Constitution offers options for the recognition of customary law as a valid source of law in the NT. This is an important step because it means support for and maintenance of our own systems of authority and conflict resolution. By that I mean that you can't recognise customary law without recognising the law keepers.
This could help make sure that our young people get the benefit of appropriate guidance and codes of culturally relevant behaviour in their lives. It could also reinforce new systems of local government that relate directly to people where they choose to live. These systems have to base their decisions on consensus between affected parties. Where law is about belonging and obligation, it is more meaningful for everyone.

And without pre-empting the Land Council representatives here today, I have to emphasise that the Constitution must recognise Aboriginal land ownership, whether under common law Native Title or statutory title under the Aboriginal Land Rights Act. Land and land ownership are important cultural features and help define people's cultural identity.

There has to be some set of organic laws within the Constitution which protect our rights to our land and which prevent desecration of our sacred sites. But we also have to have recognition of and protection for other aspects of our cultural heritage, like copyright of our art works, like our medical and scientific knowledge and a wider understanding of the role we have played in managing ecosystems and protecting bio diversity. These are essential elements in our cultural identity and should be treated as such.

It is important to understand that proper Constitutional recognition of Aboriginal peoples and their cultures can only be achieved if it is a total recognition. Aboriginal cultures are made up of networks of connections through the land between all aspects of life and the spiritual and material universe. So recognising cultures means more than merely recognising the diversity of cultural, social, economic and other environmental conditions in which our peoples find themselves. It also means that you can't just pick out one or two elements of our cultures and drop what may be inconvenient.

There is no doubt that this recognition will overturn the current assumption behind the systems of law and governance in the NT: that the cultural majority of non-Indigenous people have both the right and the responsibility to control everything. This should not be a threat to anyone. What recognition of Indigenous peoples' rights could do is open the way for a less domineering and more tolerant style of government, particularly where it decentralises power and decision making.

In some parts of the United States, they are exploring how different styles of government can more effectively support the needs of the First Nation peoples. The US Supreme Court has accepted that tribes and bands have limited sovereignty to govern their own affairs. So the concept of "shared sovereignty" between Indigenous and non-Indigenous groups is coming to be accepted as a way of managing coexistence and sharing decision-making.

Of course we don't necessarily have to follow overseas models. But in the Northern Territory context, we could see the immediate application of this concept to future regional agreements. With support from the new Constitution, Aboriginal landowners could benefit from a redistribution of power and influence over their own lands. Instead of being at the mercy of changes in government policy, they could be in a position to negotiate the creation of appropriate governing structures. Provided there was the appropriate level of support for this from Commonwealth and Territory governments, it would mean more equitable access to the services and facilities that people in our towns and cities take for granted.
More importantly for our peoples in the bush, it would give them the opportunity to define the nature and pace of their involvement instead of continually going through changes dictated by external forces and remote systems of government.

A fundamental change of this kind in the power balance is likely to be more efficient and cost-effective than the present post-colonial style of centralised power and decision-making. It would certainly be more democratic and would encourage greater participation by Aboriginal peoples in the political life of the Territory. It may also encourage the development of appropriate and sustainable regional economies to feed into the new State's economy.

These are workable ideas and there's nothing really new in any of them. They have been discussed among ourselves by Aboriginal peoples in the Territory for a long time now. No-one's pretending that such fundamental change is going to be easy. Far from it.

But there has to be change because none of us - neither Indigenous nor non-Indigenous peoples - can continue to support the way things have been in the Territory.

It has to be understood that we are here to search for the best answers for our children and grandchildren. Our deep respect for our laws and the wisdom of our elders has held us together in the past. Now we have to search for our own wisdom to find the best way for future generations. We want them to know what they need to understand about their heritage. We want them to take their proud and rightful place in the affairs of the new State.

But we can't do it, nor can we expect them to listen to us, unless we have made sure that there is a valued place for them and for their heritage in the land they live in.

It is with an eye on their future that I say that new Constitutions for both the Commonwealth and the Northern Territory must entrench recognition of and respect for the rights of Indigenous Australians as the first Australians and the first Territorians. Precisely how we go about it is probably puzzling everyone at this stage. But I can tell you that the Aboriginal peoples of the Territory are here with good will, respect and a sense of excitement at the potential for building all of us a solid future. If non-Indigenous Territorians show the same good will and respect, I am sure we can work together to reconcile our interests and recognise the value of shared endeavours now and in the future.
A System of Law

DJININYI GONDARRA

Thank you Mr. Chairman (Galay) for your welcome. Today I will speak about Customary Law - the Madayin of the Yolgnu of Eastern Arnhem Land. It is true to say this is only one group of Clan/Nations within the NT, however my knowledge of other Aboriginal Nations across the country is that we each have very similar foundational principles of law.

There are three elements - foundational principles that arise from, and are connect to the source - djalkiri of Customary Law Madayin.

They are:

1. **Magaya** the law creates a state of peace harmony tranquility true justice for all the citizens.

2. **Dharpirrk** the law must perfectly follow the principles of common law, the statutes, and the practices from the constitutional base. Therefore the drafting of law must be consistent.

3. **Waga Luthun** the law is assented to by the citizens in a ceremony that shows that they are all under the discipline, responsibility and protection of the law.

No constitution would be recognised as law without these foundational principles being included.

What I would like to do now is to look at a statement on the overhead about Madayin. I am going to ask my staff to do this with me for our time is very short to even give you the briefest look at what is a most complex legal system, and it must be done in English which is a foreign language for me.

Justice Blackburn in the Gove Land Rights case 1971 said he could see that a 'rule of law' and not a 'rule of man' operated in Aboriginal society. Let us see ............

**The Madayin** is the name for a complete system of law for the Yolgnu (Aboriginal people) of Eastern Arnhem Land.

It embodies the rights of the owners of the law or citizens (rom watangu walal) who have the rights and responsibilities for this particular embodiment of law.
This Mādayin includes; all the peoples law (rom), the instruments and objects that encode and symbolise the law (Mādayin girri), oral dictates, names and song cycles and the holy, restricted places (dhuyu, nungat wagna) that are used in the maintenance, education and development of law.

This law covers the ownership of land and waters, the resources on or within these lands and waters, it regulates and controls; production and trade, the moral, social and religious law including laws for the conservation of, and the farming of, fauna, flora and aquatic life.

The Yolgnu of Arnhem Land believe that if they live out their life according to the Mādayin it is a right and civilised way to live.

The Mādayin creates the state of magaya. Magaya is a state of peace, free from hostilities, true justice for all.

The political structures which are established by the Mādayin are that of:

- **Bapurrur** paternal estate owning clan/nation - surface rights.
- **Yirralka** the estate of the Bapurrur divided into distinct areas for natural farming.
- **Ringitj** an alliance of clan/nations with a common constitutional base (Ranga), song cycles, common army, and common practice of law.

The political representatives of the clan/nation are called **Dalkarra ga Djerrikay**.

A chamber of law, a jurisdiction where the leaders are called by the clap sticks. Secrecy applies creating parliamentary privilege and the only information to leave the chamber are the objects that encode the law. The citizens are outside the chamber.

**Waga Lupthan** after a law is discussed and agreed to by the representatives in the chamber (Nayanu wangany), it is, i.e. the objects are, brought out for the citizens to assent to. In this ceremony the objects representing the law are placed in the water and the people go under the water to indicate they are under the discipline, responsibility and protection of the law. No one is above the law!

The principle of the separation of powers – Yothu/Yindi. The members of the government are from one clan/nation – Yindi, and the public servants, including the police and officers of the court are from a separate clan nation – Yothu.

Sanctions are carried out by officers of the Chamber according to law – **Bayirra not payback.**
The Rights of Indigenous Peoples and the Draft NT Constitution

ANNEKEELEY

Synopsis

In this paper I will consider some aspects of the draft NT constitution from the perspective of the rights of indigenous peoples. I am not attempting in the limited time available here to do this exhaustively, but will consider some of the issues that are of particular importance to indigenous peoples, and that should therefore be of importance to all Territorians. Those issues are: the Preamble to the constitution, the continuing protection of Aboriginal land and sacred sites, and the right to self-determination and Aboriginal self-government.

Indigenous people in the NT have special rights arising from their status as indigenous people. International law now increasingly recognises the special rights of indigenous peoples and of ethnic minorities. Australian statutes and common law already recognise the unique rights of Australia's indigenous peoples. These developments have apparently been ignored by the Sessional Committee on Constitutional Development in its work. The proposed mere acknowledgment of the fact of the prior occupation of indigenous people in the Preamble to the draft Constitution is grossly inadequate and completely unacceptable as we prepare to enter the twenty-first century. It is proposed to compromise twenty years of constructive land rights legislation. Of particular importance are the issues of Aboriginal self-determination and self-government.

In the NT indigenous people also have special rights as owners of more than 50% of the NT land and over 80% of the coastline and also as permanent residents of the NT which otherwise has a very transient population. Their unique position requires negotiations by both the Territory government and the federal government in any serious proposal for developing an NT constitution, whether or not it is to be accompanied by the grant of statehood. This has not happened and has not yet been proposed by either government.

Before proceeding any further with a draft constitution for the NT, there needs to be a community education program carefully developed and implemented to enable a level of informed debate throughout the community about what could or should be contained in a modern constitution. Such a program must also seek to educate the community about the unique rights of indigenous peoples which must not be trivialised by the use of political scare tactics, but presented using overseas examples showing them to be constructive and assisting in the stable political and economic development of a region for all its residents.
The Sessional Committee’s current work has been carried out too much at arm’s length from the NT community. After carrying out the community education program I have proposed above, community consultations should then be carried out in a meaningful way seeking the real and considered input of all Territorians. In my view there is still much work to be done in the NT before a real working draft constitution has been developed for consideration and discussion within the community.

1. **Introduction**

The theme of this Constitutional Foundations conference is "reconciling a diversity of interests in a new Northern Territory constitution for the 21st century". I hope this important theme will be explored vigorously over these two days.

There are many diverse interests in the Northern Territory ("NT") which currently compete in a divisive political climate that is not assisting attempts at reconciliation. A constitution for the NT must recognise these diverse interests and work constructively to accommodate the legitimate rights and interests of different groups. This must happen whether or not the NT goes on to become Australia’s seventh state.

Another important component of the conference theme is that any NT constitution is for the 21st century. As Professor Cheryl Saunders, one of the distinguished speakers who addressed you this morning, said in her paper given to the "Constitutional Change in the 1990s" conference here in Darwin in 1992:

"You in the Northern Territory are in a unique position to draft a modern constitution to meet modern needs..."\(^1\)

The people of the NT are indeed in a unique position to insist that the NT constitution is a modern document reflecting progressive Australian values and standards. We are not constrained by the problems being faced in reviewing the Australian Constitution, of amending an historic document. There is a clean slate. There is also a responsibility to ensure that any NT constitution developed will stand us in good stead in the 21st century and beyond. It must therefore recognise certain basic rights, particularly the special rights of its indigenous people. It must reflect the state of current developments in constitutional law and international law, including Australia’s obligations under the various human rights treaties and conventions which it has ratified. It is not as big a step as some seem to think. There is already recognition of some of the unique rights of indigenous peoples in Australian statutes and in the common law.

It is also essential that the constitution be developed and drafted using modern processes and structures of community consultation. That has not been adequately done to date. Aboriginal people need to be given a real opportunity to talk about it amongst themselves and to be invited by government to advise it on how they

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\(^1\) Professor Cheryl Saunders, The Contents of Constitutions paper delivered to the Constitutional Change in the 1990s Conference in Darwin in October 1992, p.7.
would like to carry out the consultations and negotiations which are an essential part of this process of constitutional development.

My particular interest is in the recognition of the rights of indigenous peoples within the constitution, so after outlining some indigenous peoples' rights, I have considered the draft of the NT constitution as tabled in the NT Assembly\(^2\) and analysed some aspects of it from that perspective. In the limited time available I have not attempted to do this comprehensively, but rather to focus on what I consider to be several key issues: the acknowledgment of prior Aboriginal ownership of the NT in the Preamble, the continuing protection of Aboriginal land and Aboriginal sacred sites, and the right to self-determination and Aboriginal self-government.

2. **Indigenous Peoples' Rights**

2.1 **International Law**

Traditionally international law was defined as a system of law only governing the relations between international states or countries. It is now generally accepted to be broader than that and can include the principles and rules of conduct between the states and international institutions or organisations and in some circumstances with individuals and non-state entities.\(^3\) The reasons for this are the establishment of a large number of permanent international institutions such as the United Nations, and the international movement to protect human rights and fundamental freedoms of individuals.\(^4\)

"Generally, there has been, since World War II, the evolution of a growing body of principles and procedures on the subject of human rights. The Charter of the United Nations lists human rights protection as one of the primary purposes of the organisation, along with peace and security. The Universal Declaration of Human Rights and the two International Covenants of 1966 (on Civil and Political Rights; and Economic, Social and Cultural Rights) give definition to the main groups of human rights. Other international instruments develop more specific standards in particular areas...of particular relevance [is] the International Convention of 1965 on the Elimination of All Forms of Racial Discrimination."\(^5\)

There are several major international conventions and treaties containing provisions relevant to indigenous peoples including the Universal

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\(^2\) The draft constitution was prepared by the NT Sessional Committee on Constitutional Development ("the committee") and was tabled in the Assembly on 22 August 1996 and amended in November 1996, ("the draft constitution").


\(^4\) Ibid.

Declaration on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Political Rights ("ICESCR") and International Convention on the Elimination of All Forms of Racial Discrimination. For example, Article 27 of the ICCPR provides a limited guarantee of cultural rights which indigenous people have successfully relied on. Other conventions and treaties deal specifically with indigenous peoples' rights, such as the 1957 International Labour Organisation Convention No. 107 dealing with Indigenous and Tribal Populations and which emphasises the claims of indigenous peoples actually occupying their traditional lands. The draft United Nations declaration on the rights of indigenous peoples is discussed further below at 2.1.2.

In various international fora Australia has taken a leading role in the development on international human rights law. There are now many multilateral human rights instruments, most of which Australia is a party to. Some of these Conventions have been explicitly brought into the operation of Australian domestic law but others have only been introduced in part or in a limited way, for example by appending them to an Act of Parliament.

2.1.1 The United Nations Working Group on Indigenous Populations


Professor Erica-Irene Daes has been Chairperson of the United Nations Working Group on Indigenous Populations since 1984 and has been very active in developing the draft United Nations

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Declaration on the Rights of Indigenous Peoples ("DDRIP"). When addressing "The Position of Indigenous People in National Constitutions" conference in Canberra in June 1993, Professor Daes pointed out that when she began as Chairperson in 1984, work on the DDRIP had not begun and many governments questioned whether indigenous peoples had any distinct rights at all as people. Since then "[t]he truly global scale and significance of the indigenous movement has become clear for all to see."

2.1.2 The Draft United Nations Declaration on the Rights of Indigenous Peoples

"The [d]raft Declaration on the Rights of Indigenous Peoples is of the greatest importance. Every paragraph of the [d]raft Declaration is based upon known instances of violations and abuse of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the [d]raft Declaration. It is written as an antidote for a troubling reality.

It is essential that every government understand that the [draft Declaration is remedial both in its content and in its scope. The [d]raft Declaration does not spring from political origins or from diplomatic niceties. It began as a cry from the indigenous peoples for justice, and is drafted to confirm that the international standards which apply to all peoples of the world apply to indigenous peoples. It is an inclusive instrument, meant to bring indigenous peoples into the purview of international law as subjects of international law."

The draft United Nations Declaration on the Rights of Indigenous Peoples is based on principles laid out in Articles 1-5 of the declaration which underpin the rights of indigenous peoples. The principles include: the right to self-determination; the right to a nationality; individual and communal rights and the recognition of traditional and customary law.

The draft Declaration also contains provisions dealing with a wide ranges of matters including:

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8 Professor Erica-Irene Daes, in a paper delivered at The Positions of Indigenous People in National Constitutions conference, Canberra, June 1993, Speeches, p.52.

9 Ibid.


11 Margaret Fahy, above n.7, p vi.
• protection against genocide and ethnocide;
• rights related to religion, languages and educational institutions;
• ownership, possession and use of indigenous lands and natural resources; and
• participation in the political, economic and social life of the States concerned, in particular in matters relating to their own internal and local affairs.\(^{12}\)

In relation to the right of indigenous peoples to self-determination Article 3 of the draft Declaration states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

As Professor Daes points out:

"With few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern Constitution of the States in which they live, or to share in any meaningful way, in national decision-making. In some countries they may have been excluded by law or by force, and in many countries they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples have never been, and are not now, full partners in the political process, and lack others' ability to use their democratic means to defend their fundamental rights and freedoms.\(^{13}\)

What indigenous peoples seek to achieve through the recognition of their right to self-determination is for them to achieve full and effective rights within States, whereas [nation] States are concerned to protect their territorial integrity. While endorsing that State concern, Australia has provided significant support and guidance as to the interpretation of self-determination in the draft Declaration.\(^{14}\)

2.2 Australian Law

The Australian legal system already recognises some of the unique rights of Australia's indigenous peoples. There are already statutes which recognise the unique position of Australia's indigenous peoples in this country and the

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\(^{12}\) Ibid p.iii

\(^{13}\) Professor Erica-Irene Daes, above, n.8,p.56.

\(^{14}\) Ibid p.vii.
common law also recognises some of these rights. Apart from the various federal, state and territory statutes that introduce into domestic law, in part or in full, Australia's obligations under the multilateral treaties that it is a party to, there are other statutes establishing and enforcing the unique rights of Australia's indigenous peoples. Some of these statutes are a partial codification of Aboriginal customary law. For example, the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the Northern Territory Aboriginal Sacred Sites Act 1989 ("the Sacred Sites Act").

This legal and political recognition is not a party political or ideological matter. While it was the Whitlam labor government which established the Aboriginal Land Rights Commission, the reports from which led to the drafting the Aboriginal Land Rights (Northern Territory) Bill, it was Malcolm Fraser's coalition government that amended and introduced it into law. Country Liberal Party governments in the Northern Territory have introduced the Sacred Sites Act which offers some protection of Aboriginal sacred sites and permits Aboriginal custodians access to visit their sacred sites. NT governments have also continued the reservation in favour of Aboriginal people previously contained in the Crown Lands Act\(^\text{15}\) and now set out in the Pastoral Lands Act\(^\text{16}\) which permits Aboriginal people access to their country on pastoral leases to visit, hunt and gather food and water on the land.

The special relationship between Aboriginal and Torres Strait Islander people and their land is now well recognised in statute and the common law. Aboriginal and Torres Strait Islander heritage, sacred sites and objects and aspects of religious and cultural beliefs and practices are recognised and protected in federal, state and territory heritage protection laws. While Aboriginal and Torres Strait Islander people may wish to improve some of those laws, the recognition of these unique indigenous peoples rights is now well entrenched in Australia. What has not occurred yet is any constitutional recognition of these rights and the NT developing a modern constitution for the twenty-first century is in a unique position to ensure that this happens.

3. **Some Sections of the Draft NT Constitution Relevant to Indigenous People's Rights**

   Note: References in these square brackets [ ] are to the relevant section of the draft NT constitution as tabled in the NT Assembly on 22/8/96 and amended on 9/10/96.

\(^{15}\) Section 24 of the *Crown Lands Act*.

\(^{16}\) Section 38(2) of the *Pastoral Lands Act*.
3.1 The Preamble - Acknowledgment of Prior Aboriginal Ownership of the NT

The first paragraph of the Preamble acknowledges that

"since time immemorial" all or most of the NT "was occupied by various groups of Aboriginal people under an orderly and mutually recognised system of governance and laws by which they defined their relationships between each other, with the land and with their natural and spiritual environment".

While accepting that no other Australian constitution contains any such acknowledgment, that of course is a reflection of the time of their drafting; this is conceded by the Hon Steve Hatton MLA in his Tabling Statement\textsuperscript{17}. In my view this clause does not go nearly far enough; it fails to acknowledge prior Aboriginal ownership of this land and the facts of Aboriginal dispossession by non-Aboriginals. The recognition of an Aboriginal system of governance is one step but it is not followed through logically by accepting Aboriginal peoples' ongoing right to self-determination and self-government.

Aboriginal people must be properly consulted about the wording of the clause which is to acknowledge their original ownership and governance of this country. This has not been done to date and is an essential part of any constitutional development process in the NT. This proposed acknowledgment only of their occupation, without recognition of the special rights of indigenous people is, in my view, completely unacceptable.

3.2 Aboriginal Customary Law (Section 2.1.1)

The draft Constitution proposes two alternative methods of incorporating Aboriginal customary law into the laws of the NT. Aboriginal customary law is not defined, but to the extent of its existence in the NT immediately before the commencement of the Constitution it shall be recognised as a source of law in the NT. The recognition of Aboriginal customary law is an extremely complex area which governments have shied away from even since the Australian Law Reform Commission's extensive report on the subject was released in 1986. It is an issue that requires extensive consultations with Aboriginal communities across the Territory; this has not happened to date and must be done if there is a proposal for it being included in a constitution for the NT.

While Aboriginal customary law is a specialist area I do not intend to delve into, there is one important aspect of international law that is relevant that I would like to bring to your attention. There is still an unresolved argument about another consequence of the Mabo decision\textsuperscript{18} which potentially has

\textsuperscript{17} Hon. Steve Hatton, MLA, Final Draft Constitution for the NT, Tabling Statement, 22/8/96, p.5.

\textsuperscript{18} \textit{Mabo v. Queensland} (1992) 107 ALR 2, ("Mabo")
very important consequences for the recognition of Aboriginal customary law. In the Mabo decision the High Court acknowledged the legal fiction of *terra nullius*, without accepting the legal consequence of that at international law, namely that Australia is a conquered territory. As Australia was not 'terra nullius' at the time of Australia's acquisition by the British, at international law it could only be lawfully acquired by conquest or cession. This argument had been accepted by Murphy J in 1979 in *Coe v. Commonwealth*[^19] when he found that Australia had been acquired through conquest and that "might give rise to a different set of legal rights"[^20]. "In the case of conquered or ceded territories, the ancient laws remained in place unless expressly repealed by the new sovereign"[^21]. The existence of an Aboriginal system of law is not in question[^22]. The consequence of this is that if the High Court reconsidered its rewriting of international law in the Mabo decision, Aboriginal customary law would be found to have remained in place except to the extent that it has been expressly repealed. Such a finding would put Aboriginal people in a very different negotiating position on this extremely important issue, either for constitutional recognition or specific legislative recognition. For a more detailed discussion of the argument, see Gerry Simpson's paper referred to in footnote 21 below.

### 3.3 Protection of Aboriginal Land Rights Section 7.11

Under section 7.1(1) of the draft Constitution it is proposed that an Organic Law[^23] will be enacted called the "Aboriginal Land Rights (Northern Territory) Act" which shall be based on the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* ("the Land Rights Act"). It is clear that the Act as proposed in the draft Constitution will be very different from the existing Act in some substantial ways which in my view attack the very basis of indigenous land rights. The draft Constitution as proposed would require that the changes to the Act must be in a form agreed to by the Commonwealth. I will now look at some of the proposed new provisions as set out in the draft Constitution.


[^20]: Ibid. 138.


[^23]: In the section 2.3 of the draft constitution, an Organic Law is either declared by the constitution to be one or is an Act of Parliament which expressly states that it is one. To become an Organic Law, an Act must be supported by more than a simple majority of members of Parliament and comply with certain extra procedures, which the Speaker must certify to the Governor. It can only be amended by amendment to the constitution itself or by complying with various provisions as if it were a new Organic Law and must have been considered by the Standing Committee on the Constitution and Organic Laws (see sections 2.3, 2.4 and 2.5).
3.3.1 Inalienability of Aboriginal Land

The draft Constitution proposes a major change to the form of title of Aboriginal land\textsuperscript{24}. It is proposed that Aboriginal land will no longer be inalienable, held on trust and protected for future generations. Inalienable title has been a foundation stone of Aboriginal land rights in the NT from the outset. The Whitlam government appointed Sir Edward Woodward QC (as he now is) to conduct the Aboriginal Land Rights Commission in the NT and after extensive research and consultations he presented reports to the Federal government in 1973 and 1974. In both those reports he recommended that Aboriginal "title must be communal and inalienable"\textsuperscript{25}. He stressed that land must not be able to be sold or mortgaged, other than by transfer to other Aboriginal communities\textsuperscript{26}. He recognised the unique relationship between Aboriginal people and their country and the need for their landownership to be protected. He also recognised the opposition to Aboriginal land rights in the NT and so he also recommended that "it is important that [land rights legislation] should be protected in such a way that its provisions cannot be eroded by the effect of any Northern Territory Ordinances"\textsuperscript{27}. These recommendations were accepted and are contained in the Act. Now, even before the NT government controls the Land Rights Act, it is proposing to remove part of its core. Surely the federal government, with its special responsibilities for Aboriginal people and for all Territorians, cannot permit a constitution for the NT to entrench such a diminution of Aboriginal rights.

Under the proposal it will be possible for Aboriginal land to be "sold, assigned, mortgaged, charged, surrendered, extinguished or otherwise disposed of" if a court or body established by an Organic Law:

(a) is first satisfied that all Aborigines having an estate or interest in that land...have been adequately informed of, and a majority of them have voluntarily consented to, the proposed transaction; and

(b) the proposed transaction is otherwise in the interests of all Aborigines having an estate or interest in, or residing on, that land\textsuperscript{28}.

\textsuperscript{24} "Aboriginal land" is defined in s.2 of the Land Rights Act as including freehold land held by an Aboriginal land trust.


\textsuperscript{26} Ibid.

\textsuperscript{27} Ibid, Second Report, para 740.

\textsuperscript{28} Section 7.1(3) of the draft Constitution.
The court or body referred to above shall consist of a Judge nominated by the Chief Justice and shall have power to conduct an inquiry, including the power to summons witnesses and require documents. The findings of this court or body shall be subject to appeal as if it was a civil judgment of a single Judge\textsuperscript{29} [section 7.1 (4)]. Under this proposal, the unique and strong form of title currently held by Aboriginal people in the NT would be lost. Communities could be subjected to all sorts of offers and proposals which they would have to consider, requiring many meetings and an increased potential for community tension and division.

It is not clear from the draft constitution, how the Judge will satisfy himself or herself about who should be consulted, the nature of the consultations and decision-making processes to be used in considering the proposal; this level of detail would be expected in the legislation itself. Similarly, no criteria are provided as to how “the interests of all Aborigines having an interest in, or residing on, that land” are to be determined. There are many unresolved issues about the proposed method of implementing this proposal and there has been no attempt to consult Aboriginal people about this fundamental change.

I have been privileged enough to work on several land claims since 1988 and have gained some insight into the price Aboriginal people pay to go through the process demanded by our non-Aboriginal legal system to prove that they are indeed the traditional owners of the country. The process gone through to get title to their land is very demanding requiring the claimants to assist with anthropological research and legal processes over several years, sometimes many years. Especially in the first fifteen years of land rights, most claimants had to not only convince the Aboriginal Land Commissioner of their traditional ownership, but then survive legal challenges brought by the NT government opposing the grant of the land. Many claimants have unfortunately not lived long enough to see the return of their country. The government now proposes removing the foundation of that Aboriginal title: its inalienability. To go through this process and receive inalienable title at the end of it only to subsequently have that inalienability removed is outrageous.

The most likely reason to be provided in support of such a change would be the increased potential for obtaining finance for some business or commercial ventures on Aboriginal land. While it would depend on the particular proposal, generally land in the NT has such a limited economic value that, for example, most pastoralists use their stock as a security rather than their lease. Surely with some lateral thinking by bankers, developers and joint venturers can find other ways of securing their interests without requiring the land as security.

\textsuperscript{29} Section 7.1(4) of the draft Constitution.
The loss of Aboriginal land in a failed venture is not just the distressing story of a business-person who mortgaged their family home for their business and lost it to the bank, the loss of this land would mean so much more. It is their country, their inheritance and their responsibility to maintain it and to pass it on to future generations. The inalienability of Aboriginal land must be maintained.

From a government we all know strenuously objects to Aboriginal people owning 52% of the Northern Territory, this appears to be a slightly more sophisticated form of dispossession than some used in the past. It must not be permitted.

3.3.2 Compulsory Acquisition of Aboriginal Land

Under the draft Constitution an Organic Law will be able to provide for the compulsory acquisition of an estate or interest in all or any part of Aboriginal land, which estate or interest is less than freehold title,

"providing that the acquisition is on just terms and for or in furtherance of any purpose which is for the benefit of the public (other than as a park) and whether or not that purpose is to be effected by the Northern Territory or by any other person or body, and otherwise on terms and conditions not less favourable than for the compulsory acquisition of other land under a law of the Northern Territory".30

Currently, section 67 of the Land Rights Act prevents compulsory acquisition of Aboriginal land by a law of the NT. The proposed provision would give the NT government very wide powers to compulsorily acquire Aboriginal land, not only for itself but for other people or companies for any purpose which is "for the benefit of the public". This is considerably wider than the provisions of the Commonwealth Lands Acquisition Act which currently controls compulsory acquisition of Aboriginal land. I consider this proposal to be completely unacceptable and would remove many of the benefits and rights currently held by Aboriginal people under the Act.

Just terms compensation for Aboriginal owners of land must require compensation for an attachment/relationship to that land which is substantially different from non-Aboriginal land ownership; it threatens the future of the people, their culture, their way of life, capacity to maintain and teach their religious beliefs, customs and practices to their children, may endanger sacred sites for which custodians carry a heavy responsibility and remove the land rights of all future generations. Simple commercial valuation of land as is

30 Section 7.1(6) of the draft Constitution.
done for non-Aboriginal land owners would have the effect of discriminating against Aboriginal people. Any legislation which provides for just terms compensation for compulsory acquisition of Aboriginal land should explicitly set out the broader range of matters to be taken into account in determining what is "just".

This proposed Organic Law, the "Aboriginal Land Rights (Northern Territory) Act" will be able to be amended by a majority of either two-thirds or three-quarters of the NT parliament; the proportion is to be determined by the NT Constitutional Convention31. The constitutional entrenchment in this way of removing the inalienability of Aboriginal land and of wider powers of compulsory acquisition of Aboriginal land should not be permitted. Both of these provisions will lead to further dispossession of Aboriginal people and constitutionally entrenching them would mean that it would be very difficult for them to be altered at some stage in the future. Constitutional entrenchment should only apply to the recognition of rights and not to the removal or diminution of important indigenous peoples' rights.

3.4 Protection of Aboriginal Sacred Sites (Section 7.2)

Under section 7.2 of the draft Constitution an Organic Law is to provide for the protection of and prevention of desecration of Aboriginal sacred sites on and off Aboriginal land and will regulate entry onto those sites. The right of Aboriginal people to have access to sacred sites would continue and the wishes of Aboriginal people in relation to the protection of those sites shall be taken into account. This proposed Organic Law raises the possibility of some person or body other than traditional Aboriginal owners or Land Councils providing access to sacred sites on Aboriginal land; this would be a severe erosion of current Aboriginal rights to control access to their country. Of particular concern would be access by exploration and mining companies and other developers.

The current Northern Territory Aboriginal Sacred Sites Act 1989 is claimed by some to be the best sacred sites legislation in the country. The fact is that it was introduced without proper consultations with Aboriginal people and in the face of significant Aboriginal objection with protest camps in Alice Springs, Tennant Creek, Katherine and Darwin. The primary objection of Aboriginal people is the Minister's power to override the decision of the Aboriginal Areas Protection Authority ("the Authority") and to deliberately authorise the desecration or destruction of Aboriginal sacred sites. Also the Authority is not sufficiently dependent of government and is subject to Ministerial direction on a range of issues.

31 Section 7.1(2) of the draft Constitution.
The most celebrated example of the exercise of this power was in 1991-2 when the NT Minister authorised the deliberate destruction of several major women's sacred site complexes in order to build a "flood mitigation" dam north of Alice Springs. The then Federal Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, then used his powers under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) to issue a declaration preventing construction of that dam for twenty years and protecting those important sacred sites. The dam is a long and sorry story of bungled consultations with Aboriginal custodians by the NT government, including by the then Chief Minister Marshall Perron himself, to try to extract Aboriginal agreement to the dam. As the Hon Hal Wootten wrote in his report to the federal Minister:

"... The process of obtaining consent for this particular dam was not initially pursued through normal professional channels and advisers were excluded, many relevant custodians were not consulted, many other Aboriginals with a legitimate interest in the protection of the sites had not had an opportunity to put their views, the consultations leading to consent had been marred by confusion about the exact location of the dam and its nature and size, and some custodians had been given inducements to consent in the form of land and houses."

As we all know the current NT sacred sites legislation can be ineffective to protect Aboriginal sacred sites. Considerable work has been carried out by Aboriginal organisations on what is needed in comprehensive sacred site protection legislation and the Hon. Elizabeth Evatt has recently reviewed the federal Aboriginal heritage protection legislation and made relevant recommendations. This work should be considered carefully before any such constitutional provisions are drafted. But more importantly, what do Aboriginal people themselves want entrenched in an NT constitution about protection of their cultural heritage? These important matters have not yet been the subject of effective consultations with Aboriginal people and must be before the constitutional development process goes any further.

### 3.5 Aboriginal Self-Determination (Section 7.3)

"Subject to the Constitution, an Act may provide for the grant of Aboriginal self-determination and related matters". The Preamble recognises "that the Aboriginal people of the NT are entitled, under and in accordance with this Constitution and the laws of the NT, to self-determination in the control of

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33. The Hon. Elizabeth Evatt AC, "Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984", report to the Minister for Aboriginal and Torres Strait Islander Affairs, August 1996.

34. Section 7.3 of the draft Constitution.
their daily affairs". These two clauses do not appear to grant any rights per se, but merely to allow that they may be granted in the future. This is clearly inadequate. A modern NT Constitution must grant the right to Aboriginal self-determination.

The definition of "Aboriginal self-determination" within the draft Constitution is:

"the activity of Aboriginal people in the Northern Territory exercising control over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities."

I think that this definition is too limited. The use of "daily lives" appears to limit the exercise of Aboriginal control. Although, the definition is arguably wide enough to include Aboriginal customary law (see also section 2.1.1 of the draft constitution) and possibly for the establishment of Aboriginal local/regional government for some matters. The inclusion of the word "economies" may assist to broaden the issues covered.

Work should be done on developing an acceptable definition of Aboriginal self-determination, making use of international law, the draft United Nations declaration on the rights of indigenous people and the considerable relevant overseas research and experience. Of course, here again, Aboriginal people must be consulted about what they want. Developing these fundamental concepts in isolation from those directly affected is absurd.

3.6 Aboriginal Self-Government

As the owners of 52% of the NT, most of which consists of large tracts of land remote from the larger towns, Aboriginal people in the NT are ideally placed to exercise a form, or forms, of self-government. In the NT unlike many other parts of Australia this could take place without major impact on non-Aboriginal population centres and problems of conflict of laws arising.

"...the principal policy task of governments and indigenous peoples in ‘first world’ rural and remote areas today is finding or inventing practical administrative and legal accommodations for indigenous cultural autonomy, local and regional self-government, and resource and territory management within the national unity and constitutional framework of the existing nation-state.

The development of appropriate governing structures for indigenous communities will be the most important specific constitutional development issue for indigenous peoples in the Northern Territory. The inseparable corollary issue is how indigenous local and regional

35 Paragraph 15, Preamble, draft Constitution.

36 Section 11.1 of the draft Constitution.
structures will relate to federal and future territorial government structures.\textsuperscript{37}

Apart from the federal government's constitutional responsibilities to Australia's indigenous peoples and its responsibilities to the residents of any proposed new Australian state, it must be actively involved in negotiating with indigenous peoples in the NT about appropriate government structures in such a new state.

Aboriginal self-government should be recognised as a right and as a level of government within the Constitution, similarly to the draft Charlottetown Accord in Canada. Especially for the large areas of Aboriginal land in the NT, Aboriginal self-government should be pursued. I will not attempt here to tackle the vast range of matters that would have to be negotiated, but simply raise this most important issue for further consideration. Work needs to be done here too making use of international law, the draft United Nations declaration on the rights of indigenous peoples and other overseas experience, for example, Canada and Greenland Home Rule. Once again Aboriginal people must be enabled to develop their views on these matters and be given an opportunity to negotiate with government within the constitutional development process.

4. Modern Constitutional Development - The need for Community Education and Community Consultations

It should be clear now that indigenous people in the NT have special rights arising from their status as indigenous people. International law now increasingly recognises the special rights of indigenous peoples and of ethnic minorities. Australian statutes and common law already recognise the unique rights of Australia's indigenous peoples. These developments have apparently been ignored by the Sessional Committee on Constitutional Development in its work.

In the NT indigenous people also have special rights as owners of more than 50\% of the NT land and over 80\% of the coastline and also as permanent residents of the NT which otherwise has a very transient population\textsuperscript{38}. Their unique position requires negotiations by both the Territory government and the federal government in any serious proposal for developing an NT constitution, whether or not it is to be accompanied by the grant of statehood. This has not happened and has not yet been proposed by either government.

Before proceeding any further with a draft constitution for the NT, there needs to be a well resourced community education program carefully developed and implemented to enable a level of informed debate throughout the community about what could or should be contained in a modern constitution. Such a program must also seek to educate the community about the unique rights of indigenous peoples

\textsuperscript{37} Peter Jull "Constitution-making in Northern Territories: Legitimacy and Governance in Australia", p.22

\textsuperscript{38} Ibid p.2.
which must not be trivialised by the use of political scare tactics, but presented using overseas examples showing them to be constructive and assisting in the stable political and economic development of a region for all its residents.

I appreciate that the drafting and presentation of a constitution for the NT is not simply a legal process carried out in a political vacuum. Presentation of a constitution that was perceived as radical or progressive would be rejected by the NT voters. A community education program such as I have proposed above should assist in relieving unreasonable fears and anxieties and assist in improving the standard of debate on the issues.

The Sessional Committee's current work has been carried out too much at arm's length from the NT community. After carrying out the community education program I have proposed above, well resourced community consultations should then be carried out in a meaningful way seeking the real and considered input of all Territorians. In my view there is still much work to be done in the NT before a real working draft constitution has been developed for consideration and discussion within the community.
Session 3

Accountability, Rights and Entrenched Constitutional Restraints on Government
The Constitutional Entrenchment of Open and Accountable State Government

Alistair Wyvill

Introduction

It is apparent that a proper consideration of the constitution for the new State of the Northern Territory requires an examination of the existing constitutional arrangements of the bodies we are seeking to emulate. We are not creating something unprecedented. There are, and have been for the whole of this century, equivalent bodies politic in existence. Plainly, the experience of the Australian States is of direct relevance to the task of drafting the constitution for the State of the Northern Territory.

The Royal Commissioners who inquired into and reported on the commercial activities of the Western Australian Government in the late eighties found that two 'complementary principles express the values underlying our (Western Australia's) constitutional arrangements'

- it is for the people of the State to determine by whom they are to be represented and governed.
- the institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.²

They translated these principles into three 'practical goals'

- government must be conducted openly
- public officials and agencies must be made accountable for their actions
- there must be integrity both in the processes of government and in the conduct to be expected of public officials.³

These 'values' and 'goals' would appear to summarise the fundamental aspirations that all Australians share for their institutions of Government and reflect the basic principles that Territorians would wish to see adopted in the arrangements for Statehood.

¹ Alistair Wyvill, B.Econ. LL.B (Hons)(Qld) LLM (Lond.), Barrister, Part-time lecturer Northern Territory University.
³ Ibid., p1-9, 1-10.
The constitutions of the existing States all follow a similar model. They are to be found principally in practice and convention. To the extent that they are documented, there are normally several sources, only some of which contain any reference to 'constitution'. These however are not in fact documents that would accord with any lay conception of that term. Further, the entrenchment of these arrangements occurs, if at all, in limited circumstances, apparently irrelevant to questions of accountability. The power of parliament, or those who control it, is essentially supreme. In no real sense is there any entrenchment, or even express recognition, of the values and goals of open and accountable government.

Recent experience shows that, in many instances, the activities of State Governments in Australia have fallen far short of achieving these goals. Rather than 'open' and 'accountable', the words that more readily come to mind are 'secret', 'corrupt' and 'contrary to the public interest'. The sufficiency of their constitutional arrangements has been put directly in issue.

The various inquiries over the last decade into the activities of State Governments have produced a volume of material that would pose a daunting prospect to any researcher. The limits of time, and a healthy dose of cowardice, preclude on this occasion any attempt to consider this information in its entirety. Of course, this is not to say that such a project would be of little value - the contrary would be the case. For present purposes however it would seem appropriate to confine the survey to the two major reports and subsequent investigations that have raised directly the question of whether open and accountable government requires express provision in some form in a State's constitutive documents.

The Fitzgerald Report

On 11 May 1987, Four Corners broadcast the 'Moonlight State'. The report depicted the presence in Brisbane of significant organised crime associated with gambling, prostitution and drug trafficking. Given its scale, the irresistible inference was that Queensland police had either consciously ignored or condoned it.


The hearings had disclosed 'institutionalised' misconduct (including widespread bribery and similar forms of corruption) at all levels of government in the State - from the police force, through the public service, to cabinet. The evidence, which does not need to be recounted here, was spectacular in its detail and dominated the national press for many weeks.

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It was easy to focus on the personalities and the intrigue. However, as Fitzgerald said, the most important thing about the events upon which his report was based was not the guilt or innocence of the individuals involved but

... the pattern, nature and scope of the misconduct that has occurred, and the lesson that it contains for the future.  

Subsequently, a special prosecutor's office was established and criminal proceedings commenced against many of those adversely mentioned in the report and others associated with them. The final 'wash up' saw gaol sentences imposed on several former cabinet ministers, a police commissioner and a large number of senior police, amongst others. A former premier escaped a conviction for perjury, only by the misconduct of one of the jurors at his trial. We also saw for the first time in Australia's history the removal of a supreme court judge by the formal motion of parliament.

In making recommendations for the reform of the institutions of State Government, Fitzgerald was conscious not only of his limited time and resources but also of his limited mandate. He said:

The report is therefore aimed at allowing permanent institutions and systems to operate in the ways intended in a democratic society. Solutions can then be found, improved and reviewed through the democratic process.  

Fitzgerald identified certain fundamental principles which he considered critical for good government and with them the fundamental problems he saw with the operation of State Government in Queensland at that time. These included

- The political processes of informed public debate and opposition must be allowed to operate.
- Parliament and the media are critical for the dissemination of the information necessary for these processes.
- As many issues are too complex to be properly dealt with by the whole of Parliament in the time available, a comprehensive system of parliamentary committees is required to provide an 'independent forum of investigation and debate'.
- A general means for the external review of administrative decisions and Freedom of Information legislation are important for informed public debate on the operation of Government. Their absence from Queensland during the relevant period contributed to improper conduct remaining undetected and becoming institutionalised.
- Whilst political considerations may legitimately influence the formation of policy by cabinet, they have no role to play in the implementation of policy. If cabinet is

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5 Ibid.
6 Ibid. emphasis added.
7 Ibid., at p358
to have a role in the ‘detail of administration’, there is a potential for the improper politicization of such decisions.

- In these circumstances, the principle of cabinet secrecy may operate more widely than is necessary and prevent the disclosure of the fact that such politicization has occurred.

- The politicization of the administration further blurs the line between formation and implementation of policy. It also creates an impediment to the exposure of improper conduct, essentially linking the careers of public servants and their political masters in an alliance ‘based on mutual self interest’. Additionally, it inhibits the provision of frank advice to Government.

- Politicians... tend to pass legislation as a ‘solution’ to complex problems, rather than as a part of a reasoned and practical process of law reform. Informed critical debate, with input from independent bodies, is essential to effective law reform.

- In particular, ‘(c)riminal justice reform should be removed as far as possible from sectional political interest. Any body making recommendations on these matters should be constituted so as to avoid bias, and the issues should be reassessed on a continual basis as social conditions alter.’

- Further, ‘(t)he administration of criminal justice should be independent of Executive controls. It is an apolitical, vital public function’.

- Organised crime is an ‘especial threat’ to our society since it leads to ‘the perversion and corruption’ of its basic institutions. ... ‘(L)aw enforcement agencies are disorganised... The national system for the sharing and acting on intelligence is inadequate, and is a major comfort to organised crime.’ Special measures may be needed to combat corruption, which is a manifestation of organised crime.

- ‘Independence is essential to a body charged with investigating misconduct...’

- ‘Public confidence in the fairness of the electoral system is important to a restoration of social cohesion and respect for authority. The institutional culture of public administration risks degeneration if a Government’s activities cease to be moderated by concern at the possibility of losing power.’

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8 Ibid., at p359  
9 Ibid., at p359  
10 Ibid., at p361  
11 Ibid., at p366  
12 Ibid., at p360  
13 Ibid  
14 Ibid., at p366  
15 Ibid., at p359
The principal institutions he recommended be established to address these issues and to manage the required processes of reform were the Electoral and Administrative Review Commission (‘the EARC’) and the Criminal Justice Commission (‘the CJC’), each to be properly authorised by statute, with sufficient funds to discharge its responsibilities, and to report to a Parliamentary Select Committee.

Fitzgerald did not identify or address specifically the question of whether the EARC, the CJC or any of the other legislative reforms he proposed should be constitutionally entrenched such as to prevent or inhibit their abolition or repeal.

The EARC

The EARC’s general mandate was to provide an ‘independent and comprehensive review of administrative and electoral laws and processes.’\(^{16}\)

The specific priorities identified by Fitzgerald for the EARC to consider and address initially included

- a review of electoral boundaries
- the preparation and enactment of legislation on freedom of information, administrative appeals and judicial review of administrative action
- legislation to protect whistleblowers
- appropriate guidelines (including with respect to the proper role of ministers) for appointments to senior public positions, and the advertising, appointment and appeals processes for public servants generally
- a system of Parliamentary Committees
- a review of the resources of the Auditor-General to effectively check the use of public money, insuring that his or her role includes the audit of all ministerial expenditure, together with a review of the Public Accounts Committee Act 1988
- guidelines for monitoring the costs and activities of ministerial and departmental media units and press secretaries by an all-party Parliamentary Committee
- the proper funding of the Opposition
- a code of conduct for public officials and a register of the financial interests of Parliamentarians, Ministers and their families
- a public register of donations to political parties

It is not entirely clear whether Fitzgerald intended that the EARC should be a permanent body. However, he did state that it was to provide

... an enduring independent process to review and recommend the necessary electoral and administrative laws and guidelines and procedures.\(^{17}\)

\(^{16}\) Ibid., at p370

\(^{17}\) Ibid., p370, emphasis added.
The CJC
Aside from certain relatively specific responsibilities – for example, reviewing and monitoring the performance of the Police and reporting on the reform of the criminal law – the CJC’s mandate was more general than that of the EARC, extending, for example, to discharging those criminal justice functions not appropriately to be carried out by the Police Department or other agencies.  

However, it does appear clear that Fitzgerald intended that the CJC would have a ‘permanent role’19 in the government of Queensland, beyond implementing the reforms necessary to deal with the problems disclosed in his report. Hence, his recommendations concerning the CJC were in two parts – the first dealing with the establishment and functions of the CJC generally and the second with its particular ‘Review Programme’.

The Review Programme – described as ‘an essential part of its immediate function’20 – included

- the development of legislation dealing with misconduct within public institutions in general, including obliging public officials to report all official misconduct or any reasonable basis for a suspicion of such misconduct
- consideration of the obligation of public officials to be accountable for their activities and whether that obligation should be enforced by the prescription of criminal offences constituted by:
  (a) the holder of any public office lying in connection with that office
  (b) any person lying to Parliament in respect of any matter of that person’s or any other person’s personal conduct.
- consideration of the necessity for law to prevent, facilitate the detection of, and punish officials who act when private interest conflicts with their official duty.

Post Fitzgerald Report

The EARC
Since the Electoral and Administrative Review Committee Act 1989(Qld) was enacted, the EARC has published twenty-one issue papers and produced the same number of reports. Aside from addressing several aspects of the Queensland electoral system, their topics included

- declaration of interests for elected representatives21
- appeals from and judicial review of administrative decisions22

18 Ibid., at p372
19 Ibid., at p372
20 Ibid., at p377
• freedom of information\textsuperscript{23}
• public sector auditing\textsuperscript{24}
• protection of whistleblowers\textsuperscript{25}
• registration of political donations\textsuperscript{26}
• the role of government media organisations\textsuperscript{27}
• the review of the Queensland constitution\textsuperscript{28}

It is the last of these reports which is principally of interest for the present inquiry.

At the time of its inquiry, the EARC noted there were ‘at least 27 documents’\textsuperscript{29} that describe some but not all aspects of the ‘constitution’ of the State of Queensland, the remainder essentially being a product of convention. It was not surprising therefore that the EARC recommended that these documents be consolidated into one Act.\textsuperscript{30} Certain other recommendations to ‘tidy-up’ the constitution were also made.\textsuperscript{31}

However, its primary recommendations concerned the convening of a constitutional convention to draft a new constitution for the State, the aim of this process to be:

\textit{... the production, within five years, of a Constitution which is, subject to the Constitution of the Commonwealth of Australia, the supreme law of Queensland and capable of amendment with the approval of the majority of the voters at a referendum}\textsuperscript{32}

The EARC further recommended that

• any revised Constitution describe the fundamental relationships between the three parts of the government; the Parliament, the Executive and the Judiciary.\textsuperscript{33}
• the proposed Constitutional Convention should consider whether there should be some constitutional rules defining the scope of executive power, specifying that

\textsuperscript{23} (December 1990) Serial No.90/R6
\textsuperscript{24} (September 1991) Serial No.91/R3.
\textsuperscript{25} (October 1991) Serial No.91/R4.
\textsuperscript{26} Investigations of Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues (June 1992) Serial No.92/R2.
\textsuperscript{27} Review of Government Media and Information Services (April 1993) Serial No.93/RI.
\textsuperscript{28} Consolidation and Review of the Queensland Constitution (August 1993) Serial No.93/R4.
\textsuperscript{29} \textit{Ibid.}, chapter 6.
\textsuperscript{30} \textit{Ibid.}, para 4.123.
\textsuperscript{31} See generally \textit{ibid.}, chapter 6.
\textsuperscript{32} \textit{Ibid.}, para 4.91.
\textsuperscript{33} \textit{Ibid.}, para 5.36
the executive must exercise its power according to law, and guaranteeing the availability of remedies against abuses of power or wrong decisions of the executive.\footnote{Ibid., para 8.57}

Although not making any specific recommendation, the EARC discussed at length the submissions it received on the desirability of limiting the power of parliament by entrenching certain constitutional provisions. Few suggested that there should be no limit at all and that amendment of the most important entrenched provisions (e.g., independence of the judiciary) should occur otherwise than by popular referendum. The principal controversy concerned the precise balance to be struck between the particularity required to ensure that proper accountability is not and cannot be avoided and the generality required to give the constitutional arrangements sufficient flexibility to deal with a changing world. In this regard, the EARC noted Professor Carney's submissions that:

- only those provisions which are ‘susceptible of undesirable change that is likely to undermine the democratic system of government’ should be entrenched.\footnote{Ibid., para 4.51}
- to avoid the practical difficulties often encountered with removing outmoded but entrenched constitutional provisions, a temporal limit to entrenchment of say 25 years could be provided with a full constitutional review to then follow.\footnote{Ibid., para 4.50}

The EARC was abolished in 1994, having, it is said, completed its mandate. Many of its functions have been inherited by other commissions reporting directly to Parliament.\footnote{e.g., the Information Commissioner.}

However, the responsibility for constitutional reform rests now with the Parliamentary Legal, Constitutional and Administrative Review Committee,\footnote{The successor to the Parliamentary Electoral and Administrative Review Committee.} comprised of course entirely of parliamentarians.

The five years limited by the EARC for the production by a constitutional convention of a single entrenched constitutional document for Queensland expires in August next year. Although proposals for the production of a consolidated constitutional document in modern language are presently in place along with the consideration of an entrenched Bill of Rights, there are no plans for the convening of the convention envisaged by the EARC. The Fitzgerald reforms are, and it appears will remain, legally unprotected from amendment or repeal by Parliament.
The CJC and the Mundingburra Agreement

Since its establishment in 1989, the CJC has enjoyed considerable controversy and was until recently itself the subject of an inquiry. It is beyond the purview of this paper to examine the CJC and its operation in detail. Rather, it is proposed to look at the significance of its present history for the question of constitutional entrenchment.

Fitzgerald plainly saw the CJC as a permanent institution necessary for the proper operation of state government in Queensland, at least for the immediate future. Implicit in this view is the proposition that, during this period, Parliament ought not abolish it or qualify its powers and duties such as to inhibit the proper performance of its functions. The CJC should enjoy for a time a degree of de facto constitutional entrenchment, which, absent actual amendment of the constitution, could of course only be conventional - that is, based purely on trust. The circumstances in which such a convention would cease to apply are entirely unspecified.

In January 1996, the coalition of parties that had presided over Queensland for the period the subject of Fitzgerald's inquiry and who had, as a result largely of the events surrounding his report, been evicted from office, reached an agreement with the Queensland Police Union. In return for support of the Union in a crucial bi-election (Mundingburra), the then Opposition agreed in writing that, should they gain government, they would

- remove certain deputy Police Commissioners considered 'unsuccesful' by the Union.
- substantially reduce the number of Police at the CJC.
- give the Commissioner control over the secondment of Police to the CJC.
- give the Union a veto over the appointment of the Commissioner of Police.
- limit the CJC's powers in certain respects to investigate police misconduct.39

To the extent that these changes required an Act of Parliament, whilst only two members of the House were signatories, the implication was clear - if they gained government these persons would use their power through cabinet and then caucus to effect the relevant legislative changes.

But for the naivety of an official of the Union who volunteered the document to the press, it is probable that it would not otherwise have seen the light of day.

A subsequent Joint Memorandum of Advice produced by two senior Queensland barristers cleared the Premier and the Minister for Police (as they had become) and the representatives of the Police Union of any criminal offence or official misconduct as defined under the Criminal Justice Act 1989 (Qld).40

39 See generally the CJC Report on an Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal Between the ALP and SSAA, December 1996.

40 Ibid, ntc 39.
Nevertheless, the subject conduct was plainly against the letter and spirit of the Fitzgerald Report. Fitzgerald noted the significant role played by the Union in promoting the ‘police culture’ (which he found to be one of the principal causes of corruption\(^{41}\)), in resisting reform and in supporting corrupt officers.\(^{42}\) He specifically found that

... it is singularly inappropriate for the Union to demand the right to influence the selection of the Police Commissioner or Minister.\(^{43}\)

Here, the very forces that were responsible to a significant degree for the corruption the subject of his report were at work dismantling some of the ‘permanent’ mechanisms Fitzgerald had recommended be put in place to prevent its recurrence.

The lesson to be learnt appears clear - the ‘conventional’ rather than actual entrenchment of critical anti-corruption institutions cannot in fact be trusted. Whilst all Queenslanders may not necessarily agree that the CJC in its present form is entirely successful, this ‘deal’ highlights the problem of relying entirely on Parliament to properly discharge its law-making, and law-changing, power. One cannot declare with any confidence that the people of a State are properly protected from corruption in government unless the relevant institutions in their essential form are constitutionally enshrined.

In spite of this recent experience, as noted above, the entrenchment of open and accountable government appears to be off the agenda. Proper constitutional arrangements to provide open and accountable government for Queensland still appear to be some way off.

**The WA Inc. Report**

On 8 January 1991, former High Court judge, Sir Ronald Wilson, and Western Australia Supreme Court judges, G A Kennedy and P F Brinsden, were appointed by the Governor of Western Australia to undertake the Royal Commission into Commercial Activities of Government and Other Matters. The matters that led to this Royal Commission are also well known and a review of the principal names involved is probably all that is necessary to recall the substance of the various allegations – Burke, Parker, Bond, Connell, Rothwells and the Kwinana petrochemical project.

On 19 October 1992, the Commissioners delivered an interim report (in seven volumes and described as ‘Part I’) setting out their findings as to the various events the subject of their inquiry and making certain referrals with a view to the institution of criminal proceedings.

They were also directed to report whether -

... changes in the law of the State, or in administrative decision making procedures, are necessary or desirable in the public interest.\(^{44}\)


\(^{42}\) Fitzgerald Report, pp.2 1-2.

\(^{43}\) Ibid., p.280.

\(^{44}\) Royal Commission into Commercial Activities of Government Act 1992 (WA), s.?
This they did in Part II of their report delivered on 12 November 1992.

The Commissioners preface the discussions of their recommendations by describing their conclusions as to the ‘(f)undamental principles of government’, because ‘(r)ecommendations for change, both specific and directional, must also respect the ‘principles which underlie our system of government’. In this regard, they identified the two complementary principles set out at the beginning of this paper.

The ‘three practical goals’ that are said to follow from these principles are worth repeating

- government must be conducted openly
- public officials and agencies must be made accountable for their actions
- there must be integrity both in the processes of government and in the conduct to be expected of public officials.

The Commissioners saw these best achieved through measures which included

- improving the performance of Parliament in its scrutiny and review of government by the development of an effective committee system and, related to this, diminishing the influence of the Executive over its actions, including with respect to funding.
- the recognition of five ‘parliamentary agencies’, truly independent of the Executive, where Parliament is involved directly in appointments, funding and receiving reports and recommendations. Those proposed were:
  (a) Auditor General;
  (b) Commissioner for Administrative Investigations (the Ombudsman);
  (c) Electoral Commissioner;
  (d) Commissioner for Public Sector Standards (an expansion of the existing Public Service Commissioner); and
  (e) Commissioner for the Investigation of Corrupt and Improper Conduct (replacing the existing Corruption Commissioner).
- establishing rules requiring the proper recording of cabinet decisions.
- creating a clear delineation between staff appointed as political advisers to ministers and senior public servants (including the senior staff of Government agencies), with rules to ensure that the appointment of the latter is not politicised.
- providing proper rules for the registration of interests of members of Parliament and public officials.

46 Ibid., p1-9, 1-10
• introducing 'whistleblower' protection, freedom of information legislation (together with a review of secrecy legislation) and a system of administrative appeals.
• providing proper rules for the disclosure of donations and electoral expenditure, with monitoring of compliance to be entrusted to the Electoral Commissioner.
• a review of the criminal law as it applies to the holders of public office.

Finally, like Fitzgerald, the Commissioners acknowledged the limited nature of their mandate to make precise recommendations on all areas requiring reform. In this respect, they proposed that 'an independent review body' called 'the Commission on Government' be established to 'conduct the necessary further inquiries and to undertake the consultation (with the public) that is required', namely, to 'consult extensively about the vital principles and elements of our system of government'.47

Post WA Inc. Report

In 1994, the Western Australian Parliament passed the Commission on Government Act 1994. Mr J F Gregor was appointed as the full-time chairperson whilst Mrs Anne Conti, Mr Reg Dawson, Dr Frank Harman and Dr Campbell Sharman were appointed as part-time commissioners. The Commission's function was to inquire into twenty-four specified matters 48 which included the various measures recommended by the Royal Commissioners and outlined above. Additionally, the Commission was empowered to inquire into any other matter it considered relevant in preventing corrupt, illegal or improper conduct by public officials.49

Between March 1995 and March 1996, the Commission produced fifteen discussion papers on the majority of the twenty-four specified matters. Between August 1995 and August 1996, the Commission produced five substantial reports on the specified matters, totaling in excess of 1,000 pages. It is valuable to list the topics the Commission covered (excluding matters of background or introduction) to show the substantial degree of overlap between the matters it examined in discharging its terms of reference and those raised by Fitzgerald and subsequently by the EARC or the CIC. This list also highlights the critical importance generally of the Commission's inquiries for any informed consideration of the content of the proposed Territory Constitution.

Report No. 1

Chapter 2 Secrecy Laws of the State
Chapter 3 Cabinet Secrecy
Chapter 4 Financial Administration and Audit Overview
Chapter 5 Access by the Parliament and Ministers to Information for Accountability Purposes

47 Ibid., pl-14
48 Commission on Government Act 1994 s.??
49 Ibid., s.??

Session 3
Chapter 6 The Auditor General’s Powers to Access Information
Chapter 7 Electoral System Overview
Chapter 8 The Legislative Assembly (electoral system)
Chapter 9 The Legislative Council (electoral system)
Chapter 10 Parliamentary Privilege and Judicial Proceedings

Report No. 2 Part 1
Chapter 2 The Official Corruption Commission and Whistleblowing
Chapter 3 Impropriety and Corruption within the Public Sector
Chapter 4 The Existing System
Chapter 5 Whistleblowing as a Means for the Prevention and Exposure of Improper Conduct in Western Australia
Chapter 6 An Effective System to Prevent and Expose Improper Conduct in Western Australia

Part 2
Chapter 7 Independent Archives Authority
Chapter 8 Parliamentary Scrutiny and Review
Chapter 9 Parliamentary Scrutiny and Review of the Public Sector
Chapter 10 Scrutiny of Legislation
Chapter 11 Disclosure of Political Donations and Electoral Expenditure
Chapter 12 Political Donations
Chapter 13 Disclosure of Electoral Expenditure
Chapter 14 Other Matters Relating to Political Finance

Report No. 3
Chapter 2 Commercial Activities of Government
Chapter 3 Government in Commerce
Chapter 4 The State Ombudsman: Introduction
Chapter 5 The State Ombudsman
Chapter 6 Conduct
Chapter 7 Elected Officials
Chapter 8 Appointed Officials
Chapter 9 Financial Independence of Parliament
Chapter 10 Caretaker (Government) Conventions
In these reports, the Commission made a total of 263 specific recommendations for reform of the functioning of government.

It is the last report which is directly relevant to the topic at hand. The twenty fourth specified matter into which the Commission was required to investigate was 'the adequacy of processes by which the constitutional laws of the State may be changed'. Otherwise, interestingly, the question of the adequacy of the constitutional arrangements was not specifically addressed by the Royal Commission. On the other hand, the Commission on Government, commenced its last report with the following paragraph:

The ultimate safeguard for the prevention of corrupt, illegal or improper conduct in the public sector should be the State Constitution. It should establish the principal institutions and offices of the State Government, and set out their roles, functions and duties. Without such a constitution, it is not possible to hold public officials properly accountable for their actions, and without accountability our system of representative democracy cannot work effectively.\(^\text{50}\)

The Commission therefore determined to link its investigations of Specified Matter 24 with an inquiry

... into the role that the constitutional laws of the State can play in preventing corrupt, illegal or improper conduct...\(^\text{51}\)

At the commencement of its examination, the Commission noted that

\(^{50}\) Commission on Government Report No. 5,p1

\(^{51}\) Ibid
Limiting the exercise of executive power is a principal goal of constitutional government and is a prerequisite for ensuring the propriety of government activity. Yet, the constitutional laws of the State give little guidance as to the nature and scope of the exercise of executive power.  

And therefore

Fundamental aspects of our present governmental system are conducted by unwritten conventions and traditions. This means that there is little relationship between constitutional language and governmental practice. This disjunction has important implications for the prevention of corrupt, illegal or improper conduct. Because the role and functions of the principal executive officers of the State are not set out in the Constitution, holding the incumbents accountable for their actions faces a significant impediment.

After examining the submissions it had received and the arguments for and against making specific provision in a constitution with respect to such matters, the Commission determined that

The constitutional laws of the State should be the fundamental safeguard against corrupt, illegal or improper conduct in the public sector: these laws should set out the important institutions and offices of government and provide clear statements of the responsibilities of each institution and officer.

The Commission then made specific recommendations with respect to the constitutional recognition of the Executive Council, the Premier, his or her ministers and Cabinet and the description of their respective natures, powers and duties, including imposing specific duties to uphold the Constitution and the laws of the State and requiring an 'oath of accountability to the people of Western Australia.'

In addition to making important recommendations for constitutional provisions for a fair electoral system and to ensure the existence and independence of the judiciary, the Commission also recommended that the independence and impartiality of the Auditor General, Ombudsman and the proposed Commission for the Investigation, Exposure and Prevention of Improper Conduct be constitutionally entrenched.

Finally, the Commission recommended that a people’s convention be established to review the constitution and to submit a draft to Parliament and then the people for approval at a referendum. One of the specific matters the Commission recommended this convention consider was the constitutional entrenchment of the independence and

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52 Ibid., at p36.
53 Ibid., at p38.
54 Commission Recommendation 252, Report No. 5, p.27.
58 Commission Recommendation 258, Report No.5, p.73
impartiality not only of the offices specified above but also of the Commissioner for Public Sector Standards, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner (established under the Freedom of Information Act 1992) and the Solicitor General, issues in respect of which the Commission did not express a final view.\textsuperscript{59}

The Commission recommended that half of the members of the convention be directly elected. Interestingly, the Commission specifically recommended that

The legislation establishing the procedures for election to a people’s convention should be designed to minimise the influence of political parties.\textsuperscript{60}

To date ..........

\section*{Common Themes on the Reform of State Constitutions}

The findings of these studies of corruption and improper conduct in State Government appear to have several common themes:

1. In both instances, the relevant conduct flourished as a result of the unrestrained, unsupervised and unreviewed actions of the Executive.

2. The Executive was assisted, and this conduct covered up, by a politicised public service, which in Queensland at least, extended to the police.\textsuperscript{61}

3. This conduct arose, in part, from the absence in many instances of clear statements, first, of the powers and duties of the relevant office-bearers and public servants and, secondly, of what is not acceptable conduct in the exercise of these powers and the discharge of these duties.

4. The two institutions which ought to have detected and expunged this conduct - but did not because of ignorance - were Parliament and public opinion as informed (or not as the case may be) by the media.

5. In the case of Parliament, this occurred inter alia because:

   (a) it had insufficient institutions and procedures for reviewing the actions of the Executive and the public service;

   (b) in the exercise of its remaining functions, it was vulnerable to the usual de facto control exercised by the Executive through the political party system.

6. In the case of public opinion, this occurred inter alia because of:

   (a) inadequate public access to information concerning the workings of government;

   (b) inadequate rights of review of administrative action:

\textsuperscript{59} Report No.5, p.73.

\textsuperscript{60} Commission Recommendation 263, para 4, Report No.5, p. 110.

\textsuperscript{61} It is probably difficult to say who was assisting whom in Queensland. Certainly however in both cases there appears to have been what Fitzgerald described as an ‘alliance based on mutual self-interest’ between the executive and the public service.
The Constitutional Entrenchment of Open and Accountable State Government

(c) inadequate protection for and encouragement to 'whistleblowers'.

The proposed remedies also had common themes:

1. Proper recognition and definition of the positions of those who exercise executive power, both individually and collectively;
2. Clear statements as to the quality of conduct expected of such persons;
3. Clear statements as to the quality of conduct expected of the holders of elected positions generally;
4. Clear rules to ensure the integrity of electoral processes;
5. Clear statements as to the quality of conduct expected of public servants and the police;
6. Clear rules to ensure that neither the public service nor the police are 'politicised';
7. The creation of independent, permanent bodies to 'audit' compliance with these standards and report thereon to Parliament;
8. Clear limits on confidentiality of information concerning government;

It also appears common ground that Parliament should not be supreme. Rather its powers should be limited by a constitution. On the terms of the Constitution, the EARC and the Commission on Government appear to agree that:

1. It should describe, clearly and adequately, the organs of government and their relationship to one another.
2. Its critical provisions should be subject to change only by referendum.
3. The critical provisions should extend, at least, to those concerning the independence of the judiciary.
4. A constitutional convention is required to consider inter alia what other provisions ought to be included in the constitution to ensure that Government is and remains open and accountable.

The Commission on Government would go further and specifically recommend to the Convention that it enshrine the independence of an Auditor-General, Corruption Commissioner and the Ombudsman, in addition to provisions for fair elections. Fitzgerald would probably join them in suggesting that institutions with the essential features of the CJC and the EARC (which would appear to overlap to a significant degree with those recommended by the Commission on Government) also be entrenched. Certainly, the recent experience with the Mundaring agreement heightens concerns that anything less will fail.

At the very least, these matters require the consideration of the convention.

Concerning the balance of the agenda for this convention, these should include

1. The standards of conduct to be required of elected and other officials and their enforcement.
2. The independence of other officers like the Solicitor General, Public Service Commissioner, the Director of Public Prosecutions and the Speaker.

3. Freedom of information (and its counterpart - limits on secrecy in government) and the role and independence of an Information Commissioner.

4. Administrative review.

5. Protection of whistleblowers.

The Territory Constitution - The Progress to Date

On 28 August 1985, the Territory Parliament established the Select Committee on Constitutional Development comprised of three Government members and three members of the Opposition. Although the members have changed, this ratio has remained the same. The Select Committee has held public hearings throughout the Territory and produced nine discussion papers, two information papers and an interim report. A draft constitution was published in June 1995 and, in August 1996, a document described as 'Final Draft Constitution for the Northern Territory' was produced.

Questions concerning the constitutional entrenchment of principles of open and accountable government (and its counterpart the prevention of corruption) have never been raised let alone addressed in the materials produced by the Select Committee. In fact neither word appears in any relevant sense in the Final Draft. If anything, the notion of 'open government' would appear to be implicitly contradicted by the oaths of absolute secrecy required of members of the executive council and ministers by s.4.10(1). Further, the Final Draft

- does not recognise or entrench the positions of Auditor General, Ombudsman, the Solicitor General, the Director of Public Prosecutions or any other office which might control the excesses of the Executive.
- aside from requiring as far as practicable equality in the number of persons in each electorate, does not make any provision to prohibit unfair electoral practices.
- does not specify the standards of conduct required of ministers, parliamentarians or other public officers.
- does not provide for any parliamentary mechanisms that could be used to control the Executive, e.g., committees.
- Contains no requirements for freedom of information or provisions otherwise limiting the executive's power to apply blanket rules of secrecy to its affairs (including punishing whistleblowers), nor does it contain any right to administrative review.

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62 possible right to freedom of information was mentioned in passing in Discussion Paper No 8 entitled 'A Northern Territory. Bill of Rights?' (page 2) but not taken any further.

63 The Final Draft does identify a Standing Committee on Constitutional and Organic Laws, whose responsibility covers the amendment of the Constitution or any Organic Laws: see s.2.6. This committee will be of little help in dealing with excesses of the Executive if the Constitution or its Organic Laws contains no relevant protections in the first place.
Finally, none of these questions are raised in any direct way by the materials produced by the Select Committee, which are no doubt intended to assist, if not define, the ambit of the debate at the Constitutional Convention proposed, it is understood, for next year.

The constitutional arrangements envisaged by the Final Draft possess most if not all of the deficiencies identified by the Fitzgerald Inquiry and the WA Inc Inquiry. In short, it entrenches the supremacy of the Executive above any principles of accountability. In practical terms, the proper conduct of Government then becomes a matter of pure trust, without any effective mechanisms to monitor the honest and competent discharge of this mandate, save those the Executive sees fit to impose upon itself.

Conclusion

There are powerful arguments for the entrenchment of some principles of open and accountable government beyond merely (but importantly) the independence of the judiciary. The recent experience of other Australian States highlights the perils if no such restraints are provided. The difficult questions are to describe the provisions that ought to be the subject of entrenchment and then to define the degree of entrenchment they should enjoy. Plainly however, the Territory should not adopt without question solutions from other States where circumstances are substantially different, but must instead find the balance between providing for real accountability on the one hand and flexibility and cost-efficiency on the other.

Of course none of this is intended to suggest that those who presently enjoy executive power in the Northern Territory are or may be corrupt. This is not about actuality but propensity, whether it be in the decades or the centuries to come. The evidence appears clear that, without some modification, the system we are about to adopt is vulnerable to corruption and it is that fact we must confront.

In a submission to the EARC on the reform of the Queensland Constitution, R McFadyen said in reference to governments from both ends of the political spectrum:

> In recent and present Queensland Government we see evidence of how one man can control the whole of Parliament, using his Cabinet of Ministers to impose his will on the Legislature. The backbench parliamentarian is pledged to support the Cabinet, the Cabinet is pledged to support the Premier, the ruling group dictates. The Premier may simply be a front for non elected influential groups.

> The people are disenfranchised and have no recourse. Under such circumstances the true role of Government is negated, the Public Service is made corrupt and Parliament is reduced to poor theatre. Today, the time has come to give the people the opportunity to take their 'rights' out of the 'trust account' and hold them themselves.\(^6\)

It would be a disservice not only to ourselves but to following generations to ignore these questions at this critical time. At least, they must be asked and considered.

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\(^6\) Ibid., nte... para 4.53
Recommendation

It is axiomatic that debate concerning limitations on the power of Parliament should not be conducted or controlled exclusively by Parliamentarians. There is an urgent need for an independent, properly resourced body, in alternative to the Select Committee on Constitutional Development, to investigate the wealth of material available from the other States and to report to the Constitutional Convention on the options for the entrenchment of open and accountable government in the Constitution for the new State of the Northern Territory. This is in the interests of all Territorians, not least of all those who aspire for membership of the House or Representatives and Cabinet. An ill-considered decision could prove unworkable at great cost to all involved.
Indigenous Rights and Parliamentary Legitimacy

The Case for Constitutional Recognition and Protection

MICK DODSON

Ladies and gentlemen, Mr Chairman. Perhaps before I say that my first duty is to acknowledge and salute the Larrakia people, it is good to be on your country.

The Chairman described me as the Social Justice Commissioner, I am also a republican.

Ladies and gentlemen, the existing political order in the Northern Territory is, in my opinion, unworkable and unjust. And I also believe that this order has deeply entrenched structural deficiencies that exclude the aspirations of Aboriginal peoples. It is an order that is designed by and for non-indigenous society. It is an order which preserves and reserves political power for a non-indigenous culture, and seeks to override Indigenous political authority and social organisation. It is an order that marginalises our cultures, excludes our legitimate jurisdiction, and ignores our voices.

Now, the prospect of entrenching such an order in a new state, a new state constitution, is to say the least, alarming. Today I want to look beyond the question of the day-to-day operations of the political system of this place, and ask some fundamental questions about the legitimacy of non-indigenous governments and the right to self-determination.

But before I do that I will start with a much simpler critique of the recognition of Indigenous rights in this jurisdiction, and I will assume, for the sake of argument, that the non-indigenous parliament is the legitimate sovereign and does have the right to govern all the lands and peoples within its territory. The question remains however, “what do democracy and justice demand of such a parliament?” I would suggest at the very least that the government must govern justly for all people under its jurisdiction, and I do not think I would get any disagreement from the Territory Government on that point.

For the last 20 years, however, the Territory Parliament has consistently failed to meet that demand, because it has consistently failed to uphold the rights of its Aboriginal constituents. After 20 years of self-government it is indeed a sad thing to conclude that those charged with the solemn task of governing, for all peoples, feel little compulsion to respect the human rights of all peoples. And it is a sad thing that pragmatic, electoral considerations consistently trump respect to the principles of justice and equity. And it is a sad thing that we cannot trust a democratic system in what is supposed to be an enlightened and tolerant country. It is sad but it is true. When I look at the performance of the Territory Governments over the last 20 years, and what I see is consistent government opposition to claims under the Land Rights Act. I see the Territory
government and its scandalous behaviour over the handback of Uluru. I see the shameful failure to provide my people with decent housing, health care, education or essential services. I see a government that blames us for the unacceptably high rates of incarceration. I see a government that vehemently opposes our legitimate native title rights. And I find very few reasons for trust.

What I do find, is that the so-called self-governing parliament excludes the interests of Aboriginal Territorians, and it does so unashamedly. It feels no shame in telling us that the only way we can get a decent house or toilets or schools is to allow the desecration of our lands. It feels no shame in running election campaigns on racist platforms. It feels no shame in trying to extinguish our rights.

The evidence, is undeniable - the Territory Governments have failed to fulfil the first necessary condition for the legitimacy that is that it must govern for all peoples. Not only are we, as peoples, excluded from participating in the structures of governance, we are then marginalised by it by its so-called democratic operation.

Ladies and gentlemen, the human rights of Aboriginal Territorians are not safe in the hands of parliamentarians. Our rights are accorded little value in the political stock market, and sold too quickly when mining, pastoral or tourist shares come up on the screen. In my remarks today I would like to approach the question of Indigenous rights as the constitution for the Northern Territory develops, from 2 different angles.

The first argument with which many of you will be familiar, I will call the protection angle, and I mean by this a Bill of Rights or a Charter of Rights. It is concerned with entrenching fundamental human rights into a foundational law so that they are not vulnerable to the whims of particular parliaments. As a Human Rights Commissioner, I would also add that the entrenchment of fundamental human rights is a matter of concern for all Australians, not only Indigenous Australians.

The second I will call the self-determination and political legitimacy angle. In this I am more concerned with the structural position which Indigenous peoples must occupy in a system of governments if that system is to be legitimate. The question of political legitimacy has never been settled in this country, and I would suggest that it is absolutely crucial in the negotiation, not consultation, negotiation of a new constitutional document.

Now, turning to the first, as the examples I referred to indicate, a Territory government with untrammelled laws for our lands and communities represents a grave and very real danger for Aboriginal Territorians. As things stand now there is no jurisdiction in this country that operates under a constitution which fundamentally protects the rights of citizens. Basically, what the constitutions of the Commonwealth and the various states do is set up a system of government and then tells the various players in that system what they can do. They say very little about what governments cannot do, or about what they must do, they say very little about the people who give governments their authority, and they say very little about what we, the people, can expect and demand. And that means, in effect, that a parliament, once elected, operates with few constraints. Were the Commonwealth or Territory to pass legislation which violates our rights, the Constitution as it presently stands would have very little to say about it. The only real constraint is the prospect of losing office. We are putting a lot of faith in the democratic process.
In recent years, Australians have begun to feel some of the repercussions of not having rights explicitly set out in our national Constitution. This had led for many of us to call for a Bill of Rights or major constitutional amendment, or both these things.

In the meantime, one way some people have been trying to get around the apparent constitutional vacuum is to look for rights implied in the Constitution. Some of you may be familiar with the recent cases that looked at political advertising and the more recent Kruger case which was largely run along these lines.

I certainly do not assume the authority to determine the Australian Constitution on the question of implied rights. I would, however, say that appealing to implied rights is, at best, an interim approach. The High Court's recent decision in Kruger starkly demonstrates this fact. Now, I do not want to generalise too much about that decision because it was argued in a particular context and so its findings have limited application. However, the High Court found that legislation which sanctioned the removal of Aboriginal children on the basis of their race could not be found to be constitutionally invalid, because the Constitution does not contain an implied right to equality under the law, and the court found that provided the Constitution provided the power for the Commonwealth to pass legislation in a particular area, the court has no say over the content or social implications of that legislation.

The situation is slightly different in the case of laws passed today by the States and Territories because discriminatory legislation would be overridden by the Commonwealth Racial Discrimination Act of 1975. If, however, the Commonwealth now or in the future amended or repealed the Racial Discrimination Act, those protections would fall away. This is a fact we should put at the forefront of our minds when we think about protection of human rights. With majority support in both houses, any Commonwealth Government could amend or repeal any of the major human rights or anti-discrimination legislation - as they could amend the Northern Territory Land Rights Act and the Commonwealth Native Title Act. Our rights are very, very vulnerable. It may well be that the High Court would find that future discriminatory enactments contravene implied rights in the Constitution, or it might be that the High Court found that the Commonwealth has not had the constitutional power to enact the legislation in question. And, of course, discriminatory legislation would contravene the international treaties to which we are a party.

But when you get down to what it means on the ground for Indigenous people, the safeguards are very thin.

Turning specifically to the case of Aboriginal Territorians, to date the major legal safeguards against violation of our rights have been the Commonwealth Racial Discrimination Act and the Commonwealth's Northern Territory Land Rights Act. In the last 20 years they have provided the basis for some of the more important protections we have gained. Now, however, the Government in Canberra is threatening to derogate from its international human rights responsibilities and is showing clear signs of distancing itself from its constitutional responsibility to Indigenous peoples. The result for Aboriginal Territorians is that the Commonwealth safety net is quickly growing some very large holes. Now, more than ever, the rights of Aboriginal Territorians must be safeguarded. The safest and simplest way to give deeper legal roots to those rights is to simply and explicitly entrench them in constitutional documents.
Clearly, if the Territory is moving towards statehood a constitution for the new state will be the appropriate mechanism for entrenching rights.

Turning to the substance of a new constitution, as a general point I must say that I find the draft Constitution a frightening and somewhat immature document. It misconceives, misunderstands, and reveals a profound ignorance of the nature of human rights. It fails to recognise the nature of human rights - that is that they are inherent, inalienable and indivisible. They are not gifts of Governments - rather they are the rules which governments must themselves respect.

In the time I have today I will not attempt to set out in detail what the specific contents of such “rights protecting provisions” ought to be. Rather, I would urge those involved in putting constitutional proposals to look to the key international human rights instruments.

I include here both the general United Nations human rights treaties, to which Australia is already party, and the specific declarations of indigenous rights, the most important of which have been articulated by indigenous peoples ourselves - the clearest and most developed statement of the rights of indigenous peoples being the draft declaration on the Rights of Indigenous Peoples which is currently being considered by the UN Commission on Human Rights.

Just to give you some idea of the areas I would insist on, the following is a non-comprehensive list of the minimal rights that should be incorporated in any Constitution or Bill of Rights:

- Civil rights including the right to equality before the law, the right to a fair trial, the right to be free from arbitrary arrest or cruel or inhuman punishment and the right to nondiscrimination;
- Cultural rights such as the protection of sacred and significant sites and other cultural and intellectual property, the right to speak our own languages, the right to practice and transmit our cultures and the right to profess and practice our own religions;
- Social rights such as the right to a decent standard of health, housing, education and essential services;

I would just like to mention in this context that CLP plans to privatise infrastructure projects constitute a significant threat to the provision of essential services to remote and economically deprived indigenous communities. In other words, they are threatening to violate the social rights of those Territorians. Constitutional protection of rights to such services may be a way of minimising this threat.

The constitution should also include:

- Economic rights such as the right to a fair wage and to social security;
- Political rights such as the right to full participation in political processes;

And of course the right to self determination, which I will turn to shortly in my comments on the constitution and political legitimacy.

Before I do so however, I would like to make specific mention of the prospect of repatriating the NT Land Rights Act.
Once land rights legislation falls within the jurisdiction of the Territory or a new State, the new parliament will have the power to amend the Act as it sees fit, subject only to the Commonwealth *Racial Discrimination Act* and any future constitutional restraints.

And anyone who has been listening to the vitriolic attacks the Territory Government has been levelling at the *Land Rights Act* over the last twenty years can guess what they intend to do to it.

As you might predict, those aspects of the Act that are most important to indigenous peoples are precisely the sections likely to be undermined by a Northern Territory or future State government. Successive Territory Governments have made it perfectly clear that they see the mining veto as an impediment to the development and prosperity of the Territory. We know that the CLP plans to get rid of the veto power and replace it with a far weaker provision which will deprive traditional owners of any genuine control over what happens on their land.

Successive governments have also demonised the Land Councils and we can be fairly confident that a future state government would gut the Land Councils given the first opportunity.

Given the importance of the *Land Rights Act* for Aboriginal Territorians, any future constitution must provide sufficient protection to entrench the rights that Act currently protects and affords.

I would like now to turn to the question of the system of governance itself - this being the ultimate constitutional question.

For some years now, indigenous peoples have been using international fore to question to legitimacy of states which claim the right to participate in international system as the absolute sovereigns of colonised territories.

Our argument is that prior to colonisation the right to govern a territory lay exclusively in the hands of the first nations or Indigenous peoples. Sovereignty or the right to govern can only shift location if and when first peoples or nations have agreed to share their sovereignty with other peoples or nations.

In other words, settler societies which claim the right to govern a country or territory cannot legitimately do so unless the Indigenous peoples of that territory have given their full and free consent.

We are now beginning to see an acknowledgment both in international law and in state practice of the legal and moral basis of these arguments. International law has made significant advances in recognising the application of the right to self-determination to Indigenous peoples. And States themselves are beginning to admit that there are flaws in their claims to absolute sovereignty.

In Australia indigenous peoples never agreed that governance of this country would be shared with non-indigenous peoples. The original contract between indigenous and non-indigenous peoples was never forged.

Rather non-indigenous peoples assumed political legitimacy. And it was on the basis of this assumption that they got on with the business of drafting constitutions which
distributed the powers of governance between the various branches of the non-indigenous government.

What those constitutions did was ignore the fundamental breach and go on to cement our disposssession into the country’s foundational laws.

As a consequence the constitutional documents of the various original colonies, now the States, and of the Commonwealth are flawed documents. They are themselves violations of the fundamental right to self-determination of the first peoples of this country. And they remain illegitimate.

This illegitimacy is yet to be acknowledged. But it is not forgotten by Aboriginal and Torres Strait Islander peoples.

Political realities have meant that most of the time Indigenous peoples are forced to work within the existing constitutional system to try to assert our rights. Domestic courts have refused to entertain challenges to sovereignty, and indigenous peoples lack the standing at international law to mount a legal challenge at the international level.

This should not, however, be taken as consent. The contract which would represent such consent is yet to come.

I would suggest that the prospect of a constitution for the Northern Territory presents an ideal opportunity to re-open these questions.

With the wisdom of hindsight, Australians, and specifically Territorians, should be asking ourselves how we want to approach the constitutions which will take us into the twenty first century.

Should we be approaching modern constitution making with a nineteenth century colonial ideology?

Can we, as a nation, afford to ascribe to such an ideology when it has been rejected in the rest of the world?

Because if the Northern Territory constitutes itself on a document which ignores the legitimate rights and claims of the indigenous peoples of these lands, that is exactly what we will be doing.

All over the world, in Canada, in northern Europe, even in south and central America, states are re-examining their national constitutions and amending them so as to accommodate indigenous political, cultural and territorial rights.

In this Territory we have a unique opportunity to forge a constitution which, from the outset, recognises those rights and establishes a political order which supports their exercise. We have the opportunity to do what no other constitution in this country did - that is, to allow the Indigenous peoples to play a full role in determining the political structures which will govern our lives.

I want to make it perfectly clear that I am not simply talking about the role which individual citizens, Indigenous and non-indigenous, may play in constitution making in a liberal democracy. I am talking about the foundational negotiation of governance that has yet to take place between the indigenous peoples and the non-indigenous people of this land.
I am well aware that any mention of the collective rights of peoples tends to strike fear into the heart of some non-indigenous Australians. They see it as a betrayal of liberal democratic principles and a radical departure from our political tradition of individual freedom and equality.

I do not intend to argue the case for the rights of peoples today - it is far too complex and difficult a topic. Suffice to say that throughout the latter part of this century there has been an increasing recognition in international law, and in countries throughout the world that distinct peoples within nation states retain their self-determining rights.

However it seems that in Australia people still feel justified in using the innocent sounding doctrine of equal rights to justify assimilation. Equality, used in this way, is in fact code for the dominant group asserting its cultural rights at the expense of those of minority or colonised peoples.

Further, the assertion that recognising difference leads to inevitable conflict has been proved to be wrong!

Every time someone throws up rhetoric about "balkanisation", I think that we should refer them to the numerous examples of federal states in which nations or peoples live together in equality while continuing their distinct cultures. And for those of you who think this could not possibly apply to Australia, I would refer you to the case of Norfolk Island.

There is, in a addition, a purely pragmatic reason to recognise the distinct cultural and political rights of Indigenous peoples. The consistent failure to recognise that we are distinct communities with deep and abiding cultural and social values has not worked!

The time is long overdue for non-indigenous Australians to recognise that wishing away our differences will not make society just and decent for Aboriginal peoples. It is time to realise that welfare programmes which attempt to bring us jobs, social services or improved life styles will never solve the fundamental problems we face. Unless and until we are permitted to reconstitute ourselves as political communities with control over our own lives, the problems will remain intractable.

Cultural recognition is the key to indigenous policy.

And the constitution is the obvious starting point for such recognition.

How that happens is not something I would presume to pre-empt. That is something to be negotiated with the Aboriginal peoples of this Territory.

I would, however, like to make some general suggestions.

Recognition should not be limited to a token preamble paragraph which acknowledges Aboriginal peoples' distinct cultures and histories. The Constitution must actually allow for indigenous peoples and our organisations to share in the business of governance.

Flowing from this, there should be a provision in a new Constitution which allows for indigenous peoples to choose whatever sort of government entity we consider appropriate, and for the such bodies to be given full and complete recognition.

Indigenous government should not have to conform with the structures non-indigenous peoples choose for themselves.
The boundaries, powers and types of representation of Aboriginal government must also be determined by Aboriginal peoples ourselves.

I would note in this regard that the imposition of non-indigenous structures and boundaries has been one of the major problems with the existing local government system.

As a note of caution, I would also add that in assuming greater power, Aboriginal Territorians will have to think about what types of constraints should be put on Aboriginal government. For example, should our governments be subject to the same constitutional restraints that apply to the non-indigenous community? Or should we create our own Bill of Rights? I would suggest that in asking these questions we might look to other countries such as Canada and the United States which are somewhat further down the track in self-government.

In concluding, I would like to say that over the last eighteen months, along with many other Australians, I have, at times, felt a little depressed about the prospect of recognition of our rights.

But I think that we can approach a new constitution for the Northern Territory as a real opportunity.

The reality is that all of us, both indigenous and non-indigenous Territorians are living in this land together. All of us feel that this is our home. And all of us have a commitment to the prosperity and harmony of our home.

The idea that short term gains at the cost of social conflict and exploitation will bring long term economic and social success is simply wrong.

Social peace, economic well being and political legitimacy will ultimately depend on the recognition of the rights of the Indigenous peoples of this land and acceptance of indigenous political entities, not their denial.

I believe that ultimately all Territorians will come to see the truth in these ideas.

We can start to forge a peaceful and successful home now by drafting a new Constitution for a new relationship. Or can deny ourselves the opportunity and delay the inevitable.
An Upper House
The Ultimate Restraint on Government?

Mr Peter McNab

It has been argued that it is a false dichotomy to talk in terms of a choice between unicameralism and bicameralism, concepts that for Australia basically 'concretised' themselves in the nineteenth century. This is because the ideas of delay, revision, inquiry and such like, central to the case for bicameralism (see below), are today found in the myriad of modern institutional supplements and in more vigorous public debate over issues. Likewise, it is said that unicameral proportional representation can guarantee a diversity of views. Hence it is concluded that unicameralism and bicameralism are 'alternative means of obtaining the same [Westminster model] ends'.

Given that this is so, it would seem to follow that where such institutional culture, debate and other restraints are demonstrably inadequate (such as in the Northern Territory) the case for bicameralism is strengthened. Likewise, the absence of any suggested change to proportional representation for the single-chamber in the new State means that the case for bicameralism is strengthened. The corollary is, of course, that a second chamber based on a large measure of sameness as the lower house would not be a useful change. The case for bicameralism is also strengthened if there is not to be any Bill of Rights for the new State. This is a matter that I will return to below.

In essence, a case is I think made out for bicameralism that corrects for lack of effective revision and representation arising out of the current proposals for the new State's Constitution.

Essential Arguments Supporting Bicameralism

To my mind Professor Peter Self has succinctly captured the main arguments for a second House in these passages:

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2 Euthanasia, Northern Territory-style, with insufficient safeguards for the weak and vulnerable: and manifestly unjust mandatory sentencing for petty crimes (both laws probably falling foul of a Bill of Rights) are examples suggesting a lack of institutional restraint and mature reflection on the Northern Territory Legislative Assembly. The principal architect of the Northern Territory euthanasia law (Mr Marshall Perron) claimed, with some justification, that an absence of public intellectuals in Darwin was one of the main reasons he was able to have his Bill passed.
Undoubtedly the best institution for forwarding these purposes [i.e., review and revision] would be a well-designed upper house or chamber. The complexity of modern government and the case for some check upon the decisions of the popularly elected lower house, have led to widespread acceptance of the need for a bicameral legislature; but the composition and powers of the upper chamber remain subjects of considerable difficulty. If directly elected, it duplicates and conflicts with the lower house. A hereditary chamber lacks legitimacy and probably competence, while one nominated on the advice of party leaders, as in Canada, is open to patronage and favouritism.

The most successful upper houses are probably those, such as the German and Swiss, which contain nominees of the states within a federation. In all countries and not only in formal federations, the representation of smaller governments within a national assembly is a valuable way of implementing the objective of political decentralisation. It helps to ensure that national laws and policies are made with due regard to the advice of those who will often be charged with their application and interpretation, and it corresponds to a ‘bottom-up’ rather than a hierarchical conception of government. However, the consequent control of centralised initiative by localised interests may also be too restrictive, if the latter are given a completely dominant place within the upper house.

Another familiar theory is to design the upper house as a ‘parliament of industry’ or functional assembly to represent the principal occupations of the society. This idea might seem to accord naturally with the logic of corporatism, but it has never been implemented in a democratic society. A strong objection to this proposal is that it might simply replicate and confirm the influence of strong economic interests upon government, thus completely contradicting one of the main objectives of parliamentary oversight of the administration. On the other hand, such a house might be designed to achieve more balanced representation of functional groups, and more open compromises between them, than can occur through administrative bargaining. In any event, there would be considerable value in introducing into parliament more individuals from the sciences, arts and professions and people drawn from a wider range of occupations than the few groups which dominate political recruitment.

Consequently, the upper house should be designed so as to get a desirable mix of membership. For example, half of the members might be representatives of state or local governments, while the other half might be elected at large from all occupational groups in the society, plus representatives of the unemployed and retired. Alternatively and preferably, these geographical and occupational proportions could be lower, and perhaps a third of the members might consist of individuals chosen in some way for their distinction and originality. Room might also be found for leaders of voluntary organisations and learned societies. The guiding aim would be to create a second chamber having specific political roots but also a diverse and talented membership, so that it could competently act as the ‘grand inquisition of the nation’ into the conduct of government. Such a body should still be given only limited powers to delay new
legislation or to challenge financial policies. The lower house, as reflecting the current state of party politics, would continue to be dominant in these matters.\(^3\)

Bicameralism was attractive to the 1986 New Zealand Royal Commission on the Electoral System but, on balance, a better system of revision and representation was there thought to have been achieved by the recommendation of and subsequent implementation of a system of proportional representation (known as the mixed member proportional system, or MMP).\(^4\)

The Irish model\(^5\) its vocational-functional character (particularly the University constituencies) has proved itself capable of leading public opinion in ‘politically risky’ matters of Irish public opinion.\(^6\)

**Australia’s Upper Houses**

The history of Australia’s upper houses for each colony (each of which, of course, subsequently became a State in the federated Commonwealth of Australia) are discussed in Lumb.\(^7\) Generally, the five remaining upper houses are elected\(^8\) and co-equal except in respect of the origination of money bills and subject to any special procedures to resolve conflicts between the Houses. A system of proportional representation currently operates in NSW and SA (and in Tasmania’s lower House and the ACT single House).

Some political scientists have tended ‘to treat upper houses as alien to Parliament proper’.\(^9\) So it was with the work of the Sessional Committee on Constitutional Development. It has, one can only assume, been decided that upper houses are intrinsically destabilising; ‘yet more politicians’ and more wasted money. But had, for example, such a chamber been able to amend (or stop) the current mandatory sentencing regime\(^10\) it would have probably paid for a substantial part of its own operations.

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\(^5\) For details of the Seanad Eireann (the Senate) see Morgan, *Constitutional Law of Ireland* (1985) ch. 6.

\(^6\) Such as family planning and the reform of illegitimacy status.


\(^8\) For details see Smith, in Brett and others (eds) *Developments in Australian Politics* (1994) 109-110.


\(^10\) See the *Sentencing Amendment Act* (No. 2) 1996 (NT).
An Alternative to a Bill of Rights?

Key parts of the Constitution of the Independent State of Papua New Guinea 1975 have now become a significant influence in the drafting of the Northern Territory's Constitution for a New State.\(^{11}\) This has not extended to the notion of adopting a Bill of Rights, embryonically in place in Papua New Guinea since 1970,\(^{12}\) and now entrenched in Papua New Guinea's Independence Constitution.\(^{13}\) A Bill of Rights has been significantly down-played in the Northern Territory’s Draft Constitution for statehood.\(^{14}\) Presumably this is as a result in part of the feeling that such developments only serve to show a 'lack of confidence'\(^{15}\) in the newly developed nation's leaders, a matter apparently not to be even hinted at in the Northern Territory.\(^{16}\)

As the Select Committee ignored a second chamber so too its apparently cavalier treatment of a Bill of Rights. It is simply quite unthinkable that we should go forward at this time with a new Constitution for a new State without entrenched protection from the excesses of the Executive and Legislative branches of government. Manifestly unjust mandatory sentencing such as exists in the Northern Territory which would ordinarily fall foul of a Bill of Rights\(^{17}\) demonstrates conclusively the need for a Bill of Rights or an alternative parliamentary mechanism of equivalent review.

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\(^{12}\) Human Rights Ordinance 1971 (PNG). This was a private member's Bill: see references in Brunton and Colquhoun-Kerr, The Annotated Constitution of Papua New Guinea (1984) 94.

\(^{13}\) Constitution of the Independent State of Papua New Guinea 1975 (PNG) Part III, Division 3 ('Basic Rights').

\(^{14}\) See Addendum ('Options for Dealing with Rights') to: Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, Final Draft Constitution for the Northern Territory (August, 1996). The Draft does not contain a Bill of Rights.


\(^{16}\) The Papua New Guinea Constitutional Planning Committee opted for 'strengthening' the existing single House (which became the 'National Parliament') and for a system of more effective provincial government in place of an upper house: see Brunton and Colquhoun-Kerr, The Annotated Constitution of Papua New Guinea (1984) 264.

\(^{17}\) Cf. the Canadian test of punishment 'so excessive to outrage standards of decency' under s.12 of the Canadian Charter of Rights and Freedoms, prohibiting cruel and unusual treatment and punishment: R v Smith [1987] 1 SCR 1045.
Representation of Minorities

The mandatory sentencing legislation, amongst its many faults, disproportionately impacts upon disadvantaged minorities. Minorities are groups held together by common ties of descent, language, culture or religious faith in virtue of which they feel different from the majority of the population in a country. On this 'consciousness of difference' minorities have based political claims: for equality with the majority; for special treatment; and even for autonomy or for separation. These claims can nowadays extend to consultation (or maybe even veto) in parts or the whole of the law-making process. Liberal democracy has axiomatic respect for the position of minorities. Their aspirations would be met in large measure by an second chamber based upon proportional representation.

Proportional Representation

I turn to the key issue of proportional representation. This concept has been defined as:

Any system of voting in elections to a legislative body which is designed to secure that the representation in that body reflects as accurately as possible the divisions of opinion within the electorate. It is usually based on multiple-member constituencies. Modified forms are widely employed on the European mainland, usually in the form of party lists, while in Ireland and in the Commonwealth the single transferable vote is used.

There are three major types of proportional representation. Temple describes them as follows:

1. Party Lists

Under this method, voters choose between lists of candidates offered by parties in an electoral district. This might cover the whole country (as in the Netherlands and Israel), or the district may be local or regional or a combination of all three. Voters may be restricted to voting for party lists without being able to pick and choose or reorder candidates on the lists (these are called 'controlled lists'); or, conversely, may be able to choose among candidates or re-order lists (these are called 'open lists').

Seats are allocated to parties according to the proportion of the vote each has received, although some systems keep out those parties which do not reach a 'threshold' of at least, say, 5% of the total vote. Once it is known how many seats a party is entitled to (worked out by mathematical formulae), that number of candidates is taken from the party's lists and declared elected.

Part list systems are the most common form of PR. They originated in Europe during the nineteenth century and are the ones used mostly in Scandinavia and Northern Europe. France has used a closed list system but this is rare. Open lists vary considerably, from the single choice allowed in Belgium to the extremely

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democratic choices open to Swiss voters who can cast two votes for a single candidate, delete names or even write in new names.

2. Mixed Member Proportional System (MMP)

This is used only in Germany and is a compromise between First-Past-the-Post and party list methods. Electors have two votes, one for constituency member, elected FPP, and one for closed lists of candidates offered by the parties. This is the PR option chosen by [New Zealand] voters in the September 92 referendum and the one favoured for New Zealand by the Royal Commission on the Electoral System...

3. Single Transferable Vote (STV)

This system is used in Tasmania, Malta, the Republic of Ireland and for elections to the Australian Senate. Each elector votes in a multi-member constituency which returns from 3-7 MPs and numbers each candidate in order of preference.  

It is to be admitted that proportional representation has a degree of complexity not found in other electoral systems. Nevertheless that, by itself, is insufficient to rule it out. This is specially so when the evidence suggests that countries with moderate forms of proportional representation do extremely well in the indicators of democracy.  

And it is not necessary, for present purposes, to resolve which system of proportional representation is the most desirable. What is needed is a commitment to the principle of proportional representation.

The arguments (in summary form) for and against a system of proportional representation are set out in the Appendix. However, one major argument ought to be addressed here. This is the issue of the alleged instability of government brought about by bicameralism involving proportional representation. We can take the Australian Senate as a test case.

The Senate has in fact only intermittently guaranteed a government a legislative majority since proportional representation was introduced in 1949 that position has been, apparently exacerbated by the rise of centre-left parties in the Senate. The Senate also has a long established and successful record with respect to its committee work. The Senate, as it currently operates, can hardly be said not to have significantly contributed in a positive way to the standard of Commonwealth policy-making, legislation and debate. Apart from the aberration of 1975 (which did lead to an early election) relative stability

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22 See also Wright, Mirror of the Nation's Mind: Australia's Electoral Experiments (1980).
26 And, arguably, an overwhelming electoral endorsement for its decision to delay supply.
has been the norm. In short it has successfully demonstrated a model of parliamentary
negotiation, review and representation.

The exact nature of an upper house’s influence over supply and its ability to block or
delay legislation are significant matters of detail to be worked out. However, again what
is presently needed is a commitment to the principle of bicameralism.

Conclusions

The case for a system of proportional representation in the new State of the Northern
Territory is strong if one accepts the basic premises that (a) instability has not been the
main consequence of proportional representation systems; and (b) diversity, consultation,
compromise, reflection and respect for minority interests should be paramount.

If we are not to have proportional representation in a single chamber or a Bill of Rights
then I suggest that we must have a second chamber (with proportional representation) to
obstruct or prevent the excesses of populist majoritarianism which I spoke about in a
paper (entitled ‘Wither Majoritarianism?’) in this exact place five years ago at a
predecessor constitutional conference.27

I regret to say that the more unsavoury aspects of majoritarianism have, I think,
flourished in the Northern Territory in the last few years and it is incumbent upon us all
to seriously consider what mechanisms will exist in the new State to protect basic goods
such as due process, life, liberty and property from excessive Executive interference or
neglect.

Appendix: Summary of Main Arguments ‘For’ and ‘Against’ Proportional Representation

[Source: State Electoral Office of New South Wales, 1997]

For:

- each party or group is elected in proportion to the total number of votes it won
- this system thus appears to be the most accurate in responding to the voter’s choices
- smaller parties as well as large parties are therefore more able to have representation in parliament
- the multi-member electorates give voters a wide choice of candidates and a chance to elect candidates from different parties

Against:

- the group voting ticket system may result in people voting for a group rather than a person, which may not encourage strong ties between local members of parliament and voters
- two major parties may be compromised by the minority parties holding the balance of power in parliament
- voter’s ballot papers are more difficult to mark correctly
- vote counts are very long and complicated to work out

Further discussion on the issue in the context of New Zealand’s former First Past the Post System

[Source: Temple, Making Your Vote Count Twice, MP v FPP (1993)]

So what are the chief differences between governments elected by FPP [first past the post] and those elected by a PR [proportional representation] system?

Citing PR first, it is possible to summarise the differences as follows ...

- elections by proportional representation instead of simple majority vote;
- broad coalition cabinets instead of one-party majority cabinets;
- a balanced power relationship between cabinet and parliament, instead of cabinet dominance;
- a multi-party instead of a two-party system;
- a multi-dimensional party system where the parties differ from each other on more than just social and economic issues.

Following on from the last point, PR offers a greater choice of candidates and usually ensures better representation for women, ethnic and sectional groups. PR also tends to attract a better quality of candidate to politics.

... What are the disadvantages?
The acceptability of a simple two-party system depends on a government’s implicit pact with the public to observe FPP’s unwritten rules. Under FPP politicians must...

- take notice of public opinion while in office;
- take a high degree of responsibility for the well-being of the community;
- have respect for the pre-eminence of parliament - the people’s representatives - decision-making;
- behave in accordance with their party’s stated philosophy and policies.

Over the past ten years all these rules have been broken or badly bent to the extent that the trust and understanding of the electorate has been lost. Also, FPP no longer fits the modern political reality that New Zealand has more than two political interest groups. Social and cultural changes mean that we are now a more diverse society than 20 or 50 years ago. The FPP system does not cope adequately with minor parties and causes women, Maori and special interest groups to be under-represented. Additionally, the FPP sponsored two-party system causes complete changes of government and, often, reversals of policy. These can mean far-reaching changes when there has been only a modest change in political attitudes within the community and a modest change in percentages of the vote.

Even the ‘local MP’ attitude of FPP is not a tactic aimed to be when those who did not vote for their ‘local MP’ feel uncomfortable approaching a politician with a different background or political view to their own. In reality, only a modest proportion of voters actually communicate with their ‘local MP’. Most MPs spend most of their time away from their electorates on government, party or parliamentary business.
An Upper House

The Ultimate Restraint on the Executive?

DR JAMES RENWICK, SJD

Introduction

The Final Draft Constitution for the Northern Territory produced by the Sessional Committee on Constitutional Development in December 1996 provides that the proposed Northern Territory Parliament 'shall consist of a single house'. That proposal, if adopted, would continue the form of legislature - unicameral - that has been in existence in the Northern Territory, in one form or other, since 1947.

The Northern Territory shares its unicameralism with the other self-governing territories (the ACT, and Norfolk Island). But, subject to the result of the recently proposed referendum in Tasmania, the new State of the Northern Territory would share its unicameralism only with Queensland, which, of course, abolished its upper house many years ago. It must be asked whether this is the right choice.

As far as I am aware, there has been no detailed consideration given to the merits of an upper house by the Assembly's Sessional Committee on Constitutional Development in its otherwise excellent work. In this brief session, I wish to suggest that an upper house, functioning properly, has many benefits to offer for good government in the broadest sense and is therefore worth serious consideration. I suggest that this is especially so, regardless of one's political allegiance, because, (as at the date of writing), there has been one party in government continuously since 1974.

In this paper I will take the Australian Senate as the model for an upper house. This is partly for convenience as its work will be known to all here, and partly because it is, in my opinion, a good example of a generally effective upper house.

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1 Clause 3.6(1).
2 Northern Territory (Administration) Act 1947 (Cth); see Heatley and Nicholson, Selected Constitutional Documents on the Northern Territory (Northern Territory Department of Law, 1989) pp 280-290.
3 See Australian Capital Territory (Self-Government) Act 1988 Part III.
4 Norfolk Island Act 1979 Part IV.
5 The Australian, 15/8/1997, p 6 suggested that Tasmanian electors will soon have the opportunity, by referendum, to dispense with their Legislative Council.
I am all too aware that the immediate response to a proposal to establish an upper house may be dismissive. It may be said that the Northern Territory's population cannot justify it, that it would be too expensive, or that the Territory, like the rest of Australia, is over-governed. Whatever may be said on grounds of expense and on population, the key question to my mind - and it is a big question - is whether the Northern Territory if it became a State would be better governed if it had an upper house.

In this paper I will deal with:

- **The Rationale Of Bicameralism**;
- Whether an upper house truly provides, as Odgers' Australian Senate Practice asserts, "An Assurance That The Law-Making Power Is Not Exercised In An Arbitrary Manner";
- the capacity of an upper house to gain access to government documents - plainly important where there is no Freedom of Information Act; and
- the capacity of an upper house to call the executive formally to account (and thus aspects of Parliamentary Privilege).

**The Rationale Of Bicameralism**

The rationale of bicameralism is aptly summarised in Odgers' Australian Senate Practice (7th edition) as follows (the full quote is set out in a footnote):

> "The principle of bicameralism has a long history. As well as being practiced by many states since ancient times, it has also been expounded by the leading philosophers and practicing politicians in the course of the development of modern western nations. Bicameralism is in practice necessary to achieve a parliament truly representative of the people. Bicameralism helps to improve and enhance the representative quality of a parliament and to ensure that it is representative in a way in practice not achievable in a unicameral parliament. Modern societies are complex and diverse; no systems of representation are, of themselves, capable of providing a truly representative assembly.

Adequate representation of a modern society, with its geographic, social and economic variety, can be realised only by a variety of modes of election. This is best achieved by a bicameral parliament in which each house is constituted by distinctive electoral process. A properly structured bicameral parliament ensures that representation goes beyond winning a simple majority of votes in one election, and encompasses the state of electoral opinion in different phases of development.

Bicameralism is also an assurance that the law-making power is not exercised in an arbitrary manner. Such an assurance is of considerable practical significance in parliaments where the house upon which the ministry relies for its survival is liable to domination by rigidly regimented party majorities.

The rationale of bicameralism is expounded in clearest terms in *The Federalist*, the famous essays written in 1787-88 by Alexander Hamilton, James Madison and John Jay to explain the Constitution of the United States. This work, which was referred to by the Australian framers, warned that those administering government:

> "may forget their obligations to their constituents, and prove unfaithful to their important trust ... a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the
people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient” (No 62, Everyman ea., p. 317).

In so arguing The Federalist adopted the French philosopher Montesquieu’s proposition that: “The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting” (The Spirit of the Laws, 1748, Hatner Press, 1949, p. 160).

Montesquieu was aware of the implications of a single representative body liable to domination by the executive power, a condition observable in many assemblies of the British or Westminster type in which legislative and executive power are combined. He warned that “When the legislative and executive powers are united ... there can be no liberty” (ibid., p. 151).

The Federalist also drew attention to the value of a second, reflective expression of representative opinion. Pointing to “the propensity of all single and numerous assemblies ... to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions”, The Federalist urged the contribution of a second body, less numerous and able “to hold its authority by a tenure of considerable duration” (ibid.). Such a second body responds to “the necessity of some stable institution in the government”.

The Federalist, in urging the utility of the second opinion, invoked not only arguments drawn from political prudence but also others deriving from the “whole system of human affairs, private as well as public”:

We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state. (The Federalist, No. 51, pp 264-5)

A philosopher who gave close attention to the question of bicameralism was John Stuart Mill in his great treatise, Representative Government (1861). Mill was acutely conscious of the limitations which a house elected on the basis of single member constituencies posed for representation. Mill, writing in a period prior to the rise of the organised political party and party discipline in Parliament, attached little weight to a number of the arguments for bicameralism of the type found in The Federalist. But the principal reason he offered for supporting a Parliament with two Houses is pertinent to any contemporary consideration of this issue:

The consideration which tells most, in my judgment, in favour of two Chambers (and this I do regard as of some moment) is the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult. It is important that no set of persons should, in great affairs, be able, even temporarily, to make their sic volo prevail without asking any one else for his consent. A majority in a single assembly, when it has assumed a permanent character, when composed of the same persons habitually acting together, and always assured of victory in their own House, easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year. One of the most indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation: a readiness to compromise; a willingness to concede something to opponents, and to shape good measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual give and take (as it has been called) between two Houses is a perpetual school; useful as such even
Bicameralism is in practice necessary to achieve a parliament truly representative of the people. Bicameralism helps to improve and enhance the representative quality of a parliament and to ensure that it is representative in a way in practice not achievable in a unicameral parliament.

Modern societies are complex and diverse; no systems of representation are, of themselves, capable of providing a truly representative assembly.

now, and its utility would probably be even more felt in a more democratic constitution of the Legislature. (Everyman edition, pp 325-6)

Mill thus shared the views of Montesquieu and The Federalist in identifying the virtue of the two Houses as a check on each other.

Bicameralism was addressed from a similar perspective by Walter Bagehot in another classic of political literature, The English Constitution (1867). While not an admirer of the principle of division of power exemplified by the American Constitution, Bagehot recognised the virtue of a second house not easily captured by a disciplined majority:

A formidable sinister interest may always obtain the complete command of a dominant assembly by some chance and for a moment, and it is therefore of great use to have a second chamber of an opposite sort, differently composed, in which that interest in all likelihood will not rule.

The most dangerous of all sinister interests is that of the executive government, because it is the most powerful. It is perfectly possible, it has happened, and will happen again, that the cabinet, being very powerful in the Commons, may inflict minor measures on the nation which the nation did not like, but which it did not understand enough to forbid. If, therefore, a tribunal of revision can be found in which the executive, though powerful, is less powerful, the government will be the better; the retarding chamber will impede minor instances of parliamentary tyranny, though it will not prevent or much impede revolution. (The English Constitution, in Norman StJohn-Stevas (ed), The Collected Works of Walter Bagehot, London, The Economist, vol. 5, pp 273-4).

The framers of the Australian Constitution inherited this collective wisdom. When they combined it with their decision that Australia should be a federal nation, they found the case for a strong second chamber irresistible:

There are two essentials, equal representation in the Senate and for that body practically co-ordinate power with the House of Representatives. All those who recognise what are the essentials to a true union will admit these essentials. (Mr John Gordon, Australasian Federal Convention, 30 March 1897, p. 326)

We are not here to discuss abstract principles, we are not here to discuss the meaning of words; but I venture to think that no one will dispute the fact that in a federation, properly so called, the federal senate must be a powerful house .... We are to have two houses of parliament each chosen by the same electors .... We are to have, instead of a highly centralised government such as they have in Great Britain, a division of powers.... (Sir Richard Baker, Australasian Federal Convention, 17 September 1897, pp 784, 789)

The Constitution reflected their conclusion that, in order to perform the representative role assigned to it, the Senate, like its United States counterpart, must have the power to veto and to suggest changes to any proposed law. It could not be merely a debating and delaying chamber.”
Adequate representation of a modern society, with its geographic, social and economic variety, can be realised only by a variety of modes of election. This is best achieved by a bicameral parliament in which each house is constituted by distinctive electoral process.

This question of a 'distinctive electoral process' is what Peter McNab's paper will consider.

Odger's goes on to say:

A properly structured bicameral parliament ensures that representation goes beyond winning a simple majority of votes in one election, and encompasses the state of electoral opinion in different phases of development.

Bicameralism is also an assurance that the law-making power is not exercised in an arbitrary manner. Such an assurance is of considerable practical significance in parliaments where the house upon which the ministry relies for its survival is liable to domination by rigidly regimented party majorities.

'An Assurance that the Law-Making Power is not Exercised in an Arbitrary Manner'

Views will differ as to whether that assurance has been justified by the actions of State upper houses and by the Senate. It is true that, given our rigid party systems, that assurance will probably only be fulfilled where the upper house is not controlled by the government party of the day.

On that assumption, the benefits of an upper house scrutinising proposed legislation and threatening the ultimate sanction of disallowance, except for money bills, are potentially substantial. (Of course, the avenues for resolution of that deadlock brings its own problems and complexities, including the question of the Governor's reserve powers).

The work done by a number of Senate Committees in this regard is important. So, the Senate Standing Committee on Scrutiny of Bills considers whether bills for Acts, by express words or otherwise:

(a) trespass unduly on personal rights and liberties;
(b) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
(c) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
(d) inappropriately delegate legislative powers; or
(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

And the Senate Standing Committee on Regulations and Ordinances scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;
(b) that it does not trespass unduly on personal rights and liberties;
(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.\(^7\)

In principle, I am sure there would be general agreement on the importance of laws being critically measured against these standards.

In addition, the Senate's Estimates committees have proved a useful venue to ascertain and question the use to which public funds are being put and to question government policy generally, or in its application to a particular case.

While these committees may be bipartisan in their approach on occasion, I suggest that they would not work nearly as well if they lacked the sanction, through the Senate itself, of disallowance of the bill or regulation.

Access to government information and Parliamentary Privilege

A significant weapon which the Senate possesses is its power, derived from the privileges of the House of Commons via s 49 of the Constitution, to demand the presence of witnesses and documents and to compel witnesses to give evidence on oath or affirmation on pain of committal for contempt of Parliament: see Parliamentary Privileges Act 1987 (Cth) s 7.

There is a similar power under s 25(1) and (5) of the Legislative Assembly (Powers And Privileges) Act 1992 (NT).\(^8\) (That Act also gives the Full Court of the Supreme Court...

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\(^7\) The full list is as follows:


\(^8\) (1) The Assembly may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against the Assembly determined by the Assembly to have been committed by that person....

(5) The Assembly may impose on a person a fine -

(a) not exceeding $5,000, in the case of a natural person; or

(b) not exceeding $25,000, in the case of a corporation,
jurisdiction to judicially review the warrant of committal. In addition the Northern Territory Act provides that it is a criminal offence to fail, in answer to a summons to:

(a) refuse or fail, without reasonable excuse, to appear at the time and at the place specified in the summons;
(b) refuse to be sworn or to make an affirmation;
(c) refuse or fail, without reasonable excuse, to answer a relevant question put to the person;
(d) refuse or fail, without reasonable excuse, to produce to the Assembly or a committee the books, papers, documents or articles specified in the summons;
(e) give false evidence or make a statement which is false or untrue in a particular; or
(f) present to the Assembly or a committee a document which is, to his or her knowledge, false or falsified.

The penalty is a $5,000 fine or imprisonment for 6 months).

Plainly, the existence of, and appropriate use of, this power is crucial to ascertaining and then critically examining government policies and actions. This is especially so, where there is no freedom of information legislation in force.

A difficult problems arises when a public servant is required by the Senate to produce official documents but is ordered not to by the responsible Minister. There have been famous examples of this at the Commonwealth level of government, the ‘loans affair’ in 1975 and the ‘print media inquiry’ being two recent examples:- see Lindell Parliamentary Inquiries and Government Witnesses and the references there cited, but not only at that level.

Although the executive may claim public interest immunity privilege in that situation for example in the ‘print media inquiry’ - in the end that claim is no more than an appeal for

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for an offence against the Assembly determined by the Assembly to have been committed by the person.

Not all State Parliaments have statutory, or express constitutional power to call for documents, although such a power is likely to be implied as a matter of necessity: Egan v Willis (1996) 40 NSWLR 650. 9

9 Section 26 (2) provides:

A person convicted of an offence to which subsection (1) refers may apply to the Full Court of the Supreme Court for a declaration that the matters determined by the Assembly to constitute an offence, as stated in the resolution and warrant, were not capable of constituting a breach of privilege or a contempt, and the Full Court has jurisdiction to hear and determine such an application.


11 (1995) 20 MULR383

12 See Egan v Willis (1996) 40 NSWLR 650
assertion as to where the public interest lies) rather than a fetter on its powers. This is because the Senate and also the Assembly have undoubted power to commit persons to prison for contempt of Parliament when they fail to produce documents in their possession, or information within their knowledge, in each case duly demanded. The reason this is not done in practice, is that the official is placed in an impossible dilemma and it is regarded as unfair to punish them when the real 'villain', the directing Minister, remains untouched.

In a recent case in NSW, an appeal from which is soon to be heard by the High Court, an upper House decided on direct action against the Minister. In that case, the NSW Legislative Council directed the Treasurer, Mr Egan, who was a member of that house, to produce State papers. He refused. In order to coerce him into doing so (and it didn't ultimately work) he was suspended from the House, and physically expelled by the Usher of the Black Rod, not just from the House but from the precincts of Parliament.

The NSW Court of Appeal found his expulsion and removal from the chamber valid, but found that the removal from the precincts was not justified by the relevant standing orders and that an unlawful trespass to Mr Egan had to that extent occurred.

Importantly, taking action against the Minister in this case was an available option because he was a member of the House seeking the documents. What if he had been a member of the other House? In that case, although it is uncertain, the better view seems to be that as the powers and privileges of the Houses are relevantly equal one house cannot make and enforce compulsory orders about the members of another.

Of course, a law could provide otherwise.

At the end of the day, an upper house with the powers and functions of the Australian Senate has the consequence of the lower house, in which a single party or a united coalition will nominally have a majority, and from which the executive is formed, giving up some power and opening itself up to greater scrutiny.

While these would be generally thought of as worthwhile aims, I suggest that the legitimacy of the upper house exercising those functions will depend not only upon whether it behaves in a principled fashion, but its electoral base, a subject which will be dealt with now by Peter McNab.

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13 Percentage Players: op cit, see especially the opinions of David Jackson QC in appendices pp 27-94.
Session 4

Federal Westminster System of Representative and Responsible Government, Democracy, Conventions and Republicanism
Parliamentary Democracy and the New Constitution

DEAN JAENSCHE

Introduction
The title of this Conference is “Constitutional Foundations”. The sub-title for this session is “Federal Westminster systems of representative and responsible government, democracy, conventions and republicanism”. Each concept could be given a session on its own; encompassing them all in a limited period is impossible.

What I attempt to do is:

(i) remind us of the basis of the Westminster model;
(ii) clarify the unique Australian variant of the model;
(iii) summarise what has happened to that model in Australian political practice;
(iv) suggest that the Northern Territory has not been immune from a trend of eroding Westminster;
(v) propose that the historic generation of a new constitution for the Territory is a unique opportunity to build in structures and processes to restore and protect parliamentary democracy in at least one part of Australia.

Context
The context for the focus of this session is “Westminster” but, as Professor R S Parker put it:

it is rather important to unravel the tangle of intellectual constructs, emotional responses and pictures of the real world evoked by the phrase “The Westminster System” (1978: 349),

and he is correct in his conclusion that

too many politicians ... hypocritically profess to live by the Westminster syndrome while making decisions in ways that pay no respect to it at all (1978: 350).

We need, therefore, to remind ourselves what the syndrome is and, more important, what the practice of Australian politics has done to it.

First, the principles - Parker’s “axioms”. In brief:

• responsible ministers in parliament;
• partnership of elected ministers and appointed officials;
authority in the hands of the Ministers; and
accountability which runs from official to minister to cabinet to parliament to the citizens.

His "practical requirements" include:
- non-party political head of state;
- sovereignty of parliament;
- the government proposes, the parliament legislates.

A third level, the most diffuse, consists of the conventions, the unwritten "rules of the process". And these are far from unimportant, including components such as cabinet, collective responsibility, cabinet solidarity and secrecy, and individual ministerial responsibility.

The Australian Model

This has two components - structure and process. In relation to the former, Australia is more accurately described as a "Washminster mutation" (Thompson 1980), a combination of Westminster, Washington and the Swiss referendum. Parliament is not sovereign in Australia. It is constrained by a written constitution, and its activities can be vetoed by the High Court. Yet the axioms, the practical requirements and the conventions of parliamentary democracy are all but ignored by the Constitution.

This fact identifies the purpose of my paper. The Northern Territory is in the process of developing its own constitution and corpus of related Acts. This, I argue, is the opportunity to embed and entrench principles and practices of parliamentary democracy, for the first time in Australia. It is an opportunity to decide on what principles parliament should operate, and to give these principles some authority and protection. The current draft does not do so; it should.

The processes and practices of Australian politics hardly reflect the "Westminster syndrome". All Australian parliaments are characterised by trends which have increasingly brought parliament close to impotence and irrelevance, and which have abandoned key requirements of the model of parliamentary democracy.

The various functions of a parliament include:
- responsibility - the key-stone function of making government accountable for its actions;
- representation - the link between citizen and government;
- control of expenditure and public accounts - the auditing function;
- legislation - accepting, modifying, rejecting the proposals of government;
- discussion.

The problem is that, at every level, the procedures, processes and practices of parliaments in Australia have increasingly moved away from delivery of such functions. There has been a seepage of power - but not authority - away from parliament, to the government. Procedures of parliament have become weapons of government against
parliament. Question time has become a farce. Legislation has become ratification. Investigation of public accounts is made as difficult as possible. Discussion is notably absent. And parliament's power to force government to be responsible, to be accountable for its actions, has been eroded to the point where it hardly exists.

The slow development of a committee system in some parliaments had the potential to resist, if not reverse these trends, but committees are equally affected by the prime cause - party discipline. Government control of parliament is a direct product of cohesive/disciplined parties. And Australian parties have developed this internal discipline almost to its ultimate. To some, this development has not devastated parliamentary democracy, it has merely shifted its base. To Billy Snedden, for example, (1980: 71)

In political reality, the support of the majority is assured by the rigid enforcement of party allegiance and discipline. The Executive government's power is theoretically dominant, in practice it is absolute. The Executive has become responsible to the majority support in the parliament but not to the whole parliament. Hence the shift of real power from the House to the caucus. Analysis of our system portrays a recipe for dictatorship of the majority exercised by the Executive - until the missing ingredient is included, namely, the people.

But this doctrine of "responsible party government" is correctly revealed for what it is by Gordon Reid (1980: 8)

> Advocates of the doctrine argue that, if a Minister, or the whole Minister, evades parliamentary responsibility, all is well in the theory of government because the Ministry still has to face its day of reckoning in the electorate every third year, or sooner. Is this tenable? I think it is humbug.

A second, more recent development has restored some power to some parliaments. In 1997, no less than eight of the 15 houses of parliament in Australia are "hung", with minor parties and independents holding a balance of power. This has introduced more discussion, more debate, more compromise, and some elements of responsibility, to these houses. This has occurred mainly in upper houses - in fact, only in Victoria is the upper house not "hung".

To the major parties, to the government and the alternative government, this situation is unacceptable, a real hindrance to efficient government. The opposing view is that a "hung" upper house, even a "hung" bi-cameral parliament, is one step towards restoring some power to parliament. To some extent, it is. A "hung" parliament certainly has the potential to force government, to force the major parties, to the discussion table. On the other hand, a "real" balance of power held by a minor party or by independents includes a heavy responsibility, and requires all sides to give some real thought to such concepts as representation, responsibility and, in the current Australian climate, mandate.

The Northern Territory's Legislative Assembly, although inaugurated only in 1974, has rapidly caught up with the Australia-wide trend of the erosion of parliament. The ruthless use of numbers by government, executive domination, the use of procedures as weapons, developed rapidly. The refusal to introduce an Estimates Committee is a prime example of an executive resisting close examination of its activities.

The party-electoral situation in the Territory is fertile ground for this to develop, and to increase. The Country Liberal party is all but guaranteed a return to government, and already has an unbroken term of almost a quarter of a century. A virtual guarantee of hegemony is a virtual guarantee of government arrogance towards parliament. This
would probably not improve if Labor did win office. Party discipline, the precedent set by the CLP, and revenge, would probably continue the environment.

As noted earlier, the process in which we are involved is a very rare opportunity. Changing constitutions in Australia has proved to be very difficult. Establishing a constitution is an event which should be used to the fullest - in the context of this paper, to the fullest extent of establishing the means necessary for parliament to work effectively, and entrenching these means in the Constitution and its associated Acts. As Chief Justice Brian Martin reminds us in his paper, entrenched is to dig trenches for defensive purposes. This process of writing a new constitution is an opportunity to reform current parliamentary environments and entrench the reforms, to give parliament in the Northern Territory the means to defend itself.

Entrenching Reforms

What reforms? From the beginning, we need to recognise that Australian legislatures are parliaments, not congresses in the sense of the American Congress. There are two fundamental differences, one structural, one process. First, a presidential, congressional system involves a separation of powers; a parliamentary system involves what Walter Bagehot in 1867 called the “merit [which] consists in their singular approximation”. Executive and legislative authority are separate, yet together in a parliamentary system. The key is the nature of the balance.

In Australia, including the Northern Territory, the balance has shifted inexorably to the executive, a product, at base, of the impact of cohesive, disciplined parties. In 1764, Montesquieu warned of the consequence:

> when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or Senate should enact tyrannical laws, to execute therein a tyrannical manner.

We are not yet at the point of tyranny, although oppositions regularly claim so. But the executive domination, the Cabinet and party control, need to be reversed to restore a balance.

A Select Agenda for Reform

Parliament is, first of all, a representative body. The corpus of laws constituting the electoral system is the basis of representation. At the inauguration of the Assembly in 1974, the federal government imposed a single-member electorate system. The inquiry of the Joint Committee on Constitutional Development confirmed this system. It recognised that a multi-member electoral system provides representation in proportion to the number of votes cast thus facilitating the election of candidates of minority groups, e.g. Aboriginals,

but the Committee rejected multi-member electorates and, implicitly, proportional representation, as it is
complicated in its operation ... [and concluded that] single-member electorates can
better represent the scattered population centres ... and the diverse interests of these

It is time to reconsider this conclusion. Given the nature of the Northern Territory’s
society and political geography, I would suggest that the best basis of representation
would be proportional representation based on multi-member electorates (S.3.6(3)
Alternative 3). I would suggest that this is even more important as the uni-cameral
structure is proposed to be retained.

I would introduce a fixed term of parliament (S.3.11 (1) Alternative 3). This would end
the traditional Australian tactic of governments manipulating election dates to seek
advantage. It would end the destabilisation - for all sectors of the political economy -
caused by (often) a year or more of debates about possible early elections. It would force
governments to serve out their term, and face responsibility for their actions, regardless
of the political climate.

The parliament should incorporate a fully-developed committee system. The essential
reason is outlined in the House of Representatives Practice (Petifer 1981: 557).

The principal purpose of parliamentary committees is to perform functions for which the
houses themselves are not well fitted to perform, that is, finding out the facts of the case,
examining witnesses, sifting evidence, and drawing up reasoned conclusions.

It is true that governments neither like, nor want committees, especially committees with
auditing functions. They do not like them because their purpose and function is
parliamentary, not executive. But that is why they are essential.

Although difficult to incorporate in a Constitution, the procedures of parliament should
be reformed, and the reforms given more authority than convention or, at best, Standing
Orders, for both are, in the final analysis, under the control of the party in government.
At this planning stage for a new polity, there should be serious consideration of whether
the centuries-old procedures are the best way to achieve efficiency and effectiveness in a
parliament.

The Constitution, or its associated Acts, should include a real guarantee of freedom of
information.

My final proposal, in this select list, is the necessity for an independent Speaker. In
every parliament in Australia, this is a most necessary reform. As one analyst, and
participant, put it,

    we have given him an impossible task because we have tied him to a party, yet
    expect him to be an adjudicator. (Neil Blewett, CPD 1978: 3288).

It may be possible for a “partisan” to become “objective”; but that is asking a lot. A
Speaker needs to be an adjudicator, but also needs to be perceived to be an adjudicator -
perception is a crucial component of independence.

One method is Westminster practice, where a Speaker resigns from party and is
electorally uncontested. But this would have a major impact in a legislature of only 25
members. The solution could be a Speaker from outside the parliamentary membership,
certainly a major break from Westminster traditions, but equally certainly able to be done, if the will is there.

The major cause of the decline of parliament in Australia is, of course, the strength of party identification in the electorate and the combination of party cohesion, party discipline and party confrontation in the legislature. I have no ready solution to this, except to suggest that some of the suggested reforms may change this culture for the better.

Conclusion

One of the themes stated in the rubric for this conference is

- accountability, rights and entrenched constitutional restraints on government

In the debates which will follow this convention, I would suggest these should be a key focus: the accountability of government to the parliament, and through the parliament to the citizens. This involves a serious consideration of restraints which should be applied to government and, above all, the necessity to restore the rights and powers of parliament.

There is little in this direction in the current draft of a new constitution. There is plenty of evidence of the need for it throughout Australia. The Northern Territory could provide the new model. But only if there is a commitment to do so at all levels, and on all sides of politics, especially a commitment in the major parties. My worry is that that commitment is yet to be shown.

References


Which Checks, What Balances?

DAVID TROLLOPE

*Power tends to corrupt and absolute power corrupts absolutely*
Baron Acton

*My opinion is, that power should always be distrusted, in whatever hands it is placed.*
Sir William Jones

*We know that power does corrupt.*
Anthony Trollope

Australia's political system, at both the federal and state levels, has limited, if any, formal provisions for restraining governmental power. Indeed, our fused model, with the political executive compulsorily drawn from the parliament (and mainly the lower House), results in a 'winner-take-all' governmental elite. Policy decisions are concentrated in the hands of a few and, but for the notion of a Marxist dialectic coupled with a pragmatic, politically centrist imperative, the management of the nation's affairs falls, not to parliament, but to party bosses. As Lucy (1985, 6) so aptly puts it, responsible parliamentary government has long since given way to responsible party government. Rather than deliberating on the means to fulfil the needs and aspirations of the population, keeping the apparatchiks happy assumes a dominant place on the party agenda: parliament is treated as a nuisance. This would be of no great moment if there were other avenues for genuine opponents to put a brake on some of the more outrageous excesses but the fact remains there are not. While political scientists and other observers may point to the Senate as an institution that can curb government power, it may do so only because of the proportional representation voting system used for upper House elections, which provides minor parties and independents with the real possibility of holding the balance of power in that chamber. In the present system, whether they should, or not, act to frustrate government is a matter of some dispute, but it is inappropriate to engage that issue here.

The Separation of Powers

Other than an upper house, the only way that structural checks and balances can be incorporated into the political system is to introduce the concept of the separation of powers. As noted above, all Australian jurisdictions operate, by definition, under a fused political structure where the executive is drawn from the legislature and where the judiciary is independent of the executive and legislative arms of government. Although
the concept of three branches of government can be traced to very early political theorising, for example, Plato and somewhat later in the writings of Machiavelli and Locke, the articulation of the doctrine of the separation of powers is credited to Montesquieu.

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.

(Montesquieu, Pt. 2, Bk. 11, Ch. 6)

As would be generally understood, the clearest expression of the separation of powers is to be found in the United States' system of government. At both the state and national level, the legislative, executive and judicial functions of government are not only clearly defined, but operate within a regime of checks and balances. In a famous article written in support of the US constitution, James Madison, again harking back to Machiavelli, outlined the reasons for such an arrangement:

...But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. (emphasis added).

Madison (The Federalist, No. 51)

In Australia, and contrary to the arguments proposed by Madison, we have neither the protection afforded by the separation of powers, nor do we have, at least formally, government authority vested in the people: our constitutions quite clearly show that political sovereignty rests with the Crown. Furthermore, the public service, while having a duty to the Crown, owes its loyalty to the government of the day. These structures give rise to a comparatively closed political system where 'outsiders' can easily be excluded from decision-making and citizen participation controlled with considerable facility. Now that might be all very well when the political party in government is of one's own preference, but what if that is not the case? It is precisely in such a scenario that many would wish for a more open system, replete with checks and balances. In this regard, the draft constitution, while largely reflecting Australian political reality, can be characterised as a timid, subservient document, one which was drawn up with a view to
conforming to the perceived wishes of a past political regime, too readily dismissive of alternative political systems, and one which forsakes the quest for the 'best' political arrangements.

What Remedies?

In accordance with earlier observations, the preferred solution is to jettison the fused model in favour of a separation of powers with a popularly elected governor and legislature. Clearly, there are practical difficulties associated with that recommendation, not the least of which being the Australia Act. It would also place the new state of the Northern Territory at odds with the political systems operating in other polities in the country. Yet neither of these hurdles is insurmountable: in fact, as the debate over an Australian republic attains more depth and meaning, the superficiality of the early pro-republican 'arguments' may yield to more substantive claims for political reform at a national level. The idea that we can tinker with the Australian constitution and, 'hey presto', here's a republic, has long since been abandoned by even the most fervent of supporters. Then there must be serious doubt that the Australian people would allow the federal parliament to select the President on their behalf. These are issues which must be faced if the republican debate is to be advanced, and, suddenly, the prospect of major reform does not look so fanciful. Herein lies an opportunity for the Northern Territory to take the lead in that debate.

In the event that Northern Territorians, and Australians as a whole, vote to retain a Constitutional monarchy, the provision should be made in the draft constitution for an upper house styled as a legislative council. A workable chamber could comprise 11 members initially, drawn from the recognised geographic regions of the Territory under a multi-member electoral system. The usual arguments about costs and associated efficiencies are inferior to the requirement to have appropriate checks and balances on the activities of government.

Finally, the provision for citizen initiated referenda (Part 2.6 (7)) should be strengthened to make it obligatory for the Standing Committee to not only receive, but also to pursue, through referendum, a properly presented petition. In addition, similar requirements for a petition should apply, with like obligations on the Committee, to hold a referendum to amend any act or legislation passed by the government.

Notes


Entrenchment in the New Constitution

A Critique

ALISTAIR HEATLEY

In his statement on the occasion of the tabling in the Legislative Assembly of the final draft constitution, Steve Hatton, the Chairman of the Sessional Committee on Constitutional Development, noted that two “basic philosophies of approach” of the Committee had been “(t)hat the constitution should reflect the realities of the Northern Territory, its people, its demography and its aspirations into the 21st century” and “(t)hat the constitution should aim to set the framework for a social partnership of all races and ethnic groups in an open, inclusive and democratic society” (Parliamentary Record, 24, 8415, 22 August 1996). The attempt to forge a document which not only satisfied contemporary demands but also those of the future was the dominant concern in the constitution-making process since 1987. A distinctive feature in comment on the process, best exemplified in the published proceedings of a 1992 Constitutional Conference (Gray, Lea and Roberts 1994), has been the emphasis given to the need to devise “a unique constitutional arrangement appropriate for (the NT’s) special character” (Galligan in ibid., 62). How well does the draft constitution meet the expectations of the Committee and the commentators? Here, it is argued that the draft is unduly focused on present and pragmatic political concerns and that it is likely to prove itself too rigid and incapable of adaptation.

One of the abiding criticisms of the Australian Constitution is its alleged obsolescence; many reformers contend that it is an ideological document reflecting the views of colonial conservatives of the 1890s and that it needs considerable refurbishment (or even a complete replacement) to fit it to modern political conditions. Although they admit that there has been massive informal change in the way the Constitution operates, they claim that the difficulty confronting formal alteration (through s. 128) has been a significant barrier to modernisation. Even if state constitutions in Australia are generally easier to amend, those sections within them which are entrenched pose particular problems for reform. Constitutional rigidity is thus seen by reformers as a flaw which serves to undermine continuing relevance and, at the same time, to preserve essentially instrumental and timebound provisions. Through its entire entrenchment at some level and the device of organic laws, the draft constitution will provide another example of rigidity, on a scale unprecedented in Australian states.

Alteration of the constitution is set out in Section 2 of the draft. Any change has to be endorsed by a referendum. Some matters will need only a bare majority for acceptance while others, to be specified at the later Constitutional Convention, could be required to
meet higher percentage thresholds. What a Convention might do in this regard must be speculative but special entrenchment of large parts of the constitution can not be ruled out. In the case of Organic Laws, alteration can be effected through the general method or through amending legislation, enacted under the same majority rules as the original act. That majority could be two-thirds (or three-quarters) or even higher. From a simple reading of the provisions (in s. 2.5), it seems that an Organic Law can not be repealed. Such an alteration regime imposes formidable barriers to change.

The Standing Committee on the Constitution and Organic Laws, the role of which is set out in s. 2.6, provides another parliamentary avenue for discussion of amendments and, if its membership and procedures are not skewed too heavily in favour of the government of the day, could perform a useful purpose. Moreover, the inclusion of the device of "citizen" initiative is welcome. But neither it nor the work of the Committee generally will materially affect the burden of the barriers against constitutional change.

While their relevance to future decisions is slight, it is interesting to note how Territorians have voted in constitutional referendums. In the six ballots since they gained the right to participate in 1977, only once have they supported change, and then very narrowly. Their level of support has been higher (by 1% in 1984 and 5.5% in 1988) than the Australian average but still they have demonstrated little enthusiasm for national constitutional change. It could be said from that evidence that Territorians share the general conservatism of Australians; if that mood is replicated in later local referendums, especially if they have special majority requirements, the outlook for change may be bleak. Even relatively minor alteration would require strong bipartisan support and acceptance from major pressure groups.

Amendment to Organic Laws will also be difficult. A lower general threshold of two-thirds means that, in a 25-seat Assembly, a majority of at least seventeen will be necessary; fixing it at three-quarters raises the figure to nineteen. Since the Assembly was increased in size in 1983, the CLP has held nineteen seats between 1983 and 1987, sixteen (reduced to fifteen in 1988 and further to fourteen in 1989) in the 1987-90 session, fourteen between 1990 and 1994 and seventeen (reduced to sixteen in 1996) between 1994 and 1997. Only in the first period did the CLP have the numbers to satisfy both thresholds; in another two years (1994-6), it could have met the lower limit. Support from conservative independents and minor parties would have increased the latter time-span. Some level of bipartisan cooperation would have been needed at other times to implement change. Where even higher majorities are stipulated in the future, a substantial degree of inter-party consensus will be called for. The use of the referendum method to amend Organic Laws will be subject to the limitations already outlined.

All of the above analysis assumes the present single-member constituency representational base for the Assembly is retained. If an alternative system is implemented in the constitution (as presented in s. 3.6), the likelihood of large party majorities, on past voting evidence, will be much decreased. A multiple party format with coalition governments or a balance of power situation could emerge which would further complicate the possibility of change through both the referendum and amendment of the Organic Law process.

The problems involved in alteration would not be significant if the constitution, as finally accepted, and the Organic Laws, as they are approved, proved to be timeless. Such an
expectation, however, flies in the face of experience elsewhere, in Australia and overseas. When the purposes behind the construction of the NT constitution are examined, its applicability "into the 21st century" (and presumably beyond) can be called into question. The constitution is as much (and probably more so) an instrument to achieve statehood as it is to provide a vision and blueprint for the future. Unless the entrenchment proposals are modified, the future will be held hostage by the present.

In the subsequent constitutional process which has been chosen to achieve statehood, there are three stages - the Convention, the plebiscite in the Territory to approve the constitution and the decision by the Commonwealth to accept it as part of a statehood package. The Convention will certainly develop and refine the document and, through compromise and negotiation, it will produce a final draft. As an assembly representing major Territory interests, it will seek to protect sectional positions. In particular, Aboriginal delegates will insist upon the strongest possible constitutional guarantees on land rights, self-determination and their special place within the Territory polity. As has already been suggested, what is likely to emerge is widespread and deep entrenchment.

To achieve a plebiscite result which would impress the Commonwealth government (and the Senate) with community support for statehood, entrenchment of that kind will be necessary. A majority verdict, of whatever dimension, by itself will not be enough to persuade Canberra of the validity of the demand for statehood; a sizeable proportion of the Aboriginal population must also support the constitution. Therein lies the problem: to satisfy one of the prime conditions for statehood, the Territory will be saddled with a highly inflexible constitution.

The starkest example of present exigency is the treatment of Aboriginal rights, notably in relation to land (Part 7). Just as the passage of the Commonwealth's Aboriginal Land Rights (Northern Territory) 1976 was an essential pre-requisite for self-government in 1978, so also has the fullest protection of land rights been widely acknowledged as mandatory for statehood, at least in the campaign to win acceptance. The provisions of the Commonwealth legislation "as in force immediately before the commencement date" of the constitution (with any variations sanctioned by the Commonwealth) are to be included in an Organic Law. In addition "specific features" - a veto on compulsory acquisition of Aboriginal freehold and an elaborate scheme for voluntary land dealing - will be entrenched beyond an amendment of the Organic Law. It goes almost without saying that these sections will attract the most stringent requirements for alteration.

This is not the place to discuss the merits of the Territory's land rights regime. It needs to be emphasised, however, that components of it continue to be at the forefront of partisan and group debate in the Territory and in Canberra. At present, the Commonwealth government is contemplating legislative amendment, a process which is likely to resurface regularly in the future. It may be that, left in the Commonwealth's jurisdiction, the act will be repealed in course of time. If the measure is to be entrenched into a Territory constitution, that development would be frustrated. Entrenchment would also severely constrain possible Aboriginal initiatives for reform, for example, the form of land tenure under the act. There has been discussion, including some from Aboriginal sources, about the appropriateness of unalienable freehold in the longer-term. Locking it into a "new state" constitution would virtually close the issue of tenure. The scheme for
voluntary dealing (s. 7.1 [3]) is complex, will be time-consuming and will be very
difficult to consummate.

For most part, Galligan's expectations of "appropriate" arrangements have been met in
the draft constitution. It includes many admirable and innovative features but the extent
of proposed entrenchment is not among them. That area needs considerable rethinking if
the final constitution is to be kept relevant in the future.

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Taking the Mystery out of Parliamentary Government

A Commentary on Executive Power in the Draft Northern Territory Constitution

CAMPBELL SHARMAN

It is a commonplace that many of the key aspects of parliamentary government as it operates in Australia currently rely on accepted practice rather than clear statements of constitutional law. This is particularly the case with those relationships that link the exercise of executive power with representative parliamentary government. There is, for example, little to indicate in Australian constitutional documents, state or federal, exactly how the premiers or the prime minister are to be held accountable to the electorate for their conduct in office. Even the office of premier or prime minister as head of government is almost invisible in constitutional terms.

This situation can be explained in large part by the adoption of the British tradition of parliamentary government by the Australian colonies when they achieved self-government in the 1850s, and subsequently by the founders of the Commonwealth in 1901. This tradition is characterised by the addition of the practices of representative democracy to an essentially autocratic monarchical executive. While many of the necessary modifications have been made by statute and constitutional provisions, some of the most critical rely predominantly on accepted practice. The apparently dictatorial powers of governors and the governor general as heads of state, for example, are exercised almost without exception on the advice of the premier or prime minister and their cabinets, yet there is scant indication of this in constitutional documents.

The operation of executive power in our parliamentary system may be clear to those skilled in the arcane knowledge of constitutional law and practice, but to those members of the public who think that a constitution should set out the basic rules regulating government, such a situation is confusing. Worse than this, it raises the suspicion that the processes of government are being hidden from citizens so that scrutiny of government activities is made difficult. How is it possible to know if the premier is behaving improperly if there is no constitutional specification of the job the premier is supposed to do? Even if it was not the intention of those who originally framed the constitutions of the states and the Commonwealth to make it difficult to understand how the system operates, subsequent governments have made little effort to remedy this defect. Unfortunately, there is little incentive for governments to initiate changes which

1 Western Australia did not achieve self-government until 1890.
would clarify the situation. The ambiguities that surround the exercise of executive power help to insulate the executive from legal challenge and screen from the public some of the most sensitive aspects of government.

These matters have recently been the subject of detailed inquiry in Western Australia. The Western Australian Commission on Government came to the conclusion that this lack of clarity in the constitutional specification of executive offices was a major factor in the misuse of power by governments in the State during the 1980s and early 1990s (WACOG 1995-1996, Report No.5). The report of the Royal Commission into what became known as WA Inc (WARC 1992) had disclosed that procedures designed to keep governments accountable to the public were either absent or had been ignored. The improper use of executive office had not only lost the state many hundreds of millions of dollars but had demonstrated major shortcomings in the operation of responsible parliamentary government. The Western Australian Commission on Government was subsequently set up to make recommendations for institutional change that would prevent the occurrence of corrupt, illegal and improper conduct in the governmental process (WACOG 1995-1996).

In its recommendations on Western Australia's constitutional structure, the Commission on Government proposed that all key executive institutions, their powers, obligations and relationships to other agencies should be specified in general terms in the State's constitution. These institutions were: the governor as head of state; the executive council; the premier as head of government; the cabinet; and individual ministers. To assist in this process, it set out the range of information that should be included for these offices (WACOG 1995-1996, Report No.5: 54-57).

It should be noted that the purpose of these recommendations by the Commission on Government was not to change constitutional relationships in Western Australia but simply to set out the existing procedures of executive government so that openness and accountability would be enhanced. While it would be ingenious not to concede that reducing procedures to written form may alter them, the intent was to reflect reality not to change it. The Commission considered that general constitutional reform was outside its terms of reference and recommended that other procedures be used for this process (WACOG 1995-1996, Report No.5: ch.5).

From this perspective, the Final Draft Constitution for the Northern Territory (NTLA 1996) (subsequently referred to as the draft NT Constitution) is a most interesting document. It is clearly motivated, as was the Western Australian Commission on Government, by a desire to make the processes of government more open to review by citizens and to demystify our system of parliamentary government for the purpose of enhancing accountability. The Sessional Committee on Constitutional Development of the Northern Territory Legislative Assembly is to be congratulated on the imaginative way in which it has approached the problem. But the draft NT Constitution also makes changes to the relationships between some of the key executive agencies of parliamentary government. In this respect, the document can be seen as a half way house between an attempt to make clear the framework for the existing procedures of parliamentary government, and to modify these procedures to alter the way in which the executive branch is made accountable to popular and parliamentary control.
The aim of this paper is to review those sections of the draft NT Constitution that deal with the exercise of executive power and to relate them to broader questions of designing institutions that keep government open and accountable in a parliamentary system. This is a critically important issue not just for any future constitution of the Northern Territory but for the health of our parliamentary institutions throughout the federation.

The Executive and the Legislative Process

One of the features that distinguishes the legislative process in British style parliamentary systems from the legislative process in other parliamentary systems is the privileged position of the executive in the British variant. Many of these privileges are retained in the draft NT Constitution in a form that differs little from current state and Commonwealth constitutions. These include the executive's monopoly over the introduction of money bills (s. 3.3),\(^2\) the timing of elections (ss 3.9, 3. 11) unless a fixed term option is chosen (s. 3.11.2), and the proroguing of Parliament. All of these executive actions are taken by the Governor.

But there are several features of the draft NT Constitution which mark a departure from tradition in this area. The first is a definition of parliament and the exercise of legislative power which excludes the executive as a formal component (s. 3.1). While the Governor's assent is required, it is as an additional element in the legislative process. Provision is made in cases where the Governor withholds assent for the Governor to return the bill to Parliament with suggestions for amendment (s. 3.2.3). Parliament may consider these, but is not bound to accept them, nor is the Governor bound to give assent to the bill if it is presented again (s. 3.2.4).

These provisions dealing with the withholding of assent go beyond stating existing practice. The idea that the Governor would suggest amendments to Parliament implies the possibility of a separation between the exercise of executive power and the parliamentary majority that is decidedly unparliamentary. This does not make the provision undesirable, just incongruous. Logic would suggest that, if the draft NT Constitution is anticipating a standoff between the Governor and the Parliament over proposed legislation (an odd situation in a parliamentary system), the remedy might be to adopt the United States provision that the Governor's veto can be overridden by a two-thirds majority of the legislature.

A less dramatic departure from tradition can be found in section 3.9 which, while stating that writs for elections are issued by the Governor, also provides that such action is to be taken on the advice of the Premier or the Executive Council. In other jurisdictions it is assumed that there are two occasions when the governor acts on the advice of the premier alone, these being the selection of ministers and the timing of elections. To involve the Executive Council in the latter process weakens the power of the Premier, strengthens that of other ministers and gives the Governor more room to manoeuvre. Again, there are implications that the Governor has the potential to be a more independent actor than is usually the case.

\(^2\) References are to the section numbers in the *Final Draft Constitution for the Northern Territory* (NTLA 1996).
Finally, there is the provision that a majority of members of the Parliament can call Parliament into session (s. 3.16.2). This breaks the executive's monopoly on controlling access to Parliament, but only just. A majority of members is a high hurdle and guarantees that the opposition cannot spoil the parliamentary recess. Another change in the same direction that might have been adopted is the recommendation by the Western Australian Commission on Government that Parliament must be called within 30 days of the return of the writs after an election (WACOG 1995-1996, Report No.5: 83). The draft NT Constitution sets a limit of six months (s. 3.16.3).

Overall, these provisions enhance the transparency of the rules governing the legislative process, and the decoupling of the legislature from the executive creates the potential for limiting executive control of the parliamentary process. They also enable the Governor to deal directly with Parliament in some circumstances in a way which differs substantially from customary practice. But important as they are, these changes deal with exceptional events rather than the procedures for the regular involvement of the executive in the operation of the legislative process.

The Governor

The position of Governor is the repository of executive power in the constitutional system. All important executive acts are carried out in the name of the Governor, all legislation requires the Governor's assent, and appointment to all senior offices in the executive and judicial branches of government requires the Governor's signature. The way in which the Governor exercises these powers is critical to the operation of representative parliamentary democracy yet, as has been pointed out, current state and Commonwealth constitutions provide little indication of the way in which executive power is to be made responsive and accountable to the electorate.

The draft NT Constitution has some provisions that clarify the Governor's position. In addition to stating that the purpose of the executive is to be responsible for '...the execution and maintenance of this Constitution and the laws of the Northern Territory...' (s. 4.1), the Governor is explicitly charged with 'upholding and maintaining this Constitution' (s. 4.2.2.a) and 'administering the government of the Northern Territory' (s. 4.2.2.b). Section 4.2.1 makes clear that the Governor is appointed on the recommendation of the Premier, but the length of the term of office of the Governor and the circumstances in which the Governor can be removed are masked in the usual obfuscation of the phrase '...shall hold office during Her Majesty's pleasure.' (s. 4.2.1). But the most sensitive issue concerning the Governor's powers relate to the requirement that the Governor act on advice of officers chosen from Parliament, and whether there are any circumstances in which the Governor can act without such advice. This is covered in sections 4.2.3 and 4.3.4:

'Except as otherwise expressly provided in the Constitution or an Act, or where, in the Governor's sole opinion, to so act would be contrary to his or her duty under subsection (2)(a) [the duty to uphold the Constitution and administer the government of the Northern Territory], the Governor shall act, in administering the government of the Northern Territory, only in accordance with the advice of the Executive Council. (s. 4.2.3)
If the Governor acts in or purportedly in administering the government of the Northern Territory otherwise than in accordance with the advice of the Executive Council or a Minister of the Northern Territory duly given, he or she shall, on the first sitting day of the Parliament after so acting, cause to be tabled in the Parliament a written statement of his or her reasons for so acting.' (s. 4.2.4)

Section 4.2.3 sets out the practice that the Governor acts on the advice of elected officials in the discharge of the Governor's responsibilities although, as will be discussed later, there is some ambiguity as to the exact source of the appropriate advice. But the section also provides the circumstances under which the Governor can act without such advice—where to act on advice would amount to acting '...contrary to his or her duty...' to uphold the Constitution and administer the government of the Northern Territory. This is a good attempt at setting out the conditions under which the so called reserve powers of the Governor can be used, powers to act without advice which are assumed to be used very infrequently and in circumstances which fall outside the realm of normal politics.

As with the provisions dealing with the refusal of the Governor to assent to legislation, the draft NT Constitution goes further than describing existing practice, and requires the Governor to '...cause to be tabled in the Parliament a written statement of his or her reasons...' for acting without advice. This provision, by setting in place a constitutional procedure for the Governor to justify acting without advice, could be seen as increasing the sphere of independent action by the Governor. Whether this is a good thing is a matter of opinion, but it marks a departure from current practice. It is also a provision with a similar effect to that of the section dealing with the refusal of assent to legislation (s. 3.2.3) in that it enables the Governor to deal directly with the Parliament.

While the sections dealing with the Governor set out some aspects of the operation of executive power, they do little to clarify the links between the Governor, the Premier, the Cabinet and other ministers. The only link specified is with the Executive Council.

**Executive Council**

To most of the public, the Executive Council is a body whose composition and function, and even its existence, is a mystery. While mentioned in state and Commonwealth constitutions, its activities are poorly specified and there are few hints about the role that it plays. In general, its role is a formal one and meetings of the Executive Council provide the forum at which business requiring the assent of the Governor is transacted, usually with in the presence of the head of government and a few other ministers.

The draft NT Constitution says slightly more about the Executive Council than can be found in state and Commonwealth constitutions but adds some new features. The first of these is a definition of the Executive Council which makes it sound as if it were equivalent to the Cabinet: 'There shall be an Executive Council of the Northern Territory to advise the Governor in the government of the Northern Territory' (s. 4.6.1). The second is the omission of the Governor as a member of the Executive Council (s. 4.4.2) even though the Governor is '...entitled to attend all meetings of the Executive Council, and shall preside at all meetings at which he or she is present.' (s. 4.6.3) Meetings of the Executive Council cannot be convened other than by the Governor (s. 4.6.6), although the Premier can request the Governor to call a meeting (s. 4.6.5). No quorum is set, there
are no provisions for the keeping of records, and the procedures of the Executive Council ‘...shall be as the Council determines.' (s. 4.6.7)

All of this raises as many questions as it answers. If the Executive Council is to transact formal business requiring the Governor's assent, why is not the Governor required to attend all meetings? What role does the Premier play at meetings of the Executive Council?

And if the Executive Council is some formal manifestation of the Cabinet why is there no mention of the relationship between Cabinet and the Executive Council? The improvement in the transparency of this aspect of the executive merely increases the confusion as to what is really happening.

The Premier

As head of government, the premier (or prime minister) is the most important elected executive officer, and it is reasonable to assume that the powers and duties of this office would be clearly set out in constitutional documents. As we know, this is not the case for state and Commonwealth constitutional documents none of which makes more than a passing reference to the office. In contrast, the draft NT Constitution makes clear the procedures for filling the office of Premier:

‘The Governor shall, from time to time, appoint as the Premier the member of the Parliament who, in the Governor's sole opinion, commands or is likely to command the general support of the majority of members of the Parliament.' (s. 4.8.1)

There is also a detailed description of the circumstances under which the term of office of the Premier can be terminated (ss 4.8.2, 4.9.1), all of which correspond with current practice.

This clear statement of the appointment and tenure of the Premier is not, however, matched by as comprehensive a specification of the nature and function of the office. While there are references to the role of the premier in a number of sections in the draft NT Constitution, there is no summary statement of what the Premier is supposed to do and to whom the office is accountable. The Premier can advise the Governor to issue writs for an election (s. 3.9); advises the Crown on the appointment of the Governor (s. 4.2); is a member of the Executive Council (s. 4.6.2); can request the Governor to call a meeting of the Executive Council (s. 4.6.5); can specify the number and designation of ministerial offices (s. 4.7); and can advise the Governor on the appointment and removal from office of ministers (s. 4.8.3). In addition, the Premier must make an oath or affirmation to ‘serve the government and people of the Northern Territory in accordance with the Constitution of the Northern Territory and the law.’ (schedule 6)

All this is a great advance on the extent to which the office of premier is described elsewhere in Australian constitutional documents, but there remains a certain coyness about stating that the Premier is head of government with a list of responsibilities. And there are still enough silences and ambiguities to cause substantial doubts about the precise role of the Premier and the relationship of the office to the Governor, the Executive Council and the Parliament, let alone the Cabinet which remains constitutionally invisible.
Ministers and the Cabinet

Ministerial office is mentioned in all Australian constitutional documents but sometimes using words other than the term minister – member of the executive council or, in the case of the Western Australian Constitution Act 1889, "...one of the ... principal executive offices liable to be vacated on political grounds..." (section 28). The draft NT Constitution uses the term ministerial office and makes clear that the number of ministers and their designations are settled by the Governor on the advice of the Premier. This is also the case for appointment to the ministry and the termination of office of a minister. But again, there is no specification of the nature and functions of ministerial office and the responsibilities of ministers to Parliament. The oath (or affirmation) of office for a minister makes clear the obligation to uphold the Constitution and laws of the Northern Territory (schedule 6) but makes no mention of a minister's obligations to Parliament.

This reluctance to state that ministers have responsibilities to Parliament is part of the inheritance of British style parliamentary government and a monarchical context — the ministers are the Crown's ministers, not parliament's. But it is also a reflection of the unwillingness of executive government to give constitutional backing to what are at present merely political conventions — that ministers are accountable to the Parliament for the operation of those departments and agencies listed in ministerial commissions, and that ministers are accountable to the Parliament for decisions of the Cabinet.

This is also an explanation for the constitutional invisibility of Cabinet. Cabinet is "...a meeting of ministers, chaired by the Premier, to determine the policies of the Government of the State; ..." (WACOG 1995 - 1996, Report No.5: 7, recommendation 254.4(a), and ch.4). As such it is the key forum for executive decisions in our system of parliamentary government, but its significance is seen as being political rather than part of the formal machinery of executive power. It suits the government of the day to perpetuate this myth. Without formal recognition of Cabinet, even in the most general terms, the requirement that ministers are accountable to Parliament for the decisions of Cabinet is simply a matter of political interpretation and convenience. Many of the problems with the improper conduct of governments and ministers in various states during the 1980s can be traced to the lack of formal procedures for ensuring the appropriate accountability of Cabinet to Parliament. Substantially revised procedures are now in place, but there is still a reluctance to give constitutional backing to this institution which is a vital part of our system of parliamentary government. Unfortunately, the draft NT Constitution does not take any initiative in this area.

Assessment: Accountability and Executive Power

The draft NT Constitution marks an important attempt at making the constitutional provisions affecting the operation of executive power more open to public scrutiny. There is more detail and less prevarication about the offices of the Governor and the Premier than in the current constitutional documents of other parliamentary systems in the Australian federation. For both these offices and for those holding ministerial office,

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3 For an example of how this broad obligation might be stated, see the Western Australian Commission on Government, recommendations 254.5(g) and (h) (WACOG 1995-1996, Report No.5: 7, and ch.4).
there is an obligation to uphold the Constitution and laws of the Northern Territory, even though for the Premier and other ministers this is required by way of an oath or affirmation rather than a statement of constitutional law.

Special attention is given to making clear the procedures for appointing executive officers and, the case of the Premier and other ministers, the circumstances under which they can be removed. The Governor's powers are also clearly specified together with the circumstances under which the Governor can act without the advice of the Premier or other ministers. In this sensitive area, the Governor's power to refuse assent to legislation and to act without the advice of ministers is clearly set out and in some respects these powers are extended beyond current constitutional practice elsewhere in Australia. The Governor is permitted to suggest amendments to legislation to which assent has been refused, and must prepare a statement to be tabled in Parliament explaining any action that has been taken without the advice of ministers (excluding those areas where the draft NT Constitution explicitly confers power on the Governor to act alone).

To the extent that these provisions enhance the visibility of constitutional responsibilities, they are to be welcomed, but major omissions remain. The operation of the Executive Council is still unclear and the role of the Cabinet is not mentioned at all. Of greatest significance, there is no statement of the responsibilities of the Premier and other ministers to Parliament. In other words, the central component of a system of representative parliamentary democracy remains unstated and unexplained.

In this respect, the draft NT Constitution sets up a double paradox. The first is that the document deals in detail with a few highly unusual situations involving key executive offices, but gives little information about day to day relationships. The second is that the document says next to nothing about the relationship between the Premier, ministers and the Cabinet on one hand and the Parliament on the other, yet it creates direct access to the Parliament for the Governor, albeit in exceptional circumstances. It is as though the framers of the draft NT Constitution were anticipating a more active and independent head of state, perhaps of a republican hue. Quite apart from whether this is desirable, such a situation further highlights the omission of any comparable requirement for the Premier and other ministers to make their actions open and accountable to Parliament. Whatever its other virtues, the draft NT Constitution will remain seriously flawed until this defect is remedied.

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Federalism, Republicanism and a New Northern Territory Constitution

BRIAN GALLIGAN

Since Australia has a federal constitution, the constitution of any member state is only part of the machinery of governance for the people of that state. In reading and understanding the constitution of any state, it is necessary to keep this in mind and to pay attention to the overarching commonwealth constitution of which the state instrument is an integral part.

The proposed draft constitution for the Northern Territory needs to be considered in conjunction with the commonwealth constitution for two fairly obvious reasons. First, if adopted, the state constitution of the Northern Territory will make it a state within the Australian federation under the commonwealth constitution and subject to its provisions. (Why not North or Northern Australia? Why keep the 'territory' tag when it will be a state? But I leave that sensitive issue to the people of the Northern Territory.) Being a state of the Australian federation fundamentally modifies key provisions of the Northern Territory constitution. For example, the legislative power of the parliament of the Northern Territory can not be simply 'to make laws for the peace, order and good government of the Northern Territory' as is stated in section 3.1(2)\(^1\). Rather, as a state of the federal commonwealth, its legislative powers are the residual left after the Commonwealth's specified powers or, in the case of concurrent commonwealth powers, are subject to the Commonwealth's occupying the fields where it enjoys paramountcy.

Second, the Northern Territory does not control the terms and conditions of its becoming a state of the Australian federation. The commonwealth constitution, section 121\(^2\), provides that new states may be admitted to the federation but on the terms and conditions that the commonwealth parliament decides. That means that the Commonwealth can dictate, and the NT certainly has to negotiate, not only such crucial issues as representation in the Senate and House of Representatives but also aspects of the NT constitution. Obvious examples are Aboriginal representation and draft constitution and the report of the Sessional Committee on Constitutional Development.

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2 Section 121 on the commonwealth constitution is unequivocal in giving the commonwealth parliament power over the admission of new states: 'The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.'
are silent on these issues. Indeed, the 1985 original terms of reference for the committee were changed in 1994 to delete inquiry into 'the steps required to be taken by the Northern Territory of Australia, the Commonwealth and the States of the grant of Statehood to the Northern Territory of Australia as a new State within the federation'. Instead the 1994 terms of reference added the new task for the Committee of reporting upon 'the method to be adopted to have a draft new State constitution approved by or on behalf of the people of the Northern Territory'. The reasons for changing the terms of reference are perhaps obvious: that the Committee could do the latter but not the former which would require top level negotiation with the commonwealth.

Nevertheless, in considering a draft constitution for the Northern Territory we must do so in the context of the Australian federal constitution of which it will be an integral part. This is the purpose of my paper which will examine some select issues regarding new statehood within Australia's federal and republican constitution.

Constitutional Origins or Founding of a New State

The first point I wish to consider is a fundamental but complex one: how can a new state be brought into existence as a member of an existing federation? Conceptually, this is rather more difficult than the basic issue of how a new state or system of government can be legitimately founded.

Suppose Territorians were a separate nation and decided that they wanted a new constitution. Presumably they would engage in a process of constitution making in which the established authority, the Territory Assembly and government, would put in place a process for drafting and adopting a constitution with the support of the people of the Territory. Then, by some specified formal act, such as proclamation, the new regime would begin.

Given that Territorians are already Australians and that the Northern Territory is a Territory and not an original state of the federation, the process of becoming a state is more complex. That is because changing status from territory to state within a federation is like a federal process: it entails actions and consent on the part of both the Territory that wishes to change its status and the federation of which it will become a state member. In this instance the process of constitution making in the Territory consists of preparing the Territory's proposed blueprint. This can only come into being as a state constitution by some legitimating act of the federal body. Indeed, the federal body could take charge of the process of drafting the new state constitution or insist that it contain particular provisions, although there are obvious reasons why that should be done by the Territory authority and Territorians.

When Territorians produce a draft constitution, as in this instance, it must satisfy the Commonwealth in two respects: leaving as a territory and joining as a state. First, the Territory is under Commonwealth authority as a Territory so that in proposing to leave that condition it must provide for special matters that the Commonwealth has

3 No. 1 (d) of the 1985 Terms of Reference, Appendix 1 of the Report.
responsibility for — the obvious example being native rights to land. But second, in being accepted as a state the Territory has also to satisfy the terms and conditions of entry that the Commonwealth stipulates — representation in the Commonwealth Parliament is an obvious example.

To sum up the point, producing a new draft Territory constitution that has the support of Territorians is only one part of the process of achieving statehood. The other part is satisfying exit and entry requirements of the Commonwealth. That is because the Northern Territory is already part of the Commonwealth as a territory, and in becoming a state it will be part of the Commonwealth in its new capacity.

**Federalism and Statehood**

The Northern Territory's push for statehood is based on an appreciation of the enhanced status and independence that statehood entails, and a claim that the Territory is capable of fulfilling the greater responsibilities that statehood requires. The prospects of creation of a new state within Australian federalism provides the opportunity for reflection on the advantages both of statehood and of federalism.

A self-governing Territory, as the Northern Territory has been since 1978 under the Northern Territory (Self-Government) Act 1978, has a limited amount of legislative and executive powers. The Commonwealth retains reserve powers with respect to the Territory and can exercise an unlimited override because it retains plenary legislative power with respect to the Territory. This was highlighted in the Commonwealth's quashing of the Territory's euthanasia laws.

A state within a federation also has limited legislative powers but, in contrast to the territory situation, state limitations are constitutional ones. Another way of putting this is that states have limited jurisdiction under the federal constitution, but within their jurisdictional domain they have plenary or sovereign power. The division of powers between two spheres of government, state and national, such that each has its own jurisdiction and neither is sovereign over the other is the hallmark of a federal system. Therefore achieving statehood enhances the power and independence of the regional unit: it becomes sole master of its own jurisdictional domain.

Similarly, achieving statehood enhances the citizenship of the people of the Northern Territory. That is because citizenship in a federal country is essentially dual with certain key aspects being handled by each sphere of government. While Territorians might enjoy virtually all of the entitlements and benefits that Australians resident in the states have, their Territorian citizenship is limited compared with the state citizenship of others. That is because the Territory has limited self government compared to the States, with certain powers being reserved for the Commonwealth and the Commonwealth retaining an overriding say in Territory affairs. Thus statehood would enhance the citizenship of Territorians and bring them to the same full federal citizenship of other Australians.

The Northern Territory's quest for statehood is an expression of confidence not only in its own maturity but also in the value of Australian federalism, so it is appropriate to look briefly at that. Critics like William Riker have argued, variously, that federalism:

(a) favours reactionary policies in peripheral states, such as racial discrimination in the American South;
(b) alternatively, that it makes no policy difference, evidenced by comparing Australia with New Zealand; or

(c) that it makes no sense for Australia, compared say with Canada, because here there are no regionally based minorities to deal with.\(^5\)

Regarding the first criticism, federalism allows both good and bad policies to be pursued at the state level, and at the federal level as well for that matter. While federalism, because of its checks and balances, may assist in the retention of established policies, be they good or bad, and impede the introduction of new ones, be they also good or bad, it does not privilege one or other sort of policy. Moreover, as the Canadian experience with health policy shows, federalism can assist the process of policy innovation by allowing successful experimentation in one province which is then taken up nationally.

Following on from this to the second criticism, federalism is obviously significant in affecting policy process and outcomes. This is obvious in the differential adoption of economic rationalist and new public sector management practices in Australia and New Zealand during the last decade. Even if that were not the case, federalism enhances citizen choice by providing more governmental nodes for input, pressure and influence. That is a positive value in its own right, regardless of actual outcomes. In other words, the advantage is in enhancing and refining citizen choice rather than in differential outcomes.

The third criticism assumes that federalism has only the instrumental purpose of dealing with different ethnic and cultural groups, or a sociological purpose. If that were all then federalism would make no sense for Australia where there are not state based ethnic or cultural minorities. However, as suggested in the previous point, federalism is an institutional means of enhancing the democratic participation of citizens through multiplying governments and dividing powers among them.

In a geographically large country, federalism is especially appropriate because it brings government closer to the people in distant regional groupings. I take it to be a truism that Territorians strongly prefer having a Northern Territory government than a national government in Canberra making decisions about most Territory matters. I would suggest that such regionalised decisions making is good for two basic governance reasons: one, decisions should be made as close as possible to the people affected by such decisions — we might call this the ‘democratic subsidiarity principle’; and two, there are sound policy reasons for giving political communities responsibility for policy making in areas that affect them — this can be instrumental means of ensuring better policy outcomes.

Statehood and federalism are no doubt good for the Northern Territory. But in a significant way the Northern Territory’s achieving statehood is also good for Australian federalism. It is a vote of confidence in that full membership is highly prized. But an

additional Northern state can contribute to balancing the tendency to ever increasing centralisation. Working through the ways this might occur is the subject for another paper: I simply note it as significant point that is often overlooked.

The Senate and Statehood

One key issue to do with the Northern Territory’s achieving statehood is its representation in the Senate. This is worth examining because there is a widespread assumption that the Senate is, or is supposed to be, a states’ house. This assumption has muddied consideration of Territory representation in the Senate and could cruel negotiations between the Northern Territory and the Commonwealth over statehood.

If the Senate were indeed a States’ house then that might bolster the Territory’s claim for equal representation along with other States. Against this, the Commonwealth might well claim that giving the Territory twelve Senators to represent less than half the people of any other State would be too much of a distortion to the status quo. Of course, the current Liberal-National Party Coalition government might see a partisan advantage in being able to win a majority of those seats, or alternatively both major parties might see advantage in using this as a means of expanding the House of Representatives which is constrained by the nexus requirement of having twice the number of members as the Senate.

The Senate should properly be seen not as a States’ house but as part of the national legislature with almost exactly the same power and functions as the House of Representatives. Its electoral base is the State unit, just as that for the House of Representatives is the local constituency. But electoral base does not determine purpose or function: the Senate is not a State house any more than the House is a local house. Both are parts of the national legislature with a national legislative function. That was the way the American Senate was designed; in fact, the American founders thought that the Senate would be more likely to have a national perspective because its members would be more distant from the parish pump politics of local constituencies. That was also the way the Australian Senate was designed. Much of the reason why it seems to be different has been because of responsible government which locates the executive primarily in the House of Representatives.

My point is that if the Senate is seen as it properly is — a national rather than a States’ house — then equal representation is not so significant for a new state. If the Senate is not a States’ house, then it would be no reflection on the Territory’s status as a state if it did not have twelve senators. My own view is that the Northern Territory should have about four Senators. Strategically such a small number could often control the balance of power if they voted as a bloc, but of course they would probably replicate the major party division which is an additional pragmatic reason for not having too many.

Republicanism and Statehood

The draft Territory constitution has been prepared 'within the monarchical structure' because, as Committee Chairman Steve Hatton observes, that is the present structure of the Commonwealth constitution and the existing States. While there might be prudential reasons in taking such a tack with the present Howard government that favours the status quo, the Territory is passing up the opportunity to lead constitutional innovation on the republican issue.

I want to explore two questions in this regard: one, whether and to what extent it can be said that Australia's federal constitution is a monarchical structure; and two, whether the Northern Territory could feasibly propose a republican constitution. On the first point, if Australia's constitution is fundamentally republican and only formally monarchical, as I contend, then proposing a republican state constitution is not so radical. And on the second point, I want to suggest that devising a monarchical form for the Territory at this point in time and in light of the process of achieving statehood, which is entirely based on Australian constitutional principles, is contrived and artificial.

A Federal Republic

I have argued elsewhere that Australia's constitution is essentially federal and republican because it is based on the will of the Australian people. It was drafted by elected delegates in the 1897-98 convention, endorsed by the people of the colonies voting in referendum, and included a popular referendum procedure for its alteration in section 128. There can be no doubt that politically it is the instrument of the Australian people.

Lawyers like to make the point that legally the Australian constitution was the instrument of the sovereign British Parliament at Westminster and therefore owes its legal status to that august body — or at least that it did so until the 1983 Australia Acts knocked out that prop. Such a view, however, gives too much weight to a politically disembodied notion of legal sovereignty, and relies on the overly formal Dicean notion that the legal can be dissociated from, and is superior to, the political. This position is fraught with a number of methodological problems: an infinite regress in the chain of sovereignty or otherwise a Dicean assumption that Westminster possessed legal sovereignty. If the notion of sovereignty is to be retained outside discourse about absolute monarchic power, it seems better to use it to refer to the real source of power in a regime and to make the legal derivative form the political, not vice versa.

According to this view, the Australian colonial people were primarily responsible for making their constitution and chose to have it formally enacted by Westminster for reasons of history, sentiment and legal orthodoxy. But that only means that Westminster was formally sovereign because Australians requested and consented to such a procedure.

7 Tabling speech, 22 August 1996, Appendix 10, 8.147 of Report.
for enacting their constitution. It is a moot point whether the British would, or could, have forced the Australians to do it that way had they been unwilling, or, even more unlikely, whether the British could have foisted a very different kind of constitution on Australia. In other words sovereignty lies primarily in the political will and consent of the people, and the formal legal means they chose to enact their constitution is subsidiary to that.

To understand the monarchical trappings of the Australian constitution we need a basic distinction, such as that of Walter Bagehot, between real or efficient on the one hand and formal or decorative on the other\(^\text{10}\). Bagehot explained that once such a distinction were made, even in 1867 Britain was a disguised real republic with the formal trappings of monarchy. The Australian constitution was more so in 1901, and today even the formal vice-regal part has undergone something of a Bagehotian metamorphosis and represents the Australian people probably more than the Queen.

The current republican debate is about whether to jettison the formal vestiges of monarchy and regularise the head of state as an overtly Australian republican office. It is significant as symbolic politics, although both the republican and monarchist sides tend to overstate their cases in order to mobilise support for what is a rather modest but technically difficult change. It is technically difficult because the whole executive chapter of the constitution is couched in formal monarchical language which does not describe how the actual executive works. Amending such archaic language cannot encapsulate a precise change, and keeping such language is problematic if formal monarchy is to be eliminated. Many prudent Australians would be unhappy with leaving a new Australian head of state with open-ended powers described in the constitution in absolutist terms.

**A Northern Territory Republic**

However that may be, the Northern Territory has no monarchical tradition in its current instrument of self government. So why introduce one at this point? The monarchical trappings that have been included in the Northern Territory constitution are not needed and add little to the document. Why not craft the head of state that is necessary to an Australian 1990s constitution for a new state that has a tradition of a Commonwealth appointed administrator but not a monarchical surrogate?

This could be achieved by simply deleting reference to the Crown in section 4.1, which in any case adds nothing to ‘the duties, powers, functions and authorities of the Governor’. Section 4.2(1) specifying ‘appointment by Her Majesty on the advice of the Premier and who shall hold office during Her Majesty’s pleasure’ would obviously need to be changed. A simple alternative might be nomination by the Premier, endorsement by a special majority of Parliament and swearing in by the Chief Justice of the Northern Territory for a period of say 5 years. Removal could also be provided for through the requirement of a formal resolution by a special majority of Parliament. That the monarchical bits can be so easily dispensed with underlines their incidental status within the constitution.

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Entry of the Northern Territory into the Australian federation with a Governor representing the people of the Territory and sworn to uphold its constitution and laws would be entirely appropriate. That would be developing the existing office of Administrator and adapting it to an independent head-of-state role. Otherwise the Territory constitution is thoroughly republican, being based on the will and consent of the people of the Territory.

Entry of a republican Northern Territory into the Australian federation would cut through all the meta-legal casuistry about whether there could be a republican commonwealth and some monarchic states or vice versa. So I think it would be shame if the Northern Territory did not also seize the opportunity to lead Australian constitutional debate in this way. If I am right, it would be truer to its governmental traditions and aspirations to so proceed.
Session 5

Citizens' Participation in Government
Public Participation in the Constitution Writing Process in South Africa

BHADRA RANCHOD

It is a great privilege to be with you today and in particular to share with you the experience of South Africa in respect of the participation of our citizens in the making of our constitution. We have a document which has a Bill of Rights in terms of which human dignity, equality and freedom are provided for. But the making of our constitution, which we proudly call "The Peoples' Constitution", has a long history. If I may be permitted, I would like to briefly sketch the history of my country which some may be familiar with.

South Africa became a State with the union of four provinces in 1910. The constitution, which was approved by the British parliament, denied basic human rights to people of colour. In spite of pleas by black leaders, including Mahatma Gandhi, the British decided to give the seal of approval to a document which was agreed upon at a National Convention attended only by white leaders. At the time racial discrimination was entrenched. Already, in these early days, there were organisations which opposed discrimination and pleaded for a more just society.

In 1948, a deliberate policy of legally entrenched segregation came into force and was rigidly and ruthlessly implemented over several decades. When South Africa left the Commonwealth in 1960, a new constitution providing for a Republic was adopted by an all-white parliament. But already in the 1950s there was a very strong peoples movement. On 25 June 1955 the Freedom Charter was adopted by the ANC and other democratic organisations which advocated equal rights for all South Africans and proclaimed that the country belonged to all who lived in it. That spirit remained alive. The desire to obtain equality through the years was met with a series of repressive measures which included the banning of the ANC and several other organisations.

With the release of Nelson Mandela in 1990, the government, headed by the newly elected President Mr F W de Klerk, accepted the need to end the apartheid system and reach a negotiated settlement with the disenfranchised majority. This resulted in formal negotiations which were held between the government, political parties represented in parliament, the black homelands, the ANC and the Pan-Africanist Congress. This was a compromise arrangement in order to allow for some basis on which to end the apartheid system. The Process, known as CODESA, had its difficult moments but in the end a draft constitution was agreed upon which received parliament approval in 1993. In terms of this constitution the first democratic elections were held in April 1994.
This Interim Constitution provided that a Constitutional Assembly, consisting of the members of both houses of parliament, write the final constitution for South Africa which had to be completed within two years. The task was a mammoth one noting that the Interim Constitution had not been given time to operate. But there was the political will that the constitution had to be written by the truly elected representatives of the people after wide consultation.

Parliament, in addition to its traditional role had to double up as the Constitutional Assembly. The challenges were enormous. A separate secretariat had to be created which had to ensure that this task could be executed within the short period given. Six committees were established, each of which dealt with a specific area. I, for example served on a committee dealing with the structure of government and also on the human rights committee. Each committee was assigned a group of experts, both local and from overseas.

The Product that emerged is unique in that there was a very wide measure of public participation aimed at drafting and adopting a constitution which would enjoy the support and allegiance of all South Africans. Obviously the members or these committees were representatives of political parties and the positions that they took on various issues was important. But from the outset, it was agreed that civil society and the South African public should be involved.

In order to achieve the maximum public participation, the following strategies were employed

- a community liaison program;
- a media campaign;
- an invitation for written public submissions from the public.

Let me deal with each of these briefly.

With community liaison, the object was to have an outreach programme to consult with the population at various levels and at various stages of constitution making. It was obvious that we could not reach every single South African or test their views within the short period of two years. Further we had to reach people living in rural areas who were disadvantaged; who were poor, who lacked access to electricity and who had low levels of literacy. Amongst the methods used to reach these people was the organising of a series of Constitutional Public Meetings. At these meetings, members of civil society and the public were invited to make their views known. The meetings were held in various part of the country and a total of 717 organisations participated.

There were also sector programmes at which specific issues were discussed and which took the form of involving leaders in such sectors as business, traditional authorities, labour, women and so forth. What needed to be done was to determine which individuals and organisations would best represent a sector, as well as choosing speakers who were politically acceptable and who could debate relevant issues. In this way we were able to flesh out complex issues. These hearings enabled representatives from each sector to make their input and submissions. There were two phases of sector hearings. The first involved 596 organisations, while the second phase focused on the draft itself.
An important aspect was the Constitution Educational Programme which had to take account of the large rural and disadvantaged communities and how to get them to make an effective input into constitution-making.

Another point worth noting is that a database of civil society structure had to be complied. It was recognised that the public participation programme could not be based entirely on the media strategy, and this has lessons for the future. Nonetheless, the media played a vital role. The Constitutional Assembly embarked on a national advertising campaign and also made use of the print media, radio and television. The primary objectives were

- inform
- educate
- stimulate public interest
- and to create a forum for public participation.

A very striking feature of public participation was to invite written submissions from the public. In total, more than 2 million submissions were received by the Constitutional Assembly.

After the adoption of the constitution more than 4 million copies were printed which were distributed to all households. A special feature of the South African Constitution is that it is written in plain English and is available in all eleven official languages. Through the media and the educational system there are on-going efforts to market the constitution to all the people of South Africa. Let me end by quoting the Preamble to our Constitution.

"We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people."
Working for all the People
Towards a Bipartisan Approach to the Territory's Constitution

JOHN AH KIT

Ladies and gentlemen

May I first thank the Larrakia people for their welcome to us at this conference, which is being held on their traditional lands.

I am sure that, no matter which side of politics you support, all of us are glad the recent election is finished.

Whether it was my ugly mug – or that of Shane Stone – on the TV, posters and in the papers in the last few weeks you'd be thankful that the rough and tumble and dirty tricks of a modern democratic election is over – at least until next time.

But it would be a mistake to think that the business of politics is over. Elections are only a small aspect of the political process, no matter how vital they are to the underpinnings of democracy as we understand them in Australia. And, for that matter, politics is not something that just happens 30 days a year in the Legislative Assembly.

Politics is about the full spectrum of activities across all the organisations, communities and institutions of society.

These activities range from the small scale decision making and planning processes that might take place on an Aboriginal homeland centre in my seat of Arnhem, through to the machinations of the bean counters in the Treasury Department or the considerations that are brought to bear by justices of the Northern Territory Supreme Court of Appeal.

Most of us don't care what happens in these processes, either because they don't appear to affect us directly, or because we feel they are none of our business.

But nevertheless, from the family or clan right through to the full apparatus of government, the success of the political process relies on broad agreement over the rules under which we operate and, in the context of government, the document we rely on mostly is a constitution.

It is such a document this conference is now considering, and one will have to be considered by all the people of the Northern Territory as we approach statehood.

I won't go into a detailed analysis of the history of the development of a state constitution for the Northern Territory, or indeed much of its content: all of those things have been discussed by others here.
Instead, I want to concentrate on the importance of arriving at a state constitution which achieves the "broad agreement over rules. I mentioned a moment ago, I believe the success or failure of our quest for statehood will depend on whether we can achieve consensus over what Steve Hatton has described as "an inclusive document which all sections of our community can embrace as their own".¹

This consensus is important not just because it is necessary that we have a constitution that has overwhelming community support, but also because we must demonstrate to the rest of the nation that, whatever other political differences we might have, we are united in our endorsement of the general rules by which we seek to be governed as a state.

The only way this can be achieved is if all of us as Territorians participate, and work together to create and endorse a constitution that reflects the diversity of interests we have.

It is simply not a matter of party politics.

We welcome and endorse the Chief Ministers pledge to achieve statehood by the year 2001, it is not something that can be delivered as the sole gift of one or other political party: it is something that can only be activated by all of us, in a spirit of bipartisanship that go beyond party politics.²

This is particularly true if the Aboriginal citizens of the Northern Territory are to endorse a state constitution.

For example, recent claims that the last election gave a mandate over particular matters may appear to be an appropriate spin for an election post mortem, but cannot be extended to the way we approach a document as profoundly important as a constitution, which must be approached in a thoroughly bipartisan manner.

With over a quarter of the population, and with ownership interests in about half of the Territory, indigenous Territorians must feel that they have as much "ownership" of the state's constitution as other Territorians.

This was noted after the lengthy consultations by the Sessional Committee on Constitutional Development, of which I am a member. It's Chair, Steve Hatton, has noted:

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² Stone, S, Victory speech, 29 August 1997, unpublished:

"And now we have the great challenge of Statehood, Statehood for the Territory by the Year 2001.

"As I said, the CLP delivered self government and the CLP will deliver Statehood for Territorians."

It should be noted that there is no difference between the CLP and Territory Labor as to the timetable of statehood: both want it by 2001. See, for example, "Australia's Seventh State", ALP, July 1997.
Consistently, Aboriginal people expressed strong common concerns, and even fears, in the progress of moving to Statehood and formulating our Constitution.

They were fearful that if the Aboriginal Land Rights (Northern Territory) Act became a Northern Territory rather than federal law, it could be repealed or emasculated, and the gains they have made over the last 20 years would be lost.

Similar fears were expressed with respect to the protection of Sacred Sites, and the continuation of their rights to use their own language, practice their own religions, culture, ceremony and traditions.3

Let's face it. Aboriginal people have no good reason historically to regard the actions of politicians – let alone when they start touting a constitution – with anything other than suspicion.

Mr Hatton went on to remind members of the Legislative Assembly that:

...It is still within living memory when Aboriginal people:

- were denied the practice of their customs and religion;
- (were) denied the right to use their own language;
- were dispossessed of all their traditional lands;
- (were) not recognised as citizens of Australia;
- were wards of the State: and
- were not even permitted to act as responsible adults.

This included the denial, in too many cases, of the right to bring up their own children or to pass on the heritage to their children.

Is there any wonder that such people would seek any opportunity to ensure that such circumstances could never be repeated?4

So as a result of these expressed fears, the proposed Constitution has been quite deliberately and carefully framed to take into account the concerns expressed by Aboriginal people over their existing rights in Commonwealth law. This has been done through entrenchment within the framework of the Constitution of legislation such as land rights and sacred sites.

Again, from Mr Hatton:

The final draft contemplates that, by agreement with the Commonwealth, the Land Rights Act in its current form will be re-enacted as an Organic Law of the Northern Territory.5

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5 Ibid. p.22.
This innovative approach, whereby land rights and sacred sites have guaranteed entrenchment and protection under the proposed Constitution would be unique not just in Australia. It is a Territory response to the unique nature and composition of our society.

It is my view that, with a few arguments around the edges that will inevitably occur, the proposed draft Constitution represents a high point similar in importance to the original enactment of the Land Rights Act in 1976 – in the legislative and constitutional recognition of indigenous rights in Australia.

But if a week is a long time in politics – a year is an eternity.

Since the tabling of the draft Constitution in August 1996, there have been major moves by some in politics to substantially alter land rights laws in the Northern Territory.

In this context, I would note particularly the review of the Land Rights Act currently underway by the federal minister, Senator John Herron.

The promise last year was that the draft Constitution would entrench, in its current form, legislation relating to land rights – yet already all the signals are that there is the potential for this legislation to be weakened by Canberra.

On my understanding of the review of the land rights legislation, for example, proposed constitutional developments in the Northern Territory are not to be considered despite the fact that the land rights legislation and its proposed entrenchment in the Constitution is acknowledged by the sessional committee as a lynchpin of its acceptance by Aboriginal people – over a quarter of our population.

This is an astounding but all too familiar situation: once again Canberra is considering reducing the rights of Territorians.

This time, Canberra appears to be seeking to reduce Aboriginal rights that were to be guaranteed under our state Constitution. The extensive consultation process of the Northern Territory’s sessional committee on constitutional development, and its innovative approach to entrenching Aboriginal rights as they currently stand, is in danger of being dumped by Canberra.

This is not the way to persuade Aboriginal people of the Territory that the proposed Constitution might be anything other than a Trojan Horse – a way in which they might lose their existing rights by stealth should the Territory become a state.

The good work of the sessional committee may well have been for nothing.

Make no mistake.

If we do not achieve consensus our constitution will be fatally flawed. It will be flawed because it lacks the necessary broad endorsement by the peoples of the Northern Territory that is vital if we are to have an agreement over the rules by which we are to be governed.

And if we are unable to demonstrate such an agreement, we will have little hope of gaining statehood in the short term for the simple reason that representatives of other states in the Federal parliament – particularly in the Senate – just will not wear it. The irony would be that it might be the same parliament in Canberra that has contributed to
disunity over our Constitution by reducing the rights of Territorians even before statehood is a reality.

It seems clear to me that Mr Hatton was correct when he pointed out that:

Seeking to develop an approach which recognises the diversity of backgrounds of Territorians, whilst constructing a framework for our common future, has been one of the greatest challenges for the Sessional Committee.

The answer will serve either to divide or unite us. It will either be the driving force for, or the greatest obstacle against, achieving our goal of Statehood. 6

The Darwin I grew up in during the 1950s and '60s was, in many senses, a microcosm of the Territory today. The cultural diversity we see now had its origins in a complex history of migration to here from Asia and Europe and its interplay with the indigenous inhabitants of the place. So I grew up with Fillipinos, Chinese and Malays; with Greeks, Italians and Anglos. I played footy and basketball with them, went fishing and drinking with them; and, while I could never pretend to be a great scholar, went to school with them.

Things back then were not all bread and roses for all the groups I mentioned, particularly Aboriginal people. But it was the basis for what we have today: a fairer and more tolerant society than anywhere else in Australia.

It is worth noting that as the Territory has moved towards statehood over the last quarter century, our elected representatives have been more diverse than anywhere else in the nation. Not only have we had a Chinese Australian as Lord Mayor of Darwin, but six of the eight Aboriginal people ever elected in Australia as members of Legislative bodies have been Territorians. 7

The cultural diversity we enjoy today is unique in Australia. It is reflected in the draft Constitution and should be protected – not whittled away by Canberra. It is a document that, as currently framed, would be working for all the people of the Northern Territory.

I know for myself. I support statehood and will dedicate the next four years – in a bipartisan way – to working towards the Territory becoming Australia's seventh state.

I mentioned at the beginning of this talk of the importance of the welcome given us by the Larrakia people. The Larrakia are a people integral to the fabric of Territory society. The Larrakia is one of the many Aboriginal groups of the Territory that have been joined by groups and nationalities from all over the world over the last century or so.

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6 Ibid, p.6-7.

Under the proposed Constitution, none of these groups is to have their rights subjugated in the new state of the Northern Territory.

Unless Canberra dictates otherwise.

Thank you.
The Transition to Statehood

A Question of Legitimacy and the Public Process

RICK GRAY

This paper will argue that constitutional legitimacy in this contemporary age in western liberal democracies can only be achieved through the process of public-participation in the constitution-making process. It examines the history of plans for statehood, concentrating on the issues of process and public participation.

In bringing this into perspective the paper touches briefly on the experience of Alaska's and Hawaii's admission into the Union of the United States of America as States in their own right (they being examples of sub-national polities being absorbed into a federal structure). A brief outline of Australia's experience with the processes of constitution-making. The Northern Territory's pursuit of statehood and the mechanisms of public-participation that have been canvassed by the Sessional Committee on Constitutional Development (The Committee). The present situation and the various options that may be available to the Northern Territory and what the future may hold for the Northern Territory and the process constitution-making.

Over the last fifty years, since the end of World War II, the World has seen major changes within nation states that have tested the processes of legitimising political actions. For example, third world decolonisation and the break up of the former Soviet Union have been in the forefront of political change and constitutional reform. It has dominated the commentary and dialogue in the formulation of new nation states in recent times. However, political change has not only occurred within second world communist states and third world less developed countries, but has also occurred within liberal democracies. A notable example is South Africa, where it rejected the constitutional and political institutions that represented and maintained apartheid, by establishing a new constitutional democratic regime. Constitutional change and reform has also occurred within in other western liberal democracies such as, Canada and the United States of America and is an ongoing process. They are also constitutional democracies, each having a federal system of government.

Each of these federations have undergone the process of testing the legitimacy of political actions through public participation, and in particular in addressing the recognition of sub-national polities within their respective constitutional, legal and political frameworks. These processes of legitimising political actions have been through the use of elections, referendums and sometimes constitutional conventions. For example, in dealing with the secessionist issues surrounding Quebec, territorial government for Nunavut within Canada and the admission of Alaska and Hawaii into the
Union of the United States of America. A United Nations supervised role over the Cocos Island community with referendum was held in 1984, resulting in integration with Australia.\textsuperscript{1} Referenda for the devolution of powers within the United Kingdom to Scotland and Wales are about to be held.

Legitimacy and sovereignty of the people in the affairs of state impinge upon the sources of power or authority that emanate or have evolved through political structures and institutions which the citizens of that state have recognised and accepted as being legitimate.\textsuperscript{2} The stability of any given democratic political system relies upon its effectiveness to perform satisfactorily in the eyes of its citizens.\textsuperscript{3}

The use of mechanisms such as elected constitutional conventions and referendums for both constitution-making, revision and reform has been a strong feature at all levels of society (federal and state) within the political system of the United States of America. It is associated with the concept that political authority is derived from the people. It forms the basis of America's constitutionalism. Under the American constitutional arrangements\textsuperscript{4}, Congress has power to admit new States into the Union and to "dispose of and make all needful Rules and Regulations the Territory or other Property belonging to the United States" (Bell, 1984: 7). When Alaska (1958) and Hawaii (1959) gained admission to the USA federation as States in their own right\textsuperscript{5}, wholly elected constitutional conventions and referendums were employed.

The American Constitution does not provide a procedure on how States are to be admitted into the Union, the mechanics being entirely left to Congress. As a result, two basic methods were developed:

Initially as provided by the Northwest Ordinance, Congress would authorise a territory to initiate the steps toward statehood. Once the territory drafted a constitution and set up a government, the Congress would pass a second statute admitting the territory as a state. On the other hand, the respective

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\textsuperscript{1} Paragraph 4.64 of the House of Representatives Standing Committee on Legal and Constitutional Affairs's Report Islands in the Sun which in part reads:

The UN supervised the Act of Self-Determination of the Cocos Malay community in 1984 by which the community voted for integration with Australia on the basis of complete equality. The Australian Government gave a commitment at that time to bring living standards up to mainland levels by 1994, and steps to ensure this are currently being implemented.

\textsuperscript{2} Connolly comments that,

legitimacy and tolerance flourish when people identify with a plurality of groups and principles; the 'cross-cutting' pressures moderate the intensity of particular interests and modulate social conflicts (Connolly, 1984: 11).

\textsuperscript{3} According to Dahl and Tufte the ideal political system meets two criteria:

the criterion of citizen effectiveness (citizens acting responsibly and competently fully control the decisions of the policy); and the criterion of system capacity (the polity has the capacity to respond fully to the collective preferences of its citizens) (Frenkel, 1986: 32).

\textsuperscript{4} The Constitution of United States of America and the Northwest Ordinance of 1787.

\textsuperscript{5} The majority of States in the USA system were established through the use of constitutional conventions.

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territory would present itself to the Congress as ready for statehood, thus leaving out the step in which Congress passed the enabling act or gave the territory the go-ahead to start meeting the requirements of statehood (Alaska Statehood Commission, 1981: 70).

Both Hawaii and Alaska have adopted the latter method, due to both of them encountering political opposition in Congress to their admission into the Union. Where it was impossible to get enabling legislation through Congress, each of them took matters into their own hands by respectively calling a convention, drafting a constitution and having that constitution ratified by voters in a referendum. Hawaii and Alaska, when incorporated as American territories at the turn of the Century, both have experienced changes within the their respective constitutional, legal, political and social relationships with the federal government. As new self-governing polities, there were great expectations in being a part of the federal system, in that they would be afforded the opportunity to participate equally in all aspects of the socio-political and economic culture of the United States of America. However, as Lipset correctly states, “after a new social structure is established, if the new system is unable to sustain the expectations for a long enough period to develop legitimacy upon the new basis, a new crisis may develop” (1984: 89). As history has shown in the American experience, the process of acceptance of minority groups by the majority was indeed a long and complicated one. Alaska’s repeated demands in securing local control over its fishing resources was probably the greatest unifying issue for statehood, whereas the major difference in regard to Hawaii’s admission into the Union was the issue of racism. America’s experience as a liberal democracy, in admitting sub-national polities into its federal structure, provides a relatively good example and benchmark for Australia’s attempt, in admitting the Northern Territory as an equal partner into its federal structure. The long statehood campaigns of Hawaii and Alaska do provide real examples for the Northern Territory. They have highlighted the complex elements that surfaced and impacted on the socio-economic policies, political actions and outcomes at both the federal and local levels of government.

Constitutional Conventions in Australia have only been used at a federal level, but have not been employed at a State level. Prior to federation in 1901, Australia’s self-governing colonies — later the ‘Original States’ — were established under Imperial legislation; the method of constitutional conventions or referendums were not used, although State referendums have occasionally been used since on particular issues. Towards the end of the decade leading up to federation, there were a number of enabling Acts within the Colonies for the election of delegates to participate in a federal Convention which had the task of framing a constitution for a new Australian federation. Three major sessions of the Convention were held; the first in Adelaide 1897, the second

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6 There have been recent developments in Western Australia following the Report of the Commission on Government inquiring into the role of government and accountability including to inquire into the adequacy of current procedures for constitutional change. Labor MP John Cowdell has also put a motion in the Upper House calling for a constitutional convention to draw up a new constitution (Sunday Times, (Perth) • 13 April 1997).

7 For example, the recent NSW referenda on four year fixed Parliamentary terms and the independence of the judiciary.
in Sydney of the same year and finally the third session in Melbourne in 1898, which brought the process to an end. From all of this emerged a draft constitution which was eventually accepted by the Australian voters at referendums organised in each Colony and subsequently enacted into law by the Imperial Parliament⁸, and coming into effect on 1 January 1901. Since 1901, successive Australian Governments have established and implemented various mechanisms to address constitutional change, such as Royal Commissions⁹, Joint Parliamentary Committees¹⁰, Constitutional Conventions formed of nominated delegates from Australian Parliaments¹¹ and Constitutional Commissions made up of appointed delegates.¹² Referendums are of course necessary for any express alteration of the Australian Constitution.

Australia’s most recent attempt is the upcoming Peoples Convention on an Australian republic, announced by Prime Minister Howard in Parliament on 26 March 1997. Due to the delay in the Senate in accepting the non-compulsory postal voting element of the legislation, the Convention is likely to commence in the first half of next year. The Convention is to be represented by an equal number of elected and nominated delegates¹³ and it will sit for ten days. This Convention, for the first time since the lead up to federation in 1901, will have an elected component. Of the one hundred and fifty two member Convention, seventy six candidates as delegates will be elected across the Nation. However, unlike compulsory voting at federal elections, voting will be done through a postal voting system and it will be voluntary. In his second reading speech to the bill, the Prime Minister in discussing the Government’s reason in holding a partially elected and appointed Convention commented that,

> if there is to be any change to our system of government, that change is achieved through a process that unites rather than divides the Australian community...We recognise that if people are really to have a say, to participate in the debate in some meaningful way, they must have an informed appreciation of the issues they are

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⁸ The Commonwealth of Australia Constitution Act, 1900.
⁹ The Royal Commission on the Australian Constitution (1929).
¹¹ Various Australian Parliaments resolved to join together in the Constitutional Convention to review the Australian Constitution. The Convention made up of nominated delegates, including delegates from the Northern Territory, first met in Sydney in 1973. It continued to meet on various occasions up until 1985, where it had lost the support upon the election of the Federal Labor Government in 1983.
¹² In 1985, the Federal Government established an appointed Constitutional Commission to review the Australian Constitution and its final Report was delivered in 1988. A few of its recommendations for change were then put to a national referendum in conjunction with some other proposals, but all failed.
¹³ The appointed delegates will include: 40 parliamentary delegates - 20 from state and territory parliaments, 20 Commonwealth parliamentary representatives; 36 non-parliamentary delegates will be directly appointed by the Government with a view of achieving a broad representation of Australian society; 76 elected delegates divided as follows: 20 (New South Wales), 16 (Victoria), 13 (Queensland), 9 (Western Australia), 8 (South Australia), 6 (Tasmania, and the Australian Capital Territory and the Northern Territory — 2 each.
being asked to decide (Australian House of Representatives Hansard, 26 March, 1997).

Although not yet a State, the Northern Territory has been the only existing jurisdiction since federation that has actively been pursuing a change in the political and constitutional map of Australia, by way of a grant of Statehood. The Northern Territory, a Commonwealth territory since 1911, gained limited self-government in 1978 and has advocated since 1985 that it should become a State within the Australian federation by 2001.

Since achieving self-government, the Northern Territory has had to contend with an environment of Commonwealth constraint and power. It has been a major policy initiative of the Territory Government to push for greater control and 'autonomy' from the Commonwealth. Issues relating to constitutional inequality, lack of representation in the Senate, lack of a sustainable economy based on industry and manufacturing, Aboriginal land rights and administration, control of Commonwealth national parks and uranium mining, are all factors that impinge on the Territory's statehood ambitions. This has often led to conflict between the Northern Territory and the Commonwealth Governments, notably in areas where the Commonwealth has clear authority, such as industrial relations, Aboriginal land rights and national parks under its jurisdiction and uranium mining. All of these areas impinge on the Northern Territory Government's 'executive authority' to pass laws under the Commonwealth's Northern Territory (Self-Government) Act of 1978 (the Self-Government Act). The Self-Government Act is in many respects the Northern Territory's constitution, — which is in the form of ordinary Commonwealth legislation — but it only gives the Northern Territory limited statutory 'state-type' powers. There are a number of distinct disadvantages in having the Act operate as a 'de-facto' Northern Territory constitution. Being ordinary Commonwealth legislation, it is capable of being repealed by normal legislative processes, it cannot be changed by the Northern Territory Legislative Assembly, and there is no legal requirement on the part of the Commonwealth to consult with the Northern Territory in respect of any change or amendment.

The recent overturning of the Northern Territory's euthanasia law¹⁴ by the Commonwealth Parliament¹⁵ has highlighted the constitutional weaknesses of Northern Territory self-government. Although the Northern Territory Government has expressed outrage and condemnation of the Commonwealth's action, local support and impetus for the preservation and enhancement of the democratic rights of the citizens of the Northern Territory as well as for further constitutional development and Northern Territory statehood has been mixed and often lukewarm.

As part of the process in the transition to statehood the Northern Territory's Legislative Assembly established in 1985 a Parliamentary Committee¹⁶, which had the primary task of preparing a draft constitution and to make recommendations on the method and

¹⁴ The Rights of the Terminally Ill Act.
¹⁵ The Euthanasia Laws Act 1996.
¹⁶ The Select Committee on Constitutional Development, which changed its status in 1989 to the Sessional Committee on Constitutional Development.
procedures in adopting a constitution for a new State. In its Interim Report\textsuperscript{17}, tabled in the Legislative Assembly on 2 March 1995, the Sessional Committee on Constitutional Development (the Committee) recommended that a representative 'Territory Constitutional Convention' be held to finalise the draft Constitution, and that a referendum be held within the Northern Territory to adopt that instrument.\textsuperscript{18}

In 1986, the new Chief Minister Steve Hatton (1986-1988), took over chairmanship of the Committee and in that same year mounted a concerted campaign in support of a grant of statehood to the Northern Territory. As part of the 'Towards Statehood' campaign strategy, his Government adopted three broad objectives:

(1) the attainment of a status which provides constitutional equality with other States;
(2) political representation in both houses of the federal parliament in particular, equal representation in the Senate; and
(3) the settlement of secure financial arrangements with the Commonwealth that apply similarly to other Australian States (SCCD, 1996c, Ch.1: 72).

Chief Minister Hatton was very conscious that public participation, in the constitution-making process and the involvement and support by all of the groups that influence and represent the diverse Northern Territory society, were a critical element if statehood was to be achieved;

The new state constitution must be developed within the Territory and not imposed from outside by the Commonwealth...it must be acceptable to and accepted by the majority of Territorians...No one, therefore, should doubt our allegiance to full and open consultation in the formulation of the constitutional centrepiece of our future state. It will be demonstrably the Northern Territory people’s constitution (SCCD, 1996c, Ch.1: 77).


\textsuperscript{18}In tabling the Interim Report the Chairman of the Committee, Steve Hatton, a former Chief Minister and now a Minister in the present Government, elaborated on the work of the Committee;

the committee has drawn on the historical aspects of the Australian and American experience of the establishment and running of constitutional conventions, in particular the Australian constitutional conventions of the 1890s leading up to federation in 1901, and the constitutional conventions that admitted Alaska and Hawaii as states of the union in the United States in the 1950s. The approaches taken by the respective countries in adopting a constitution were similar in that conventions were held with an elected membership, culminating in referendums. No doubt, the underlying democratic principles of involving the people in the process did play an important role in legitimising and recognising the constitution as the foundation of the system of law and government (Sessional Committee on Constitutional Development (SCCD), 1996c, Ch.4: 30).
Taking into account the Territory Government's statehood objectives, the Committee, in drawing upon the Alaskan experience in implementing the preparation of a new State constitution, endorsed a three staged process for adopting a new State constitution:

(i) the Committee will prepare a draft constitution for presentation to the Legislative Assembly. Options, where necessary, will be included;

(ii) the draft constitution will be put before a Territory Constitutional Convention. The Convention will be established by appropriate action of the Legislative Assembly and will include broad representation from across the Northern Territory community. It will receive the recommendations of the Legislative Assembly following debate on the Committee's report, will discuss the proposals and ratify a final draft of the constitution;

(iii) the constitution as ratified by the Convention will be submitted to a referendum of Northern Territory electors for approval (SCCD, 1996c, Ch.1: 77).

The Committee, in addressing the method and procedures that are available under the Australian Constitution\(^{19}\), envisaged two concurrent courses of action that should take place to assist in the transition to statehood:

(a) the preparation of a new State constitution [already dealt with above]; and

(b) the negotiation and conclusion of a Memorandum of Agreement between the Territory and Commonwealth Governments, incorporating the terms and conditions of the proposed grant (SCCD, 1996b, Ch.3: 3).

The late 1980's was also a period of intense activity in which much of the promotional work on constitutional development was carried out by the Committee. It had acquired its own staff and budget, discussion and information papers were issued, submissions invited and received, and public hearings held — the busiest time being 1988/1989, when 54 Committee meetings were held in most of the Aboriginal communities in the Northern Territory.

On 2 March 1995, the Committee tabled its Interim Report on a proposed Territory constitutional convention, reconfirming its endorsement to the three staged process for adopting a new State constitution and to facilitate the preparation and passage of the necessary legislation. The Report brought forward fifteen recommendations. The primary recommendations being, that a representative 'Territory Constitutional Convention' be held to finalise the draft Constitution and that a referendum should take place within the Northern Territory to adopt that instrument, after debate in the Legislative Assembly (SCCD, 1995: 10, 17). The Committee also recommended, that

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\(^{19}\) The Committee was aware that a state could either be created by the Commonwealth Parliament under section 121 of the Australian Constitution, on such terms and conditions as it thinks fit, including the extent of representation in either House of Parliament or by having a national referendum held under section 128, to alter the Constitution in giving a grant of statehood. Both avenues require Commonwealth legislation to bring them into effect. The Committee favoured the section 121 method, because the record of success of referendums held under section 128 has not been high.
the proposed seventy-four member Territory Constitutional Convention should comprise of at least three-quarters elected representatives plus community nominees, plus the Chief Minister, the Leader of the Opposition and the six members of the Committee:

As to the size of the total membership of the Convention, the Committee considers that the acceptable range is between 50 and 100 representatives...it would be possible to have 10 electorates of five representatives each, electing a total of 50 representatives, plus, say, 16 nominated representatives, the members of the Sessional Committee, including the then Chief Minister and Leader of the Opposition, making approximately a 74 member Convention. This total is more than the number of delegates used for the Convention for the original USA Constitution and the Alaskan Constitution, but is still a manageable size (SCCD, 1995: 13).

In arriving at this decision, the Committee was conscious of the fact that public input and participation in a forum was an essential element in developing a 'home-grown' constitution.20 A number were options were canvassed in constituting the convention membership — wholly elected, wholly nominated and partially elected/partially nominated. Although the constitutional conventions held in Alaska and Hawaii were wholly elected, the Committee was of the opinion that the Northern Territory's case was different and favoured the third option; a partially elected/partially nominated convention;

The Committee sees considerable advantages in the capacity to nominate representatives of key Northern Territory groups21 onto the Convention in conjunction with elected representatives...It ensures that those key groups having a vital interest in the future of the Northern Territory are not overlooked in the framing and adoption of the new constitution...it [also] sees it as important and that it is consistent with the democratic principle to have a majority of elected representatives

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20 The Committee adheres to the view that a Territory Constitutional Convention is the most appropriate method to frame a constitution for the Northern Territory as the Northern Territory moves towards a grant of Statehood. It provides an excellent means by which a wide cross-section of the Northern Territory community can participate in framing their own fundamental rules as to how the Northern Territory and its government is to operate. Such a Convention would be assisted by the recommendations and publications of this Committee and by the subsequent deliberations of the Northern Territory Legislative Assembly on the Report of this Committee. The Convention's draft constitution would in turn be submitted to Northern Territory electors at a referendum before being presented to the Commonwealth for implementation by the national Parliament as part of further Northern Territory constitutional development. By this democratic method, it could fairly be said that it would be a "home-grown" constitution that reflected the needs and aspirations of Territorians generally (SCCD, 1995: 10).

21 The Committee recommended that Northern Territory groups or organisations be represented on the Convention by an appropriate method of nomination, as prescribed in the legislation, such as from the following: Northern Territory Aboriginal Groups (ATSIC Regional Councils in the Northern Territory, Land Councils); Nominees of Northern Territory Local and Community Government, through the Local Government Association of the Northern Territory; Employer Organisations in the Northern Territory; Trade Unions in the Northern Territory; Ethnic Organisations in the Northern Territory; Youth; and Aged. Any failure to nominate should not invalidate the proceedings of the Convention:
on the Convention. Several ratios were suggested...favouring a mixture of elected and nominated delegates, from equal numbers, to a two-thirds/one-third ratio and a three-quarters/one-quarter ratio (SCCD, 1995: 11).

The Committee was also of the view, that it could not support a wholly nominated convention as it was inconsistent with the principle of representative democracy. In arguing the case in not having a nominated convention, the Committee noted that,

while the method of nomination may be a method of ensuring that specified interest groups in the community are involved, it would have the fatal flaw that it could not be said to be democratic in any sense. It is very likely that it would also meet with objections from those interest groups which failed to be nominated or which considered they were under-represented. It may also meet with objections from the Commonwealth Government, which must implement any proposals for further Northern Territory constitutional development (SCCD, 1995: 11).

The Committee also discussed the question of the extent of involvement that members of the Northern Territory Legislative Assembly should have in the Convention. One option, was the possibility of individual members standing for election and whether they should be delegates on the convention at all. The other option (as mentioned earlier), was to involve the Chief Minister, the Leader of the Opposition plus the six members of the Committee in the Convention. The latter option was endorsed, primarily for the reason that the Committee had been closely involved with the preparation of the draft constitution. Unlike Hawaii and Alaska, the Committee did recommend that candidates standing for election as delegates on the Convention could represent their political affiliations. This was done for the reason that the Northern Territory being a small jurisdiction, politically active individuals are usually well known and "that there should not be any exclusions of specific categories of persons from nomination" (SCCD, 1995: 11). The Committee also recommended that there not be a fixed number of days for the Convention, as was the case of the Hawaiian and Alaskan conventions, where they primarily sat for sixty and seventy five days respectively. Although the Committee saw the advantages of fixing a maximum number of sitting days in bringing to an end the Convention's task of adopting the new constitution, it was also aware of,

the complexities of the Convention's task, particularly in seeking a constitutional settlement acceptable to both Aboriginal and non-Aboriginal people in the Northern Territory, and does not want to be too prescriptive in limiting the Convention time-wise (SCCD, 1995: 11).

Minister Hatton, in commending the Interim Report to Parliament, summed up the advantages of holding a constitutional convention;

Given the view expressed already by this committee that the Northern Territory should adopt its own home-grown constitution, the committee has adhered to the view that a Territory constitutional convention is the most appropriate method by which to frame a constitution for the Northern Territory. The committee is firmly of the view that a convention provides an excellent means of drawing on a wide cross-section of the Northern Territory community that can and should participate in framing the fundamental rules as to how the Northern Territory and its government are to operate (SCCD, 1996c, Ch.4: 32).
Shortly after the tabling of the Committee’s Interim Report, the results of a national poll\(^{22}\) commissioned by the Territory Government, were released. The results found that eighty-one percent of the 1250 respondents surveyed, supported the proposition that the Northern Territory Parliament should have the same rights as the six State Parliaments, with the federal government relinquishing the controls it now exercises over the Territory Parliament. Eighty-six percent agreed that the Northern Territory should become a State, if statehood was the desire of a majority of Territorians. The Newspoll results also found strong support (57%), that Northern Territory constitutional change should occur before there was any national change to a republic. A further twenty percent were in favour of the Northern Territory being granted statehood at the same time Australia became a Republic. During this period, the Committee was considering all the submissions and other responses to its work. Workshops were commenced with regional councils of ATSIC\(^{23}\), and further promotional work was carried out. The Committee followed this up with the first exposure drafts of the new Northern Territory Constitution.\(^{24}\) Subsequently, in November 1996, the Committee tabled and published its major Report on the draft new Northern Territory Constitution, including a final draft constitution\(^{25}\), thus fulfilling a major aspect of its work.

Following submissions from the Northern Territory Government (in 1994) to the Council of Australian Governments (COAG), a joint Commonwealth/Northern Territory working group\(^{26}\) to examine and report on the implications of a grant of statehood to the Northern Territory. Shortly after election of the Howard government, the Final Report of the Working Group was published\(^{27}\) — an excerpt from the Report reads:

> The Commonwealth Government has stated that it will facilitate Statehood for the Northern Territory according to a negotiated timetable through a truly cooperative Federal partnership. More recently, the Prime Minister has indicated to the Chief Minister of the Northern Territory his support on appropriate terms and conditions (Northern Territory Government, 1996: i)

The Final Report discussed in detail the issues and options concerning a grant of statehood to the Northern Territory, although not necessarily favouring the Northern Territory proposals. It did not argue any particular line or conclusion, although it did indicate there were some issues to be resolved, but they were not seen as an impediment to statehood. The Report also identified that there were no financial impediments

\(^{22}\) The poll was conducted by Newspoll Market Research on 24-26 March 1995.

\(^{23}\) The Aboriginal and Torres Strait Islander Commission.

\(^{24}\) See the Exposure Draft - Parts 1 to 7, A New Constitution for the Northern Territory and Tabling Statement (June 1995) and Additional Provisions to the Exposure Draft on a New Constitution for the Northern Territory (November 1995).

\(^{25}\) The Final Draft Constitution was tabled in the Legislative Assembly on 22 August 1996 and a more comprehensive document including amendments to the draft tabled on 9 October 1996, was approved for printing and distribution by the Sessional Committee on Constitutional Development on 11 December 1996.

\(^{26}\) The Northern Territory Statehood Working Group

\(^{27}\) (May 1996)
attached to statehood and that the arrangements governing Commonwealth and Northern Territory financial relations, would not change because of a change in the Territory’s status. The work of the Committee was extensively noted throughout the Report, as were its recommendations for a constitutional Convention and Referendum. The Report identified a number of critical issues in assessing the level of popular support for statehood in the Northern Territory. Of particular importance was the promotion of a comprehensive program of educating the Aboriginal communities (including the wider community) on constitutional issues and matters that pertain to a grant of statehood for the Northern Territory:

It is considered essential that all processes leading to statehood for the Territory are open, frank and honest to ensure not only the support of Territorians but support of all Australians. Aboriginal, ethnic and general community groups must be involved in the development of these programs to ensure they meet the specific needs of the various communities, are culturally appropriate and create a sense of “ownership” on the part of all Territorians of the move towards statehood (Northern Territory Government, 1996: 91).

Recently, in seeking direct negotiations on statehood with the federal Government, the Northern Territory Government was given an assurance by Prime Minister Howard that the Northern Territory will gain statehood by the year 2001. This was later confirmed by all State Premiers, at a recent COAG meeting.28

On 22 August 1996, Chief Minister Stone tabled in the Legislative Assembly a long awaited statement on statehood; The Northern Territory: Australia’s Seventh State. In arguing his Government’s case for statehood, the Chief Minister referred to correspondence from Prime Minister Howard which in part read:

The Commonwealth remains committed to facilitating statehood for the Northern Territory according to a negotiated timetable, which I reaffirmed to the Council of Australian Governments meeting on 14 June 1996 (Northern Territory Legislative Assembly, Parliamentary Record No 24, 22/08/96: 8388).

The question of a Northern Territory Constitutional Convention was also raised with a number of options, ranging from an elected convention, an ‘expanded convention’ held under the auspices of the Committee that would ensure wider community discussion, a ‘Constituent Assembly’ modelled along the lines of South Africa, to no convention at all. In regard to an elected convention, the Chief Minister referred to a series of questions29

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28 14 June 1996. New South Wales initially resisted, but has recently changed its stance and given its support for Northern Territory statehood.

29 A series of questions were raised at an earlier sitting of the Legislative Assembly: Would voting for candidates be voluntary or compulsory? Would voting be proportional or preferential? Would there be any restriction in terms of the candidates who could nominate? What would a convention of this type achieve beyond the exposure draft of the sessional committee? How long would the process take? Will it assist in achieving statehood by the year 2001? How much would it cost? Is a formal process, located primarily in the precincts of the Legislative Assembly, the most effective method of consultation with the people of the Northern Territory and, in particular, Aboriginal Territorians living in remote communities? Would the convention format, which was recommended by the sessional committee, allow widespread public
which raised a number of obstacles in having such a convention. On the option of not having a convention at all he commented that,

one option would be to have no constitutional convention, with the decision-making role remaining with the Legislative Assembly of the Northern Territory. Those who urge this path argue that parliaments are elected to govern and that the prospect of 74 additional salaried members debating a constitution would be difficult to justify...preliminary estimates [provided] by the Department of the Chief Minister and by Treasury...[on holding] such an elected convention would be in the vicinity of $6m to $10m (Northern Territory Legislative Assembly, Parliamentary Record No. 24, 22/08/96).

The Chief Minister did indicate that legislation would be introduced that will provide for one of the options, before any consideration on whether a referendum should be held at all;

in any event...the Northern Territory parliament must be the final determinant of what comprises the constitution before any consideration is given to a referendum of Territory electors on the issue (Northern Territory Legislative Assembly, Parliamentary Record No. 24, 22/08/96).

In a recent ABC radio interview,30 the Chief Minister has intimated the possibility of holding a 'Territory Constitutional Convention' and that he had a bill before him for that purpose. He also discussed briefly a possible further option — which he favoured — that was not addressed by the Committee, namely, the possibility that the elected component of the Committee's recommended partially elected/partially nominated convention, be represented by the existing twenty five members of the Northern Territory Legislative Assembly.31 The Chief Minister did not fully elaborate on the details of his favoured option, other than to say that the likely cost of holding a fully elected convention would be in the vicinity of $15,000,000 and that a convention may be held late in 1997. He also ruled out the holding of a referendum;

There seems to be very little support for the issue of the referendum out there.

Territorians are saying: get on with it and the same way when self-government came,

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31 In arguing for not having a separate election for delegates to the convention, the Chief Minister commented;

Then there is the model of a combined members of the House of the Legislative Assembly, together with community representatives...for example, the Trades and Labour Council would have a representative right through to industry groups, land councils, territory youth...[and there] would be almost equal numbers of parliamentarians...I think the best option is the combined members of the Legislative Assembly, together with the community representative and that gives a holistic approach to a forum that can sit down and can constructively work through the sorts of issues and the very substance of what's going to go in our constitution (Excerpt of transcript of the ABC 8DDD FM Morning Program, 9 April 1997).
that wasn’t the subject of a referendum. In terms of the people’s convention itself, that would be an option that Government could look at.\textsuperscript{32}

One other option that has not been canvassed in the Northern Territory is the holding of a Constitutional Convention, along the lines similar to that of the forthcoming \textit{Peoples Convention}.

No final decision has yet been made and announced by the Territory Government on whether or not there is to be a Constitutional Convention in the Northern Territory. The recommendations of the Committee for such a Convention in its Interim Report No. 1, have still to be given full consideration by the Legislative Assembly.

The Committee has undertaken an extensive information collecting exercise in preparing its recommendations. It has travelled throughout the Northern Territory conducting constitutional awareness programs, prepared a wide range of discussion papers, called for submissions and has held a significant number of public hearings. In promoting constitutional awareness to the Australian population the Committee has developed an extensive mailing list of some 4000 addresses (of which approximately 900 are Northern Territory addresses), targeting specific groups including federal and State politicians and Government departments and instrumentalities, academic institutions, local governments, legal organisations, Aboriginal and ethnic organisations, pressure groups and private individuals who have requested information from the Committee. It also has a comprehensive international mailing list.

The Committee has addressed in depth, as reflected in the final draft constitution, the involvement of the Aboriginal people in the constitution-making process. In its major Report\textsuperscript{33} tabled in the Legislative Assembly in November 1996, the Committee commented on the importance of their involvement;

\begin{quote}
the Committee proceeds on the assumption that it is absolutely essential for Aboriginal people to be involved in the process of further constitutional development in the Territory…it considers that without such involvement, the prospects of achieving major constitutional reform are negligible (SCCD, 1996a, Ch.6: 5).
\end{quote}

The issue of Aboriginal involvement in the future constitutional development of the Northern Territory is unavoidable. The Aboriginal people make up a significant section of the Northern Territory community and have substantial interests and cultural values to protect.\textsuperscript{34}

\textsuperscript{32} Excerpt of transcript of the ABC 8DDD FM Morning Program, 9 April 1997.


\textsuperscript{34} The Northern Territory occupies approximately one sixth of the Australian continent, it is remote and isolated with a small population of 190,000. Approximately twenty seven per cent of that figure are people of Aboriginal descent who primarily reside in the remote areas, whilst the majority of the population balance reside in major urban areas such as Darwin and Alice Springs. Approximately forty-seven percent of the Northern Territory is land that has been recognised or granted under the Commonwealth's Aboriginal Land Rights (Northern Territory) Act 1976, with approximately another seven percent under claim — this figure could be larger,
The divisive issues that are mounting over racial tensions in Australia's evolving multi-cultural environment are not only testing the will and the maturity of the Australian nation to effectively address this issue internally, but are also raising international issues as countries assess Australia's credentials as being a united and tolerant society. Should these issues not be addressed within a positive environment the opposite situation could arise where division, polarisation and confrontation between Aboriginal people and other Australians within the wider community become a reality. The Northern Territory is not immune from all of this and it will have to confront these issues in a mature and open environment if statehood is to be achieved. This adds to the need for the Aboriginal people to be involved in the process of Territory constitutional development. The methods recommended by the Committee for Territory constitution-making should provide good opportunities for that Aboriginal involvement as part of the wider Territory community. In enhancing this involvement there may need to be added a comprehensive education program in Aboriginal communities to gain understanding and acceptance of the complex constitutional issues that are to addressed.

The debate and promotion on statehood over the last twelve years has primarily stayed within the bounds of the Northern Territory's Legislative Assembly. Compared to the USA, this is not a very long time, and the Northern Territory does not yet enjoy the political support at the federal level that was afforded at the national level in the USA in regard to both Hawaii's and Alaska's transition to statehood. Unlike the American experience, the Territory's political representatives are not constituency-based, a fact which greatly assisted Hawaii's and Alaska's pursuit of statehood. Although the Territory representatives in the Commonwealth Parliament represent the Northern Territory, they in effect represent their respective party affiliations. At the national level there has been little support for statehood. Statehood is very rarely presented or discussed in the debates of the Commonwealth Parliament, although, an exception is the recent debacle over the Territory's euthanasia law. But even there, the conventions of self-government received little support and were undermined. The processes of legitimation and public participation by using the mechanisms of constitutional conventions and referenda that were followed in the USA do provide real examples for Australia in admitting the Northern Territory as a state into the federation. Alaska's experience in the holding of a constitutional convention in particular provides a very good guideline for the Northern Territory. This is reflected in the Committee's recommendations on a constitutional convention. Fischer, who was a delegate on the Alaskan convention, recalls a number of specific aspects that contributed to its success, in particular the non-partisan election of convention delegates, the electoral distribution which assured the broadest representation of Alaskan society and the structure and size of the convention itself, which included a number of important sub-committees. Probably the most important factor that contributed to the success of the Alaskan Convention, and one that cannot be replaced in any constitution-making process,

was the fact that it took place before statehood was achieved. As a result, it proceeded outside the realm of conventional political pressures and realities. The

given the recent spate of land claims submitted by the land councils with the Aboriginal Land Commissioner, in meeting the 5 June 1997 deadline established under the Act.
convention was future oriented and had little to do with current affairs: it didn’t affect jobs, business, or allocation of power. Delegates were viewed as a group of idealists working for a great cause and dealing with issues that generated, with few exceptions, no pressures from those lobbies and special interests that regularly pursue their interests at legislative sessions. This kind of total detachment could potentially be dangerous, but when carried out by men and women who were realists as well as idealists, it provided a milieu that engendered freedom and creativity (Fischer, 1975: 186).

There are a number of options that the Northern Territory can pursue in its quest for statehood. Firstly, the Territory Government can continue on its present course in negotiating directly with the federal government on the terms and conditions of statehood, culminating in Commonwealth legislation in admitting the new state into the federation. A factor that may preclude this action is the lack of public participation in the process on accepting and adopting a constitution, thus testing the aspects of legitimacy. Another factor that may preclude the finalisation of statehood legislation, and one the present federal Government has to contend with, is the role of the Senate. Although the Coalition Parties have a majority in the House of Representatives to pass a ‘Northern Territory Statehood Bill’, they do not have that luxury in the Senate, where the balance of power resides in a handful of independent Senators. One issue that the Senate may critically examine, is the protection rights that Aboriginal people have in the Northern Territory under the Commonwealth’s Aboriginal land rights legislation (should that legislation be transferred over to the Northern Territory) and including the level of Aboriginal support and participation in the process. In bringing this into perspective, a report35 submitted to the Territory Government’s Office of Aboriginal Development, in 1995, raised a number of matters in regard to the process that would need to be addressed, before the Aboriginal people would participate:

Any process towards the empowerment of a State needs at the very least the consultation and intellectual consent of the citizens of that proposed State. For without this the State becomes a jurisdiction without the consent of its citizens...The move towards Statehood represents for the Northern Territory a once in a lifetime opportunity to get it right and set the new State on a good course, where all the citizens live under a system of law that not only talks about equality but where there is equality, and where all the citizens live in harmony (1995: 2, 15).

In Australia, the elements of legitimacy are starting to become more apparent at the national level with the upcoming Peoples Convention, where there will be an elected component. Given this approach by the federal Government, it would be difficult to engender Senate support for Northern Territory statehood should a representative Territory Constitutional Convention not be forthcoming. It is to be questioned whether the other models that have been suggested by the Chief Minister for a Territory Convention, reflect the degree of legitimacy that may be necessary for ongoing support among Territorians before any action of the Commonwealth Parliament. Any movement away from a constitutional convention, however established, may be seen by some as a

betrayal of a bi-partisan political commitment that has existed in the Committee since its establishment in 1985.

There is also the option to continue with the existing legislative arrangements — Territory self-government. However, this would appear to defeat the advocacy for statehood that has been generated and supported by successive Territory governments since 1985. The Territory Government has never rejected the concept of ultimate statehood. Nor has the Territory Government rejected the holding of a constitutional convention. On the other hand, some of the participants within the Territory's present political arrangements may want self-government to continue, for the reason that any change to the present 'constitutional' arrangements could conceivably result in some loss of political power and control. It is not yet too late for this view to prevail, although the political signs indicate otherwise. Although the Northern Territory has commenced on a course of action in developing a draft constitution for a new State, and has commenced initial negotiations with the federal Government, the statehood campaign still has along way to go.

The Northern Territory's constitution-making process in the Northern Territory is at the cross roads. The Territory Government is in a position to address a number of options which will test the legitimacy of its future political actions. It has not finalised the process of internal constitution-making, it having only reached the first stage of the three staged public process in legitimising political actions that commenced in 1985 — the preparation by the Committee of the major Report on a new State constitution, including a draft constitution and recommendations for a proposed constitutional convention and referendum. The Territory Government has not yet responded to this draft, nor embraced a decision to hold a convention to adopt a new constitution, let alone to hold a Territory referendum to ratify that instrument. Such a referendum would only be indicative, however, it would show to the rest of the Australian nation, local and demonstrable support for statehood. The current action of the Territory Government in pursing negotiated arrangements between the federal Government, as part of the terms and conditions of statehood, is a legitimate exercise and one that is necessary, if the transition to statehood is to succeed. But it is only one of the two contemporaneous courses of action envisaged by the Committee. The other is the preparation of a home-grown Territory constitution. These two need to go hand-in-hand, one reflecting and complementing the other. Both need to be subject to a public process of legitimisation and acceptance in the Territory community if they are to succeed into the future. This requires that both the process and the end result reflect both our western liberal democratic concepts, and also our idea of a tolerant, harmonious and united multi-cultural Northern Territory community. It is with regard to these factors that the efforts of the Northern Territory and its Government in pursuing statehood will be primarily judged.
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Session 6

Independence of the Judiciary and the Rule of Law
Entrench

To Dig Trenches for
Defensive Purposes?

BRIAN MARTIN

According to Blackstone\textsuperscript{1}:

"A Court is defined to be a place where justice is judicially administered. And, as by our excellent Constitution, the sole executive power of the laws is vested in the person of the King, it follows that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the Crown ... In all these courts the King is supposed in contemplation of law to be always present; but as that is in fact impossible, he is therefore represented by his judges, whose power is only an emanation of the Royal prerogative."

Basic constitutional theory in our tradition and practice, dictates that the judiciary springs from the same fount as the other arms of government, namely the legislature and executive, and is not constitutionally subordinate to either.

At a conference considering "Constitutional Foundations" it is well to remind ourselves of some of the basics. According to Professor Dicey, constitutional law "as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the Sovereign power in the State"\textsuperscript{2}. The Professor was there considering the true nature of constitutional law, and a footnote to his statement taken from Paley, (Moral Philosophy, 1785) reads:

"By the constitution of a country is meant so much of its law as relates to the designation and form of the legislature; the rights and functions of the several parts of the legislative body; the construction, office and jurisdiction of courts of justice."

In England, as we know, there is no single document known as the Constitution, but rather a body of both written and unwritten law and conventions which go to make up its content. As to the written laws, Dicey gives as examples the Bill of Rights, Habeas Corpus Acts, and, importantly for these purposes, the Act of Settlement. As to that Act, there is a most elucidating and entertaining history of the circumstances giving rise to it by the Right Hon Lord Justice Brooke in an address recently published\textsuperscript{3}. Time does not

\textsuperscript{1} Book Three, Chapter Three, p23, 7th Edition.


\textsuperscript{3} Judicial Independence · Its History in England and Wales in "Fragile Bastion", Judicial Commission of New South Wales.
permit repeating much of what his Lordship has to say, but he recounts, for example, that between 1674 and 1688, when there were only twelve judges Charles II sacked eleven of them, and not to be outdone, his brother James II sacked twelve in a period of three years. The system of appointment then was "during pleasure". Clearly, if a judgment did not find favour with the King, then he made his displeasure known by sacking the judge. As to the quality of some of the appointees, reference is made to Scroggs CJKB of whom it is said "His installation speech was a model of obsequious loyalty" and Jeffries CJKB is said to have been of limited knowledge of the law and rose to prominence because of his strict adherence to the court party". All of this occurred during a period of constitutional conflict having to do with power. Where did Sovereign power reside? What was, or should have been the source of supreme law? What power did the Sovereign have to dispense with the law?

To whom were the judges responsible? These are the issues raised and discussed by his Lordship in the context of that age.

It was in that political environment that a committee of the House of Commons drew up heads of grievances to be presented to the new King, after it had resolved that King James II had abdicated. It contained the following items:

"... for making judges' commissions (during good behaviour); and for ascertaining and establishing their salaries, to be paid out of the public revenue only; and for preventing their being removed and suspended from the execution of their offices, unless by due cause of law".

These basic ground rules for judicial independence, as they have been described, were omitted from the Bill of Rights in 1689, but William III respected the constitutional independence of his judges and in due course the Rules were enacted in much the same form in the Act of Settlement. The principles endure to this day. (The 300th Anniversary of the Act of Settlement is fast approaching; it is an event to remember).

The purpose of this brief, excursus into history is to note that not only is the independence of the judiciary a matter long ago established, and that by the instigation of a Parliament, but it is a constitutional principal of the highest order recognised and put in place as an essential part of the working out of the relationship between the legislative, executive and judicial arms of government. They all emanate from the one source, the Crown. The Northern Territory is presently constituted as a body politic under the Crown and, subject only to what may emerge from the Republican movement, I would expect that any new State will be established on the same constitutional foundation⁴.

As demonstrated, it is not necessary that there should be a single document known as the Constitution, such as is embodied in the "Commonwealth of Australia Constitution Act" or a single body of rules "by which the action of the entity concerned is regulated" (McCawley v The King (1918) 26 CLR 9 per Isaacs and Rich JJ at p51). At p52 their Honours observed that in a legal sense, as shown by the judgment in Fielding v Thomas⁵.

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⁴ Northern Territory (Self Government) Act 1978 (Cwlth), s5.

⁵ Final Draft Constitution for the Northern Territory - Report of the Sessional Committee on Constitutional Development - November 1996 ("the Final Draft")
(1896) AC at pp6-11, the Constitution of a colony may be looked for wherever any provision is made for the Constitution of any of its great organs of legislative, adjudicative, or executive power. It was noted that the Supreme Court Acts of Queensland, though not contained in the document labelled as a "Constitution", were, nevertheless, in a legal sense as much part of the Constitution of that State as the Acts relating to the State Parliament. Reference might also be made to Stuart-Robinson v Lloyd (1932) 47 CLR 482 where Evatt J. at p491 spoke in terms allowing constitutional "provisions or terms, wherever found" to come within "The Constitution of each state". Closer to the subject matter at hand, Justice Young in Attorney-General of New South Wales v Ray (1989) 90 ALR 263 at 277 expressed the opinion that s106 of the Commonwealth Constitution "extends to a prohibition on Commonwealth laws which impair the Constitution of the State including the Constitution of its courts". If that be so, then the Constitutional aspects of judicial independence may draw upon constitutive documents other than a formal Constitution. However, the proper recognition of the status of a superior court as an arm of government together with the legislature and executive, demands that it be included in any formal Constitution, as opposed to being a creature of the legislature. I have heard no reason advanced in opposition to that notion. If the opportunity is available, as here, in relation to the Constitution for the proposed new State, it should be taken. On this ground the question posed as the title of my paper is "No". The claim to entrenchment by the Supreme Court in the Constitution is of right. Ideally, the model which entrenches the separation of powers as between the three constitutional arms of government, as established by the Commonwealth Constitution, should be adopted.

The functions which the judiciary perform require its proper recognition. It is those functions which give rise to the need for judicial independence. One of the most important roles of the judiciary is supervisory, that is, the protection of citizens from arbitrary or unlawful action by the executive or its officials. Moreover, there is litigation frequently involving transactions between individuals and government involving questions of both contract and tort in which considerable sums of money can be at stake. The courts are incessantly required to adjudicate upon allegations of criminal conduct made against individuals by officials acting in the name of the State. Justice would not be done, nor would it be seen to be done, if the judiciary was subject to any form of unconstitutional direction or influence by the executive or Parliament of the day. Judges are required to be fair to all parties and to bring a dispassionate and impartial mind to bear upon the issues brought before them. Any such interference or influence by executive government on the judicial process, either direct or indirect, is incompatible with those requirements. Parliament, of course, may enact laws, and, subject to constitutional limitations, they are binding on the courts and are applied by them, but that is as far as it goes.

It is vital to bear steadfastly in mind that the independence of the judiciary is not for the benefit of the judiciary, it is for the benefit of the people and of the State. To the extent that the independence of the judiciary is compromised, then the liberties and freedoms of citizens under the law are unguarded, and the legitimate authority of the State may be undermined. There are no absolute rules in this area. That independence can not be absolute. It is the executive which appoints the judges. It therefore has the ability to control the composition of the court and thus, it is suggested, the outcome of its
deliberations. Recent debate concerning the type of judge that should be appointed to fill vacancies in the High Court of Australia, if reflective of reality, indicate a potential for abuse of that power by appointment of a judge or judges thought to be of a particular political or legal persuasion. Luckily, debates of this sort usually end up with the salutary reminder that regardless of the view that might be taken of the particular potential of a judge's personal or legal philosophies and outlook on life, governments are often disappointed by the way matters are decided by him or her as a judge. That is because judges are independent and impartial. They decide cases in accordance with a judicial process, not by whim or personal predilection. That is encompassed in what we mean by the rule of law, as opposed to the rule of man.

As to Parliament, its power over the courts is exercised in a number of ways. Subject to constitutional restraint, it can establish and abolish courts and determine, expand or diminish their jurisdiction. It can establish tribunals of various kinds charged with the responsibility of making decisions or recommendations to Ministers concerning all manner of disputes between different people and interests in the community, including the State itself. To that extent, the role of the judiciary is diminished. The Parliament can by a side wind diminish the jurisdiction of courts by abolishing rights, such as claims for damages arising from motor vehicle accidents or work related injury; changes to the criminal law can have the effect of removing judicial discretions, for example. On the other hand, Parliament can also invest courts with new jurisdiction, such as that to award compensation for injuries sustained as a result of criminal activity payable out of State funds. The jurisdiction of courts can be changed by diminishing in one case and increasing in the other, such as by changing the limits on the value of claims which can be brought in each, or transferring jurisdiction in respect of particular subject matter, such as adoptions. These may all be demonstrated by recent events in the Territory. I do not go into the merits, but mention them so that it can be seen that the Parliament is capable of exercising significant control over the power and jurisdiction of even a superior Court.

Examples of the worst exercise of that control are demonstrated by the abolition of courts and the failure to appoint former judges to any like function, or the abolition of one court and the establishment of another of like jurisdiction, but not reappointing all the judicial officers of the former to the latter. These considerations, as well, lead to the claim that the opportunity presently available must be taken to embody the Supreme Court, at least, within a new Constitution. Again, it must be emphasised that it is not for the benefit of the court itself, but for the benefit of the people who rely upon it for protection of their rights and freedoms.

Ultimately, Parliaments in most jurisdictions, arising from the English tradition, reserve to themselves the power to remove a judge usually on grounds related to proven misbehaviour or incapacity. Fortunately, the occasion for such a power to be exercised has been extremely rare, and thus the scope of the grounds has not been fully explored, but I mention this matter to point out that not only are judges appointed by representatives of the people, they may also be dismissed by representatives of the people. The suggestion that in some way judges are not accountable, or that their appointments are contrary to the democratic ideals, have no substance.
I want to digress for a moment from the interrelationship between the three arms of government and briefly look at the means by which the reputation of the courts for independence and impartiality may be seen to be compromised by others. One of the touchstones of independence is the dispensation of justice impartially. A judge in the conduct of a case, or in deciding its outcome, must act in accordance with the facts as found and the application of the law to those facts. That is done dispassionately. But there is a potential for the perceptions of impartiality to be impaired arising from unfair criticisms of a court or its members. The judgments and extra judicial statements of a court or judges are, I regret to say, often misrepresented. Criticisms are sometimes based upon a false premise, or a misunderstanding of the reasons for the outcome in a particular case, by taking only parts of a judgment or the judicial comment out of context, by inferring lack of integrity on the part of the judge and other like methods of manipulating public opinion. There is grave potential for the reputation of a judiciary to be brought low, quite unjustifiably, by resort to unfair or emotive means, including with the objective of advancing political causes. In so far as the reputation of a court for integrity is diminished, it becomes the easier for Parliament or executive to exercise influences and power, the effect of which may be to reduce the ability of the court to protect the public against abuse of power. By lowering the reputation of a court or a judge in public perception the attacker may undermine the very institution which is the final line of defence against abuse of power and upon which even the attacker may some day wish to rely for protection or vindication of his or her rights. That is not to say that the impartial judge will not, in the proper discharge of judicial duties, disregard what may have been unfairly said, but it is not hard to envisage a perception which may well arise from real or imagined hostility between, for example, members of the executive, or a particular community interest group, and a court. If the court, when next properly seized of an issue, decides against the interests or opinions of the attacker, it may be seen as having been influenced by the attack to exercise a judgment contrary to the rights of a situation. That is, to stand up for itself without regard to the merits of the case. On the other hand, if the court decides in favour of the attacker, then, in the eyes of some, that may be seen as being an attempt to make up, again in disregard of the merits. Either way, the independence of the court may be seriously called in question and the reputation for impartiality of its members damaged.

I do not wish to be thought to be saying that judgments of the courts or the views of individual judges should not be criticised, after all, the courts do it to their own members all the time and in quite public ways. Just read the judgments of the appellate courts.

However, those who seek to do so should be very clear as to their purpose and bear in mind the potential for unwarranted adverse consequences. Speaking in relation to the High Court, but with equal application to all courts, the Attorney-General of the Commonwealth in an address to the Monash Law School Foundation on 1 May this year, said:

"Where criticism of a decision of the court is based not on an analysis of the legal argument supporting that decision, but on other personal or political consideration, the criticism is likely to be unfair. And criticism of the court may affect its public standing, even where it is patently unfair. We must therefore do our best to ensure that the High Court is not unfairly criticised. Legal practitioners and educators have
an important role to play in the maintenance of independent judiciary. As well as
defending the principle of an independent judiciary, we have an educative role to
play. The role of the judiciary and its importance to our system of democratic
government is not as widely understood as it should be. It is important for all
corrected personal rights preserved to the extent that the law allows.

In this context it is especially important to remember that courts embody deals are greater
than the individual members of them.

The existence of the established courts continuing ability to operate independently, and
in accordance with the rule of law, are powerful factors in maintaining peace, order and
good government. That extends to the community as a whole as well as to its various
components. For example, it is of singular importance to the business community that it
should have confidence in an impartial judiciary available to adjudicate disputes
according to law. Economic development depends in part upon an authoritative judiciary
operating plainly within recognised legal boundaries without being open to influence by
irrelevant factors such as bribes or other more subtle deviants. This is particularly
important when it is recognised that governments let the biggest contracts. Individual
community organisations need to be assured that the exercise of power by tribunals,
which do not bare the hallmarks of independence, is open to review and supervision by
the courts. In that way decisions or recommendations which are, or have the appearance
of being, affected by other than relevant facts or accepted principles, can be corrected
and personal rights preserved to the extent that the law allows.

Our current focus on this topic ought to be restricted by the application of principles to
the Northern Territory, or indeed, to Australia. It has been the subject of consideration
on the international scene for years, and not only by the judiciary and legal profession.
Commonwealth Law Ministers meeting at Kuala Lumpur in April 1996 issued a
Communique which read, in part:

"Ministers recognised the crucial role of an independent and impartial judiciary in a
healthy democracy. The protection enjoyed by judges, including financial
independence and security of tenure, are an important defence against improper
interference and free the judiciary to discharge the particular responsibilities given it
within national constitutional frameworks."

They have authorised a Working Party to report on the results of a comparative study to
identify matters fundamentally affecting the reality of judicial independence and the
actual and perceived status and quality of the judiciary.

The implementation of the key principles has proceeded through instruments such as the
International Bar Association's "Minimum Standards of Judicial Independence" 1982, the
Principles of the Independence of the Judiciary" 1985. There is also the "Draft Universal
Declaration on the Independence of Justice" (1989). Following the pattern of reflecting
the name of the city in which important principles are agreed and declarations made,
there is as well the "Beijing Statement of Principles of the Independence of the
Judiciary" adopted by the Conference of Chief Justices of Asia and the Pacific in August
1995. Chief Justices from twenty Asian and Pacific countries took part and a copy of the
Statement is attached which also shows the full complement of signatories and the countries from which they came.

My purpose in drawing attention to those instruments is to reinforce that judicial independence is a widely accepted indispensable foundation for the ordering of good government and protection of individual rights and freedoms in any modern society.

A foundation, is by definition, the base upon which a structure rests. It is the first significant part to be put in place and it is usually built to last. It supports the structure which depends upon it and is designed and built to be permanent. Once in place, a foundation tends to be largely forgotten as the structure built upon it fulfils its function. The structure may be altered from time to time and may indeed suffer threat or actual damage to different degrees, but usually the foundations remain firm. Although there have been times, and perhaps this is one of them, when some of the judiciary may see the need to seek to jump into the trenches for defensive purposes, I do not. The opportunity for the entrenchment of principles of the independence of the judiciary in a modern constitution provides the means by which one of the core values of the society concerned can be affirmed, and put in its rightful place. Such an opportunity should not be missed.

I am aware, of course, of the "Final Draft Constitution for the Northern Territory" of the Sessional Committee, and as the published papers disclose, have made some suggestions about it in so far as matters affecting the judiciary are concerned. I look forward to the opportunity for further debate.
Attachment 2

Preamble and Beijing Statement
Preamble to Statement of Principles of the Independence of the Judiciary
Beijing, 19 August, 1995

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law,

Whereas the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both guarantee the exercise of those rights, and in addition the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985, adopted the Basic Principles on the Independence of the Judiciary by consensus,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended the Basic Principles on the Independence of the Judiciary for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country,

Whereas on 17-18 July 1982 the LAWASIA Human Rights Standing Committee met in Tokyo, Japan and in consultation with members of the Judiciary formulated a Statement
of Principles of the Independence of the Judiciary in the LAWASIA Region ("the Tokyo Principles") in the context of the history and culture of the region.

Whereas the 5th Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September 1993 recognised that it was desirable to revise the Tokyo Principles in the light of subsequent developments with a view to adopting a clear statement of principles of the Independence of the Judiciary, and considered a first draft of a Revised Statement of Principles of the Independence of the Judiciary and requested the Acting Chairman of the Judicial Section of LAWASIA to prepare a second draft of the Revised Statement taking into account the views expressed at the 5th Conference of Chief Justices and comments and suggestions to be made by the Chief Justices or their representatives, and

Noting that the 6th Conference of Chief Justices of Asia and the Pacific is being held in Beijing in conjunction with the 14th Conference of LAWASIA, the primary object of which is:

"To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region."

The 6th Conference of Chief Justices of Asia and the Pacific:

Adopts the Statement of Principles of the Independence of the Judiciary contained in the annex to this resolution to be known as the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.

Annex

Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region

Judicial Independence

1. The Judiciary is an institution of the highest value in every society.

2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent Judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that:

   (a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and

   (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

4. The maintenance of the independence of the Judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society
observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.

6. In the decision-making process, any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3 (a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.

7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.

9. Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

**Objectives of the Judiciary**

10. The objectives and functions of the Judiciary include the following:

(a) to ensure that all person are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.

**Appointment of Judges**

11. To enable the Judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

13. In the selection of judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the Judiciary is a career service; in other, judges are chosen from the practicing profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be adopted to ensure the proper appointment of judges.

15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.

17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

**Tenure**

18. Judges must have security of tenure.

19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.

20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge’s tenure must not be altered to the disadvantage of the judge during her or his term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.

25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced.
only if the preliminary examination indicates that there are adequate reasons for taking them.

26. In any event, the judge who is sought to be removed must have the right to a fair hearing.

27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.

28. Judgments in disciplinary proceedings, whether held in camera or in public, should be published.

29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.

30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the Judiciary, such consent shall not be unreasonably withheld by an individual judge.

Judicial Conditions

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Jurisdiction

33. The Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff
must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.

37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the Judiciary having regard to the needs of judicial independence and administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.

**Relationship with the Executive**

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

**Resources**

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

**Emergency**

43. Some derogations from judicial independence may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeus corpus or similar procedures.

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

It is the conclusion of the Chief Justices and other judges of Asia and the Pacific listed below that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary.
The Hon Sir Gerard Brennan AC KBE
Chief Justice of Australia

The Hon Mr Justice A. T. M. Afzal
Chief Justice of Bangladesh

HE Mr Wang Jingrong
Vice-President Supreme People’s Court of the People’s Republic of China
(Representing HE President Ren Jianxin, President of the Supreme People’s Court)

The Hon Sir Ti Liang Yang
Chief Justice of Hong Kong

The Hon Shri Justice S. C. Agrawal
Justice of the Supreme Court of India
(Representing The Hon Mr Justice A. M. Ahmadi, Chief Justice of India)

The Hon Justice S. H. Soerjono
Chief Justice of Indonesia

The Hon Yun Kwan
Chief Justice of the Republic of Korea

The Hon D. Dembereltseren
Chief Justice of Mongolia

The Hon U Aung Toe
Chief Justice of the Supreme Court of The Union of Myanmar (Burma)

The Rt Hon Mr Justice Biswanath Upadhyaya
Chief Justice of Nepal

Monsieur Le Premier President Olivier Aimot
Premier President of the Court of Appeal of New Caledonia

The Rt Hon Sir Thomas Eichelbaum GBE
Chief Justice of New Zealand

The Hon Mr Justice Sajjad Ali Shah
Chief Justice of Pakistan

The Hon Sir Arnold K. Amet
Chief Justice of Papua New Guinea

The Hon Andres R. Narvaza
Chief Justice of the Philippines

The Hon Justice Yong Pung How
Chief Justice of Singapore

The Hon Mr Justice P. R. P. Perera
Justice of the Supreme Court of Sri Lanka
(Representing The Hon Mr Justice G. P. S. De Silva, Chief Justice of Sri Lanka)

The Hon Charles Vaudin D’Imecourt
Chief Justice of Vanuatu

The Hon Mr Justice Pham Hung
Chief Justice of Vietnam

Tiavaasue Falefatu Maka Sapolu
Chief Justice of Western Samoa
Independence of the Judiciary as a Major Plank in Upholding the Rule of Law, the Theory and the Practice

Whose Role To Be Guardian? Does It Matter? Who Cares?

JANELLE SAFFIN

Late last year after a proclamation he had issued was struck down by the highest court of the nation, the elected Leader of a nation said that he thought mistakenly that he had had the power to make the proclamation. The fact that it was struck down meant, he said, that in his nation even the elected leader is subject to the law. This frank admission was made in an address to the nation and the leader made it with some degree of pride.

Who here will hazard a guess as to the identity of the leader?

I am, of course, referring to President Nelson Mandela, one of a handful of the world’s great leaders. I ask you if you will to try to imagine any other current world leader or national leader making such a public declaration, or even believing it to be necessary?

Dato’ Param Cumaraswamy, the United Nations Special Rapporteur for the Independence of Judges and Lawyers, told this story in a paper he delivered at a conference in Bangkok. This is how he put it:

“In November of last year the Constitutional Court of South Africa, on an application for judicial review, struck down a proclamation of the President in an electoral boundary delineation matter as being unconstitutional. Immediately the same evening President Mandela went before the electronic media and addressed the nation to the effect that he honestly thought that Parliament had given to him the power of proclamation. But as the Constitutional Court found it otherwise, he stated, he respected the decision of the Court. He went on to say “This decision clearly demonstrates that in the Republic of South Africa even the President is subject to the law.”


Simple words, as the Special Rapporteur commented, but words of conviction and words which demonstrate commitment to the rule of law and an understanding of the respective powers of the three arms of government. By this action, President Mandela reconfirmed the assessment of all of us that he is truly a remarkable man, and a great statesman. But
more than this, he is a true guardian and defender of the rule of law. Who among our own Nation's elected Leaders is deserving of this title?

There is a sense in which his actions constitute greatness, but his actions should be those of any democratically elected leader.

When I learned of this conference, my first thought was that I wanted to share my practical experience and working knowledge gained as a Parliamentarian of a few years standing and as a practising politician of many years standing. It is in the practice that this matter - the rule of law - goes to the very heart of our nation's democracy, yet it is a matter that is paid scant regard in everyday life.

In preparation for today's paper I was tempted for just a little to produce a work, essentially academic in nature, which explored many of the esoteric but interesting debating points about the rule of law, the Dicyean view and all that entails, thus demonstrating to you all, to my inner satisfaction, my mastery of the topic.

I was further tempted to let Burma dominate my paper: Burma - with the absolute repudiation of the rule of law by the ruling Generals of the State Law and Order Restoration Council (the SLORC), with a judiciary and legal profession compromised into inertia.

Why Burma? Because I have the distinct privilege of being the Honorary Secretary of the Burma Lawyers' Council (Australian Section) and in this role I have seen up close the tragedy of a nation of peoples who live not under the rule of law, but under its antithesis - the rule of law and order.

However, I have moved these important issues to one side, because I want to touch briefly on the historical and theoretical bases of the 'independence of the judiciary' which of course is located within what we commonly understand as 'the rule of law'.

From that perspective, I will move to comment on practical contemporary issues which confront legislators and the community in upholding the independence of the judiciary, restate the importance of an independent judiciary to our democracy, and suggest some ways to advance a culture of esteem for the independence of the judiciary.

Putting it in basic terms, I am asking what I hope is a rhetorical question: Does all this fuss about the rule of law really matter? And if it does, what should be done and who should do it?

I hope this discussion will expose in a sense, our comparative ignorance, not only of the importance of the idea of independence of the judiciary as the major plank of the rule of law, but the fundamental importance of the rule of law itself. We can look at two of the three arms of government - the judiciary and the parliament - to appreciate their respective roles in the survival of the judiciary's independence.

I suppose it becomes more of an expose of the day-to-day trappings of political life, the pressures to succumb to being 'fixers' of all perceived wrongs in society, the trap of being both legislator and judge, in a climate where the public's understanding of the rule of law and the importance they attach to it, and the public perception of the judiciary is often distorted, and the judiciary's role in nurturing its own credibility and its independence is scarcely given a thought by anyone.
There is no point in chasing after rabbits today in debates about what is rule of law and can one still have rule of law under other than a democracy. I accept the commonly held view that the rule of law defies simple definition and is easier to define by reference to the characteristics which denote its absence; however I accept as a sensible and working model the rule of law principles as summarised by The Rule of Law Foundation (see Appendix A).

These principles incorporate human rights notions and safeguards which some commentators like Geoffrey de Q Walker in his seminal work 'The Rule of Law- Foundation of Constitutional Democracy' Melbourne University Press 1988, argue the position that the explicit incorporation of these notions and safeguards is a bastardisation of the rule of law.

The thread of his argument appears to be that the rule of law principles in their most basic form do not need enhancement as they provide the mould for such liberties and rights to be protected or afforded anyway.

However both views include the principles of an independent judiciary, generally enshrined in a constitution, a representative form of government with an Executive that is accountable, and both recognise that the linchpin of the rule of law is the independence of the judiciary and that the rule of law owes its ongoing existence and longevity to the courts; hence the necessity of their independence. [op. cit p 127]

The most desirable characteristic of the rule of law is that government be subject to law and not desire, whimsy, dictates, decrees, a leader in the throes of madness, etc. It was in the 1700's that this debate was finally won, in the British common law system anyway. (For more see the Act of Settlement 1701 and Sir Edward Coke's contributions to this)

In his study of 18th century law, Professor E.P. Thompson, a Marxist Historian, wrote that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good." [ibid]

For the purposes of the meaning of the independence of the judiciary, I accept the 'Basic Principles on the Independence of the Judiciary' as adopted by the Seventh Crime Congress, Milan, 26 August-6 September 1985, and endorsed by the United Nations general Assembly in resolution 40/32 (see Appendix B).

The current debate or obsession with law and order as the answer to problems we are experiencing in our communities poses a very real threat to the judiciary's independence. That threat is exacerbated by the public's demand that politicians fix up 'lenient sentences', by police agitation about not being able to do their work and rid the streets of criminals because they are let down by both the judiciary and the politicians, and by politicians' willingness to respond with a knee-jerk reaction to such unreasonable demands.

Parliamentarians have embraced legislative judgments with the same zeal that we have embraced 'law and order'. Law and order has become a standard campaign strategy. We can never have too much of it, or be too tough. I did not get an opportunity to follow
closely the detail of the recent Northern Territory campaign, but I would be pleasantly surprised if it did not focus on law and order as well as Territory Rights.

Those demands have led in my jurisdiction to the introduction of a variety of Bills whose objective has been the overturning of current sentences for specific individuals, the creation of offences for parents without specifying what the offence is, the stipulation of mandatory life terms for certain crimes, and even amendment of certain laws that are seen to frustrate the Executive's plans. The last category applies to matters which have been before the courts, and legislative action has prevented a decision of the court from being applied. The Opposition has generally been supportive of these actions, and has even outbid us in the legislative judgment stakes.

**Pressures on Politicians to Uphold the Rule of Law**

I would like to pose a few questions regarding this very issue and contrast the pressures and incentives between upholding the rule of law and what I call "the rule of law and order".

1. Have you ever heard of an election fought on the rule of law?
2. Do constituents ever ask if we understand the rule of law?
3. Do we come under media scrutiny for our understanding of or adherence to the rule of law?
4. Do constituents ever pressure us to uphold the rule of law?
5. Are there direct incentives to uphold the rule of law?
6. Is it a requirement of oath-taking that a newly elected member of parliament pledges to uphold the separation of powers doctrine?

The answers are generally no, no, no, no and no.

**Pressures on Politicians to Uphold the Rule of Law & Order**

1. Have you ever heard of an election fought on law and order?
2. Do constituents ever ask if we understand law & order?
3. Do we come under media scrutiny for our understanding of or adherence to the rule of law and order?
4. Do constituents ever pressure us to uphold the rule of law and order?
5. Are there direct incentives to uphold the rule of law and order?
6. Do the public demand that we ignore the separation of powers doctrine, by their insistence that we fix problems within the competence of the court?

The answers are generally yes, yes, yes, yes and yes.

You may begin to get the picture. I know that politicians 'should' resist the relentless and current pressure to succumb to the law and order debate and some put up valiant attempts, but they need help.
The debate of course is somewhat polarised between the rule of law and order and the rule of law, and to some extent with the Parliament and the judiciary in opposing corners. We are both very powerful arms of government and also enjoy privileged positions in our society. Imagine if we combined our energies to become the guardians of the rule of law, and therefore guardians of the independence of the judiciary!

We are in fact, constitutionally, historically and practically in the same corner. We are two of the three arms of government, yet we don’t fully appreciate it and neither does the public. Generally when the politicians speak out against the judiciary, it is because they feel they the judiciary is treading on their turf. They are not outraged usually because they perceive that the judiciary has violated the rule of law, i.e. the separation of powers doctrine. It is the eternal battle for power.

This brings me to an issue that Professor Cheryl Saunders raised in a paper she presented recently on the independence of the judiciary. She posed the question: "...how can the judiciary gain community support for it role and its independence, if that is what indeed is required?" [Cheryl Saunders "Judicial Independence in its Political and Constitutional Context", presented at The Australian Judicial Conference Symposium (Judicial Independence and the Rule of law at the Turn of the Century) 2nd November 1996.]

This question strikes at the very heart of the current public debate about the judiciary. The public deference, tolerance or indifference to the judiciary has altered dramatically in the past ten years, along a parallel path with the public’s demand for increased accountability from those in high office and demands for more of a direct role in our democratic processes.

We need to remind ourselves of the ways in which we safeguard the judiciary’s independence, because the current debate is forcing us to move beyond the obvious and to address the so-called extra-constitutional mechanisms of independence, to nurture and protect the independence of the judiciary.

The most obvious way is, of course, through our constitution, which reflects the separation of powers doctrine. (Chapter 111). The High Court’s decision in Kable (Kable v. The Director of Public Prosecutions New South Wales unreported 1996) to some degree advanced and clarified the operation of the doctrine at State level. It must be said though that the doctrine has and does operate at State and Territory levels of governance by convention, with some attempts to give constitutional recognition to it.

Representative or Participatory Democracy

This debate highlights also another issue of fundamental importance to our system of responsible government, that is the style of democracy we want. There are increasing signs of tension between our traditional governance which is based on representative democracy and those who expect or desire a more participatory form of democracy. There are many who have never understood that our institutions of government are founded on representative democracy, and there are those who do understand but want reform.
Politicians have recognised this to some degree, but mainly in a reactive therefore ad hoc way. Their recognition though has resulted in giving ground to some of the worst aspects of the public’s demand to participate and has manifested itself in law and order issues. Participatory is not devoid of responsibility, but many who demand it do so with no reference point of responsibility. In general, it appears that the judiciary seems to have ignored such demands. In fact, they have not but the appearance is that they have and the judiciary knows only too well the maxim that ‘justice must not only be done but it must be seen to be done’.

If we are going to accept that the public has a right to be involved more actively in the democratic processes, it would be more sensible to encourage the public to engage in a vigorous debate about this.

Our institutions have their genesis in representative democracy, i.e. responsible government, not participatory democracy. The machinery required for these two forms of democracy will have similarities, but also differences, and if we are going to change our style of democracy we should do so by agreement and design, not in the piecemeal way that we currently are reacting.

I will illustrate this point with an example from New South Wales, where the public are demanding active involvement in judicial and legal processes. In NSW there is an organisation called ‘Enough is Enough’. A man whose son was murdered tragically established it.

The sentence for his killer was one that attracted a lot of negative media attention, with the conclusion that it was too lenient. Prima facie it did appear to be lenient, and devoid of the deterrence aspect of punishment. I perceive that this missing aspect of current sentencing rightly or wrongly has the public outraged, but of course they are not expressing it in these terms.

This organisation has attracted a good deal of public and political support with its direct appeal to the unhappiness felt about current sentencing practices. It has now joined some of our mainstream political processes. Their reform manifesto is as follows:

- election of judges
- education of judges and magistrates
- maximum not minimum sentences
- jury sentencing on certain crimes
- equal disclosure of evidence
- trials by majority verdict
- no plea bargaining without victim’s input
- abolition of diminished responsibility
- BI-partisan statutory body over Department of Public prosecution
- limiting of committal hearings in court
- covert case management programs

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Session 6
• re-structure of Law Reform Commission
• Court administration/management programs
• stiffer bail conditions for violent offenders

The blurb accompanying this manifesto states:

...We can no longer accept what is being handed down in the name of Justice. Our legal system is not about truth, equality or justice. The reforms must start now!!

This was sent to all Members of the New South Wales Parliament.

I know how MPs are responding, but I don’t know how the judiciary is responding, if at all.

Do the Public Equate Judicial Independence as Being About Them and Their Interest?

By its very independence, the judiciary is acting in the interests of the public, but do you believe that the public fully understands or appreciates that? I emphatically do not. Who, then, is charged with the responsibility to bring about that understanding? I say the judiciary to a large degree. As an arm of government their responsibility does not begin and end with maintaining their independence.

I assert that the judiciary has to reclaim their right to inform the public about their function and role, because it is not just the responsibility of the Parliament to do this, nor the responsibility of the Executive - but it would be foolish for the judiciary to rely on them to do this either.

If the public perceive consistently that the courts are not administering justice, will they care about judicial independence? If many are denied even a hearing in the court system for lack of resources, will they care about judicial independence? Where the public do get their day in court, do they really get justice? I have been the duty solicitor at the Magistrate’s Court in a local town and I calculated that the clients got eight minutes time each, to brief me including the filling in of the legal aid form.

I know some who say you don’t go to court to get justice, you go to court to get law, but is that really what the public expects and what the judiciary wants? I think not.

The Chief Justice of Australia, Hon Sir Gerard Brennan, says that

...a judge’s role is to serve the community in the pivotal role of administering justice according to law.” [The Hon Sir Gerard Brennan, Chief Justice of Australia, ”The Role of a Judge”, presented to the National Judicial Orientation Programme Novotel Northbeach, Wollongong 13 October 1996,(http://www.hcourt.gov.au/wollong.htm]

That is what the public expects and deserves: justice. Whilst the public cannot access the courts, the reputation of the judiciary diminishes.

In recent times a NSW Judge gave a media interview upon his retirement and in his reflections he said that he was appalled by the treatment meted out to rape victims ie.
brutal cross-examination by defence barristers. Even with my knowledge, I thought “Where were you, your Honour, when the chief witness was being diminished?”

If I thought this with my understanding of, and limited experience in, the courtroom, what would the public think? They would be mystified of right as to why he had not taken control of his court.

In the same paper, The Hon Sir Gerard Brennan said that the judge’s role when presiding at a trial, including criminal trials, was not to allow it to be an occasion to diminish the dignity of any person in the courtroom, and that, as it is the judge’s court, the atmosphere is chiefly in their hands.

So I repeat my question on behalf of the public: “Where were you, your Honour? Where were you?”

The Judicial Conference of Australia has recently undertaken some commendable work which brings together Parliamentarians, the Judiciary and the Legal Profession. I attended the first session in Sydney, and it was a useful forum. We were able to have free discussion about topical issues and each other’s role. It is better late than never to start what should have been happening since Federation.

Some persist with the claim that current criticisms of the courts are both unwarranted and unfounded. This is not the case, because some of them are warranted and some of them have foundation.

For many years I worked in health and welfare, specifically with victims/survivors of domestic violence, sexual assault and child sexual abuse. For many years these victims were denied a voice or redress through the court and the focus of their discontent became the judiciary.

One thing they found particularly offensive and distressing was the fact that they were unable to tell their story. They did not necessarily want vengeance or retribution, but they did want the court system to hear their pain. Not only did the court system not want to hear, but also they refused to hear their pleas and they have still to explain the reasons why.

Those without redress searched for and found partial solutions through the Parliament. As a result, the judiciary has to deal now with legislation giving victims of crime, the chief witnesses, the right to tender victim impact statements. The judiciary are not wholly happy with this development, but really took no remedial action to accommodate the needs of the public and tenets of justice. It would have been preferable if solutions could have been explored through the courts. Is it not possible that the prosecution, in summing up, could have included what is essentially a victim impact statement? I think so.

There are, of course, compelling reasons why the judiciary have felt constrained in these matters, and I have heard some attempts by the judiciary and legal profession to defend their position, but I have not heard them explain the situation to the public in clear terms, which highlight how the public’s interest is protected by not allowing victim impact statements. Defence is not sufficient, and explanation is required.
The same situation is going to repeat itself regarding the giving of evidence by children. If children's legal needs cannot be recognised through the courts, the matter will be taken out of the hands of the courts. It is a difficult issue, but some jurisdictions have tackled this matter, where a third party gives the primary evidence. Can a court system be seen to be relevant where it denies children their day in court? Have the judiciary any ideas about ways in which children's evidence can be factored into the system? If they have, it would be useful to have dialogue about these matters.

I chaired the Local Domestic Violence Liaison Committee and through the combined effort and goodwill of the Committee and the Magistrates many solutions were found for what at first seemed intractable problems. Equally as important, this process grew and nurtured an understanding and appreciation of each other's roles. Respect for the judiciary and support for its independence was engendered.

Burma's leader Daw Aung San Suu Kyi has said that, "We must choose between dialogue or utter devastation", a dramatic statement but one which has a message for us. The arms of government must dialogue with each other and the judiciary must dialogue with the public.

There is also the difficulty of the location of the debate. Where does it take place and who should lead it? It has to be within the public arena and it has to be based on informing, explaining and educating, not solely a defence. Defence has its place, but it will not and cannot achieve the widespread public support which is required.

The judiciary has to some extent lost ground about its relevancy. Relevancy to women, children, parents of murdered children, small claimants, judicial review of administrative decisions. If the Courts are not seen to be serving the needs of the public, then the public must be entitled to ask: whose needs is it serving? Unfair maybe, but a reality. As a politician, I am often subject to unfair criticism, but it is a reality I have to deal with as I am a member of one of the arms of government.

The judiciary as the third arm of government has a responsibility which goes beyond determination and sentencing. It should explain and educate the public about its role and its function. Such discussion could include sentencing rationale, etc., which does not, of course, have to be commentary on individual cases. Judgments should be well written, clear, intelligible and they literally should speak for themselves. Is this too hard to achieve?

Some jurisdictions are already doing this. Recently, Justice Lockhart of the Federal Court said that immediately after the 'rugby league' case decision, the court had a summary of the decision prepared which they gave to the media. His Honour said that the subsequent reporting of the case was reasonably accurate. [The Honourable Justice John Lockhart speaking at a conference titled The Courts and Parliamentarians A Workshop of the Judicial Conference of Australia 21 August 1997 Sydney]

I am sure that many court administrations are already doing such things.
Confusion of Privileges Afforded Judges with Judicial Independence

There is no denying that judges do have professional privileges. Sometimes it is commonly mistaken that these privileges are given for privilege sake. The so-called judicial trappings, particularly tenure until retirement, are not given as privileges, but come with the office to ensure independence, so that our liberty can be safeguarded.

If we value our liberty and a free society we must then recognise that professional privileges become an essential tool of judicial independence.

Although aloof to some degree, the judiciary is really the most vulnerable of the three arms of government because of its inherent and developed inability to defend itself. It can, however, defend itself in a proactive way, which it is slowly beginning to do. It has traditionally been the silent partner in government, but it is beginning to awake and this is not a bad thing.

Ideas for Action

1. Collaborate with the other arms of government, particularly the parliament, to develop and nurture a culture of esteem for the rule of law.

2. Advocate that all Parliaments have a Scrutiny of Bills and Regulation Committees to ensure adherence to the separation of powers doctrine/rule of law principles. They should be multi-partisan.

3. Judgments should be accessible and intelligible and if they must be lengthy and convoluted they should have summaries which are accessible to the public.

4. Ensure that we teach the rule of law, at least in Law Schools.

5. Become relevant in that we don't deny access because it is fraught with the difficulty of legal precedent.

6. Participate and establish the Sir Edward Coke (The Eddie's) Award in your jurisdiction. I have plans to establish this in New South Wales.

7. Get active in your State/Territory Branch of the International Commission of Jurists (Australian Section)

These are very simple things that are or can be cost neutral, but of fundamental importance to the longevity of the rule of law.

Conclusion

I am an advocate for the independence of the judiciary through my respect for and active support of, the rule of law. When I advocate for the independence of the judiciary I am not advocating for judges, I am advocating for the most important plank or principle of the rule of law. I am doing it for you and for me, but I think that those of us in power have failed to communicate this message.

I don't subscribe to the belief that judges are imbued with any greater wisdom than other professionals are. Politicians do not have a monopoly on stupidity, obtuseness, etc.
I was as appalled as were many others when I heard the unfortunate comments of Justice Bollen reported, (out of context I might add, but even so they did not sound good) in the infamous rape case. However, I was as delighted as many others when Justice Bollen was the first (I understand) to accept as a defence to murder ‘battered woman syndrome’.

In an interview about the sudden and very sad death of Diana, Princess of Wales, Lord Archer described her so aptly as the ‘brightest star in our constellation’. I thought that to be the most fitting and poignant tribute to her. He captured her essence.

It is in a similar way that I would like to have the public think about ‘the independence of the judiciary’, as the “brightest star in our constellation of rule of law principles” that constitute our democracy.

Sadly, this is not the case. The public appear to be becoming as disillusioned with the judiciary as they are with politicians.

Many in the judiciary have sat back and let this public sentiment grow. It really is time to fight back.
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Thank you, Mr Chairman. Ladies and gentlemen, I am grateful for the opportunity to be here, my first time to visit Darwin.

I must mention a couple of caveats before I start. One is that I am a late replacement for somebody else. I only received a copy of the draft constitution three days ago. I am not terribly familiar with all the issues. I have also not lived in Australia for 16 years, so I am fairly poor on my knowledge of both Australian and Northern Territory politics. I am much more familiar with Ugandan and Papua New Guinea politics, so you will forgive me if I am missing some of the background which I should have.

I should say I am fascinated by some things in the draft constitution, because they remind me much more of Papua New Guinea and Uganda than the normal Australian state constitution: organic laws and their entrenchment; Aboriginal custom as a source of law; a constitutional interpretation jurisdiction for the Supreme Court; proposals for interpretation of the constitution and organic laws by reference to originating materials. All of these are fresh, new ideas in Australia and it is great to see the Northern Territory looking to other models for some of its content.

The criticism that I would have of the judicial independence provisions of the proposed constitution is that on that subject the framers have looked, once again, to the British and Australian experience and not beyond it. And there is a rich experience from elsewhere that should, in my view, be drawn upon.

I would like to make a few brief comments on the rule of law before we start. The rule of law has developed as a principle against an historical experience, a universal historical experience of the abuse of power by the state. The basic principle of the rule of law is that people should not be subject to the arbitrary exercise of power by those who hold it. The state and its functionaries should be subject to law, and should both respect the basic rights of individuals and provide effective means for their enforcement. These are basic principles which have been emphasised repeatedly over the years.

But we tend to take the rule of law for granted in Australia. We tend to assume that the law is honoured, that there is no real threat to it. But in any situation where there are significant minorities whose interests may involve some tensions with the majority, in any situation where there is a dominating political force, there tends to be threats to the rule of law. This can occur in many ways; as for example with the Aryan-Gypsy dichotomy in Germany before the Second World War; large tribal groups versus small
tribal groups in Africa; Malaysians versus Indians and Chinese in Malaysia; white population versus Aboriginal population or CLP versus Labor in the Territory, and so on.

How is the goal of the rule of law achieved? Well, clearly it is not just through constitutions or written laws. Constitutions play a role in maintaining the rule of law, but the key issue is why. It is not that the rule of law has a force of its own. It is basically political forces which make constitutions work or not work. It is things like political parties, the press, economic interests, civil society and so on, which work to make constitutional rules get accepted in a country like Australia and results in their not working nearly so well in countries of Africa.

We have a lot of forces at work in Australia which help to ensure that the law is adhered to, but they are forces which can easily work in other ways, and which can also open and allow gaps where minorities are dealt with badly, where dominating political forces can cause problems. So, as many people have pointed out over the years, the rule of law is a fragile thing, and the judiciary is crucial in maintaining the rule of law in a country like Australia because it is at the core of maintaining the protection of the individual against the state. It is at the core of the enforcement of the rights of the individual, at the core of dealing with disputes between the state and the individual. It is at the core of handling disputes between the powerful citizen and the weak citizen. As His Honour, the Chief Justice, pointed out, you add into the mix, as is proposed in the Northern Territory, a role of interpreting the constitution, and the court can more easily come into conflict with the legislature and the executive than would normally be expected.

We have learnt from the experience in many other countries that the independence needed for the judiciary to carry out its core functions can be threatened; and it can be threatened in all sorts of ways.

The colonial situation in many countries around the world provides examples. We saw it in Papua New Guinea and in many countries of the British Empire where the patrol officer was the investigator, the prosecutor, the judge and the jailer all rolled into one. The prosecutor would investigate the offence, prosecute, sit down and pronounce a judgment and then lock the person up and look after them. There is not much protection for the rule of law in those circumstances. In the colonial system judges were part of a career service where their performance was reported to the Home Office and where they waited for promotion on the basis of reports from senior administrators.

In the post-Colonial states in Africa and Asia, dominant religious, ethnic and tribal groups have stacked the courts with people supportive of their positions. In Indonesia, I heard recently of a judgment that went against the government. The Chief Justice was then called to afternoon tea at the President’s office, went away and two days later reversed the decision. In Spain, under the authoritarian government of Franco, there was an independent judiciary which handled all of the normal civil and minor criminal cases, and there was also a parallel system of courts which handled all offences against the state. All in order to convey the impression that judicial independence was maintained; in the minor courts judicial independence did not really matter to the state, but the judges were handpicked in the parallel system of courts.

Does this sort of thing happen in Australia? Well, not the blatant things, no, but we do get a form of ‘stacking’ of the courts. What happened under Labor with the High Court,
what goes on under Liberal with the High Court? We accept, don’t we, that each political party that comes to power can ‘stack’ the High Court with the people they want. That does affect judicial independence in a way. Pressures can be brought to bear on judges in various ways that could affect their decisions - just a few names - Yaldon, Vaster, Murphy, Farquar, Ford, Staples. Once somebody is under pressure they can be forced in a direction that suits those that apply the pressure. More importantly, politicisation of the appointment process can create the public perception that judicial independence is under threat; it lowers the confidence people have in the judiciary.

His Honour, the Chief Justice, mentioned the dangers of abolition and re-establishments of courts – that has happened. The Kennett government in Victoria abolished an industrial court that it did not want as soon as it came to power and so got rid of judges it did not want. And, because the protection of the judiciary’s independence, like everything else about constitutional frameworks, depends ultimately on political forces, if political forces in Australia change over the coming 20, 30, 40 years, the pressures on the judiciary are likely to grow.

Against this background, how do the provisions of the draft Northern Territory constitution stack up? Does it provide us with a real protection for the independence of the judiciary? And here is where I come to my basic criticism.

I turn first to the discussion paper, by the Sessional Committee, published in 1987, with a second version in 1995. It is very clear the Committee proposals on the judiciary were drawing on Australian federal and other states’ experience. All the points of reference are there. The English system is executive appointment of the judiciary. There is no attempt to prevent the political stacking of the courts. It is assumed that either this will not happen or that if it does happen it does not really matter.

In Australia, at the end of the 20th century, why should we restrict ourselves to looking at the English and our own limited experience? Frankly, there is no reason, and there is, as I said at the beginning, a rich experience elsewhere.

Remember too that the independence of the judiciary in England is a very recent development. Let me read you a little of a discussion of the British judiciary in colonial America in the late 18th century. British judicial appointment policy was one of ‘strengthening the court (monarchical) interest’ and ‘advancing to the most eminent stations men without education and of dissolute manners ... sporting with our persons and estates, by filling the highest seats of justice with bankrupts, bullies and blockheads’. That is a description by an American student of legal history, (Gordon Wood, ‘The Creation of the American Republic, 1776-1787’, 1969, pp78 and 145). Evidently the British were not all that concerned about the independence of the judiciary, as long ago as recently, the late 18th century.

Even up to 1945 it was relatively well accepted in England that you could stack the higher courts, politically. That has reduced in recent times, in the last 40 or 50 years. But why are we looking to this magical model? We do have other important models.

What have we got in the NT draft constitution? Well, we have got a little protection in relation to appointments. The Chief Justice that gets appointed by the Governor on the advice of the Executive Council, after the relevant minister consults with the Leader of the Opposition and such bodies representing the legal professional as the minister thinks
fit. However, it is mere consultation. If I go and say to the Chairman, 'What do you think, should we appoint Bill?' And the Chairman says, 'Oh, my God! Are you mad?' I can go away and say I have consulted, and then proceed to appoint Bill. There is nothing to limit what consultation means in this constitution. With other judges all that is required is consultation, this time with the Chief Justice. There is no mention of qualifications. There is security of tenure, of a sort. People are appointed for life up to 70, with possible extensions beyond that, but, they can be removed by the Governor on an address from the parliament for proven misbehaviour or incapacity. That means basically a vote of the parliament can remove a judge. Is that a good idea?

I do not think these provisions adequately protect the independence of the judiciary. Is the parliament the best tribunal to judge the misbehaviour or incapacity of a judge? The parliament is not a very good fact-finding body. Alright, you give it to a committee of parliament. Is a committee of parliament a good fact-finding body? Is it possible that such a system is going to work against keeping a check and keeping judges accountable, which is the other side of independence? It is a very unwieldy procedure.

In summary, we have got provision on appointment, we have got nothing on qualification, we have got a little on security of tenure, very little protection in removal, we have got a little on remuneration - this has got to be by act of parliament, so that can be changed very easily - but there is to be no reducing remuneration while in office.

I would like to contrast that experience, very quickly, with experience drawn from elsewhere in the world, a list of the ways other institutions protect the independence of the judiciary, and I would suggest that if you are serious in the Northern Territory about protecting this crucial institution, you should at least be looking at these. I am not saying you adopt them all, but evaluate them; do not rely on what we already know.

Firstly, qualifications for appointment to office are sometimes specified to ensure the highest standards, and that contributes to independence. In Papua New Guinea, for example, there are two sets of qualifications. One is a set of qualifications about the sort of commercial and political interests which a person for appointment to a judgeship, or a person in the judiciary must meet. The second is professional and other standards, basic criteria of experience and so on. The Northern Territory proposals have nothing along these lines.

Secondly, in relation to the appointment procedures and the term of office, a number of appointment procedures used by other countries are designed to prevent stacking of the court for political reasons. There are numerous models for appointment. It can be done by the Executive alone; the Executive after consultation as in the Northern Territory model; the Executive subject to legislative veto, as is effectively the United States and Ugandan models; appointment by an independent commission, as is the model in many post-colonial states; separate career structure for the judiciary, as is the European model; or even the election of judges, as happens in many of the United States' states. But the best model seems to be an independent commission which is usually called the Judicial and Legal Services Commission. It is a commission normally made up of the Chief Justice, representatives of government, opposition, Law Society, community interests: and normally it is that body which makes the appointments, or which provides a list of names to the Executive if the Executive is doing the appointing. And the Executive is not allowed to go outside of that list, or if it does go outside of that list, has to provide
reasons. So, it is an important means of preventing the stacking. It is sometimes criticised for putting too much power into the hands of the legal profession – but there is no reason why there has to be any – or any significant – legal profession representation on such a body.

Third, as for provisions on suspension and removal from office, this can be a mixed means of protection of independence, something which reduces political pressures. Causes for removal are sometimes laid down quite broadly – physical or mental inability; misbehaviour; corruption; breach of rules about other interests.

There is a 3-stage removal process followed in many other countries, including Uganda, Papua New Guinea and many others of the recently democratising countries of Africa and elsewhere. Usually the Legal and Judicial Services Commission is the body which must initiate the process – it cannot even be initiated by the Executive. The Executive can bring a matter to the attention of the Commission, but it is up to the Commission to form its own judgment.

The second step involves an independent tribunal made up of judges, or others which sits and hears the determination. Finally the recommendation of that tribunal goes to the appointing body which is usually – but not always – required to act upon it.

Because we are running out of time I will summarise some further areas of protection: guaranteeing reasonable levels of emoluments and ensuring, or guaranteeing their payment; no abolition of the office with substantive occupants; guarantees of resources – some constitutions guarantee the judiciary and other constitutional officeholders reasonable levels of resources as a way of removing pressures; explicit freedom from direction and control; provisions on limited tenure, which some countries have, balanced by guarantees of further employment or pensions. There are further things which some countries use: limits on bench stacking, in other words maximum size of the bench laid down in the constitution so that an unhappy government cannot get what it wants by stacking the bench with extra numbers; a prohibition on extraordinary tribunals, something which may not be necessary in Australia, but possibly worth thinking about; making remuneration a charge on the consolidated revenue; bans on parliamentary criticisms of judges being expressed other than on substantive motions; immunities of judges, guaranteed in the constitution, from legal liability for words spoken or acts done in a judicial capacity. In addition, closely related are provision in some constitution for protection of the independence of the Public Prosecutor or the Attorney-General (if the Attorney-General remains vested with some decisions in relation to the public prosecution function).

In conclusion, I think maybe it is worth considering in the Northern Territory, at least things on basic qualifications for judges. We should also examine: a more independent appointment and removal process; reasonable levels of emoluments being guaranteed perhaps by an independent body; prohibitions on the abolition of courts and judges whilst those positions are being occupied; guarantees of resources; and constitutional protection for freedom from direction from other authorities. In general, we should look to models other than Australia and the UK for possible inspiration on these and related matters.

Thank you, Mr Chairman, ladies and gentlemen.
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Recognition of Multi-Culturalism
versus Mono-Culturalism
Constitutionalism and the Inclusive/Exclusive Society

GRAHAM NICHOLSON

We live in a constitutional society. The Australian Constitution,¹ as contained in section 9 of the Commonwealth of Australia Constitution Act 1900, and no doubt also the Australia Acts 1986² and the various State constitutions,³ are an essential part of the constitutional fabric and constitute the basic law of Australia. Australian governments and society are established under and in accordance with these basic legal documents by application of the rule of law. These documents, in whole or part, are constitutionally entrenched, subject to change by the Australian people voting at national or State referenda or by other special mechanisms.⁴ Constitutionalism is alive and well in Australia (although perhaps comparatively less so in Commonwealth territories).⁵

By and large, however, these constitutional documents are uninspiring documents, reflecting an age perhaps long gone, and more notable for what they do not say rather than what they do. They do not comprehensively attempt to set forth the fundamental core values of our society, the necessary elements of the Australian brand of civilisation. They offer instead very limited and uncertain guidance and direction. While the High Court may to some extent be engaged in a search for these core values by way of constitutional interpretation, including the perilous course of implied constitutional


² These Acts comprise the Australia Act 1986 of the Commonwealth Parliament, enacted at the request of all States, and a United Kingdom Act of the same name in equivalent terms. These Acts, together with Imperial Statute of Westminster 1931 as adopted in Australia, effectively terminate the constitutional links with the United Kingdom other than in the person of the Queen.

³ Each State of Australia has its own State constitution, formerly their colonial constitutions as continued by section 106 of the Australian Constitution.

⁴ The Australian Constitution in section 128, requires a special form of national referendum for any express change. State constitutions have parts that are entrenched, in some cases requiring a State referendum for change, but other parts can be amended by ordinary State legislation.

⁵ This is because Commonwealth territories are in effect dependencies of the Commonwealth and fully subject to the national Parliament’s plenary and virtually unlimited legislative powers in section 122 of the Australian Constitution.
rights, and by the process of moulding the common law of Australia, guidance as to most of the real fundamentals of our society must usually be sought elsewhere - in existing common law rules and principles, in a variety of ordinary legislation and its administration, in various constitutional conventions and understandings, in the statements of our leaders (such as they may be), in our heritage and upbringing, through the media, and perhaps in our general thoughts and feelings about the ethos of our society as it has uniquely evolved, as well as by reference to principles arising from our common humanity. Increasingly some Australians are likely to find certain common values in this regard with peoples of other countries through the ever increasing number and range of international agreements and arrangements to which Australia is a party and our ever expanding trans-national relationships. There may often be a lack of widespread agreement as to what are these Australian core values, a reflection of the growing diversity of Australian society. But the absence of such agreement may itself present the opportunity for choice in core values, enabling emphasis to be given to qualities such as tolerance and acceptance of diversity.

There seems to be a growing sense of urgency to identify these core Australian values. There is some enthusiasm to establish an independent and self-confident Australian identity, as indicated, for example, in the republican debate. Australians also seem to be concerned to find a meaningful place in the world and to seek and maintain good global and regional relationships within the family of nations, and particularly with Asia and the Pacific. At the same time, there is a desire to maintain the unique Australian character and way of life. The acquisition of full national status and severance of British links has no doubt acted as a spur in these quests.

It is of course a matter for debate as to the extent to which the core values of Australian society should be reflected in some way in its basic constitutional documents, and correspondingly as to the extent to which they should be excluded from these documents. Some matters may be seen as appropriately left to the field of ethics or religion, citing the old debate on the so-called division between law and morality. Others may be left to custom or common practice, perhaps being too vague or fluid to warrant express legal provision. But there will be a remainder, often with connections to our cultural diversity and democratic freedoms, which could potentially be the subject of express constitutional provisions.

In the post-Cold War global age, this is a matter that must be considered on a wider stage. Australians are participants in a much wider global search for human societal values. The anticipated battles of the 21st Century are more often likely to be concerned with a clash of principles and ideas (good or bad) rather than the clash of arms. This is

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6 See Australian Capital Television v Commonwealth (1992) 177 CLR 106 and subsequent cases, the most recent being Lange v ABC (High Court, unreported, 28 July 1997) and Levy v Victoria (High Court, unreported, 31 July 1997).

7 See, for example, Mabo v Commonwealth (No. 2) (1992) 175 CLR 1.
part of the course of history, as the nations and peoples are drawn ever closer together, and the concerns of one increasingly become the concerns of all. Australians have no option but to seek a meaningful and secure place in the world even though it is suffering from many defects. This does not mean that the available choices are narrowly confined or are predestined. Australians have a wide range of choices, both within the national society and as it relates externally. It is fortunate that this country still has a well established, relatively free and democratic process that permits a substantial element of personal choice in this regard.

One of these choices, and one the subject of current debate, is whether to wholeheartedly embrace the concept of the "inclusive" Australian society, made up of a multi-cultural diversity of people, an outward-looking society which welcomes all people as equals irrespective of race, background, religion, etc., or whether to retreat to the "exclusive" Australian society, based on majoritarian "white" cultural values and not freely and openly acceptance of diversity, an inward-looking society which looks down with suspicion and mistrust on others who might wish to break into that exclusive society. Australians should treasure the right to make this choice, and should reject those from either perspective in this current debate who might seek to silence the others, by violence or by any other anti-democratic means.

In this particular debate, the basic constitutional documents of Australia offer virtually no guidance. From my perspective, this is to be regretted, although I recognise an alternate point of view which states that the Constitution should be silent on this issue. In this regard, it is noteworthy that the policy of exclusion was previously entrenched, to some limited extent at least, in the Australian Constitution by the express exclusion of people of the "aboriginal race"; but these provisions were deleted at the successful 1967 national referendum. Australians are left with a virtually neutral national Constitution on this issue, apart perhaps from the racially-excluding and (in contemporary terms) relatively unimportant provision in section 25, allowing any State racially-based disqualifications from State electoral franchise to flow over into the federal arena. These constitutional documents have conveniently accommodated the "White Australia" policy in the past, and have more recently facilitated an accommodation of a policy more based on non-discriminatory immigration, multi-culturalism and, to some extent, affirmative action. Thus the choice in this regard, constitutionally speaking, is left open. The prevailing domestic legal view is that the direct impact of international human rights

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8 Section 51(26) of the Australian Constitution, prior to its amendment in the 1967 national referendum, excluded people of the aboriginal race in any State from the legislative powers of the national Parliament under that provision. Section 127, before its repeal in the 1967 referendum, provided that in reckoning the numbers of people of the Commonwealth or a State or other part of the Commonwealth, aboriginal natives were not to be counted.

9 Section 25 of the Australian Constitution provides that for the purposes of federal elections, if by a law of a State all persons of any race are disqualified from voting at elections for the lower house of a State Parliament, then, in reckoning the number of people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.
law in Australian law remains a matter of domestic parliamentary and judicial choice, unfettered by Australia's international obligations, thus effectively excluding any relevant international provisions on equality and non-discrimination unless an Australian legislature decides otherwise. Notwithstanding this, there is now a variety of ordinary Australian legislation which prohibits discrimination and discriminatory practices on various grounds, some based on international covenants and conventions to which Australia is a party. Complainants in Australia alleging discrimination or similar conduct in breach of international provisions have a right of review on individual application to international tribunals as a remedy of last resort. There is also a variety of ordinary legislation relating to the indigenous people of Australia, supplementing the evolving Australian common law on this topic. All this legislation is potentially subject to reversal by Australian parliaments (subject to the requirement of just terms for any resultant acquisition of property at the federal level and subject to the superior force of Commonwealth legislation, within constitutional power, over State/Territory legislation). There is no recognition in any Australian constitution of the indigenous people of Australia as the original inhabitants of this Continent nor of their inherited rights. There is no constitutional ban on discrimination (other than in commercial and revenue matters) and a provision preventing the imposition of disabilities or discrimination between different State residents, all in the Australian Constitution. There is one recent High Court case which may support an implied constitutional right of equal treatment under the law and before the courts throughout Australia under Commonwealth laws, but it is not clear yet how far this goes. There may be some

12 Eg: Under the First Optional Protocol to the International Covenant on Civil and Political Rights, Australia's accession to which was lodged on 25 September 1991 - see H Charlesworth, "Australia’s Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 Melbourne ULR 428. This gives a remedy of last resort to the Human Rights Committee based in Geneva for alleged breaches of the Covenant.
13 Eg: Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), Aboriginal Land Act (NT), Northern Territory Aboriginal Sacred Sites Act (NT).
14 Section 51(3xxi) of the Australian Constitution.
16 Australian Constitution, sections 51(ii), (iii), 88, 90, 92 and 99.
17 Australian Constitution, section 117. It does not, however, operate as a general guarantee against disability or discrimination.

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largely untested and probably fairly limited criminal process rights arising from the entrenched federal judiciary. There is a limited constitutional right to freedom of religion at the Commonwealth level only and a qualified implied guarantee of freedom of communication. In the absence of any general constitutional guarantee of equality before or under the law or to the equal protection of the law and any general constitutional prohibition on discrimination or any general Australian bill of rights, citizens must look to ordinary Australian legislation (where applicable) or to the common law for any available domestic legal remedies. If none are available there remains the possibility of complaint to a relevant international institution for a non-binding expression of opinion.

Now let this scenario be related to the position of the Northern Territory, as it makes plans for further constitutional development, perhaps by way of grant of Statehood within the Australian federation, with its own new Territory Constitution.

The Northern Territory, despite the grant of significant self-governing powers by ordinary Commonwealth legislation in 1978, remains a dependent territory of the Commonwealth. The virtually unlimited plenary legislative power of the Commonwealth Parliament under section 122 of the Constitution in respect of territories remains in full force in the Northern Territory. Despite judicial comments that suggest that territories and Territorians may be subject to at least some of the limited range of guarantees in the national Constitution, there have been very few cases where this view

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19 In *Kruger v Commonwealth* (High Court, unreported, 31 July 1997), only Toohey J continued to give support to a general constitutional doctrine of equality, with Gaudron J taking a somewhat narrower view.

20 Since the decision of the High Court in *Kruger v Commonwealth*, any such constitutional rights relating to judicial process may be limited.

21 Australian Constitution, section 116.

22 See footnote 6, above.

23 In *Street v Commonwealth* (1989) 168 CLR 461, Deane J (as he then was) suggested at 521-522 that while it was literally true that the Australian Constitution had no bill of rights, this was a superficial view and potentially misleading. He referred to a number of constitutional provisions. However they still fall short of an enforceable and fairly comprehensive constitutional bill of rights as found in the constitutions of many other countries. In particular, there are limited provisions in the Australian Constitution of relevance to the topic of this paper.

24 *Northern Territory (Self-Government) Act 1978* (Cth) and the *Northern Territory (Self-Government) Regulations*.

25 This status is indicated in *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248 and in other High Court cases.

26 *Capital Duplicators Pty Ltd v ACT*, above, and *NLC v Commonwealth* (1986) 161 CLR 1.

27 Per Gaudron J in *Capital Duplicators Pty Ltd v ACT* at 26-27, see also *Kruger v Commonwealth*, above.
has been applied in a positive way for the benefit of territories and Territorians. And previously conceded democratic rights in territories, such as enabling elected territory legislatures to enact their own territory legislation, are apparently subject to reversal by ordinary legislation of the Commonwealth Parliament. The application of the rule of law in the Northern Territory still very much appears to depend upon the whims and fancies of federal politicians expressed through national institutions in the ordinary way, and without regard to the conventions of responsible and representative self-government in territories.

But the Northern Territory remains in many respects a unique place within the wider Australian society. This is in part a product of history and geography, and in part a product of Australian constitutional law and politics. This is not the time and place to enter into a detailed recitation of all aspects of this uniqueness; sufficient for present purposes to mention the cultural and linguistic diversity of its small population, the substantial importance of its Aboriginal people with many still living traditional lifestyles, speaking their own languages and practising their own culture and religion, and the significant and growing links between the Territory and the nearby South East Asian countries. It is a society that is youthful, often individualistic, markedly innovative and dynamic, yet multi-cultural, egalitarian and largely tolerant of differences (including when dealing with nationals of Asian countries). There seems little doubt that the addition of the Northern Territory as a full State-member of the Australian federal system would add a new element of diversity so necessary to sustain the principle of federalism in this country.


29 As occurred with the Rights of the Terminally Ill Act (NT), the validity of which was upheld under Northern Territory Self-Government arrangements by the Supreme Court of the Northern Territory in Wake v Northern Territory (1996) 5 NTLR 170, but which was in effect later prospectively overruled by the Euthanasia Laws Act 1997 (Cwlth).

30 The Northern Territory population is reasonably cosmopolitan in its composition, like the rest of Australia, with just under one quarter of its residents being born overseas (although a larger percentage in Darwin) from in excess of 40 countries. When added to the number of children born from parents of non-English speaking backgrounds, it provides a rich cultural diversity. See Australian Bureau of Statistics, 1996 Census of Population and Housing, "Selected Social and Housing Characteristics for Statistical Local Areas - Northern Territory" (Catalogue No. 2015.7).

31 The 1996 Census reveals that about one quarter of the Northern Territory population claim to be of Aboriginal descent, many of them speaking indigenous languages. These Aboriginal people are, of course, included in the census figure for Australian-born residents, giving a greater diversity of population in the Northern Territory than elsewhere in Australia.

32 The Northern Territory Government has generally been regarded as being progressive in establishing links with South East Asian countries.
Thus if it be assumed that a grant of Statehood is to be conferred on the Northern Territory in the foreseeable future, and this seems to be the most likely form of constitutional change that may occur, it is not unreasonable, in my view, to expect that this uniqueness will be reflected in the new constitutional documents adopted by the citizens of, and applicable to, that new State. Exactly how this should be so reflected, including whether this should be done by way of provisions in a constitutionally entrenched written document called a new State "Constitution", is a matter for debate. Section 106 of the national Constitution seems to contemplate that a new State will have some form of "constitution" capable of having some continuing legal effect, and with its own mechanism for change, whether or not that "constitution" is described as such, and whether or not it is contained with a single written document. Such a new State "Constitution" would presumably form the basic law of the new State, subject to the operation of the Australian Constitution and the Australia Acts 1986. It need not necessarily be a "rigid" form of constitution, although given the uniqueness of the Northern Territory already spoken of, some degree of rigidity may be thought to be necessary or desirable to assist in preserving and maintaining this particular aspect of Territory society. The fact that the Australian Constitution is largely silent on the issue of the "inclusive" or "exclusive" nature of Australian society provides in itself no reason, in my opinion, for avoiding this issue in the context of a new State Constitution. In fact, it may well provide added reasons for specifically addressing this issue in the Northern Territory. The issue may be seen as being too important to be left entirely to the politicians and partisan politics of the day. Simple representative majoritarianism might not be perceived as providing sufficient legal guarantees on matters of cultural diversity, which appears to be widely regarded as being of great importance in the Northern Territory. It is quite a distinct and narrower question than that as to whether there should be some form of comprehensive statement of rights ("Bill of Rights") in a new State Constitution.

It is of course possible to debate the effectiveness of written constitutional guarantees of citizen's rights, and it is not desired in this paper to enter upon the subject of constitutional Bills of Rights and their merits or otherwise. What is being raised is the question of whether a new Constitution for a unique Northern Territory society should at least reflect in some way the most fundamental values of that society, and in particular the values relating to cultural diversity, in a manner designed to preserve and enhance those values. The merit of so providing has to be weighed against the importance of having a system of representative democracy, exercised through a new-State


34 Section 106 of the Australian Constitution provides that the Constitution of each State shall, subject to the Australian Constitution, continue as at 1901 (for Original States) or as at the admission or establishment of any new State, until altered in accordance with the Constitution of that State.
parliamentary institution and its responsible Ministers, unimpeded by any constitutionally entrenched provisions by reference to, and for protection of, the diverse nature of Territory society, such that the new State Government and Parliament are free to act as they see fit without any legal restraints by reference to those fundamental values.35

In my own opinion, the lessons of even the recent past, some being from parts of Europe and some from much closer to home, have indicated the importance of trying to do everything that reasonably can be done to maintain and enhance a reasonable level of unity, harmony and tolerance within our society. The principle of unity in diversity seems more appropriate and relevant today than ever before. It is not a passing value, but one which, in an increasingly interdependent world, has an enduring quality and importance. From my own perspective as a Baha'i, there is no long term sustainable future for humanity, let alone for any small section of humanity such as in the Northern Territory, without a wholehearted commitment to the principle of unity in diversity. The challenge before all of us is to develop attitudes and principles which treasure cultural diversity36 and which at the same time promote unity and harmony in a fair, open-minded and tolerant way.37 The danger of not adopting this approach is to leave open the door, no matter how slight, for the entry of prejudices, hatreds, divisions and ultimately the potential for violence and societal breakdown. I do not put forward constitutional entrenchment of our fundamental core values as some sort of universal panacea in this regard. Clearly this cannot be so. But it can be part of a more comprehensive program, designed to inculcate in all citizens the value and beauty of human diversity, and that such diversity is not necessarily productive of disunity and discord. In fact the opposite can potentially be the case. Mine is a plea for the preservation of the "inclusive"

35 There is a considerable amount of literature on the merits or otherwise of constitutionally entrenched rights beyond change by a simple majority of the members of Parliament present and voting. In the case of the Northern Territory, see Sessional Committee of the Legislative Assembly on Constitutional Development, Discussion Paper No. 8, "A Northern Territory Bill of Rights?" (March 1995).

36 The Report of the Sessional Committee of the Legislative Assembly on Constitutional Development, "Foundations for a Common Future" (November 1996), Volume 1, indicated the Sessional Committee's view that it was a critical aspect of the new Northern Territory Constitution that it should reflect the special multi-cultural nature of the Northern Territory, although recommending that it not also have a comprehensive Bill of Rights. In so far as an Aboriginal right to self-determination should also be recognised, it should operate within the wider constraint of a "harmonious, tolerant and united multi-cultural society" in the Northern Territory (see Preamble 15 to the Final Draft Constitution for the Northern Territory, being Appendix 8 to Volume 1).

37 The Baha'i Writings are replete with references to the need for unity consistent with a proper acceptance and appreciation of cultural diversity. The human race is compared to the "...... flowers of a garden: though differing in kind, colour, form and shape, yet, in as much as they are refreshed by the waters of one spring, revived by the breath of one wind, invigorated by the rays of one sun, this diversity increaseth their charm, and addeth unto their beauty". That which is said to prevent the establishment of unity in diversity is ignorance and prejudice, and the lack of recognition of the underlying spiritual unity of the whole human race.
Australian society, one which I think is very much in line with the Northern Territory tradition, and one that closely accords with basic human rights. The new Northern Territory Constitution should, in my view, offer express guidance and direction in relation to this "key" feature of Northern Territory society. The alternative of a new Constitution that is simply silent on this issue, or worse, one which actively facilitates division and preference (even if under the guise of formal equality but which is in effect based on majoritarian principles, with no corresponding recognition of minority cultures and values), is in my view a much less desirable option. The value of an entrenched written constitution is that it can provide a sound framework for achieving a balance that secures the interests of all citizens (majority and minority) in the society in a fair way, designed to maintain the "inclusive" society. The goal is a form of unity in diversity. This is infinitely preferable to a constitutional framework which incorporates or facilitates exclusivity, separateness and disadvantage. Historically, this later option is more likely to be productive of discord and violence, at least in the longer term. In my opinion, if a new Northern Territory Constitution did not reasonably reflect this "inclusive" form of society in its express language, it would be failing in its primary objectives.
Federalism of the Northern Frontier

Accommodation of Diversity in the Australian and Canadian Norths

ROGER GIBBINS AND KEVIN MUXLOW

Introduction

Minority representation in political communities with a relatively homogenous majority group has been a long-standing concern for western democratic states. Academics, practitioners, and interested observers alike have made recommendations for achieving this goal. One of the most important models for doing so is federalism, a system of government marked by the constitutional division of legislative powers between two levels of government and designed to promote unity among while also preserving regional diversity within its population. Federalism has been used nationally to provide formal representation for territorially-defined minorities, such as states and provinces, and de facto representation for national minorities which constitute state or provincial majorities, such as the francophone population in Quebec.¹ However, the fact that many national minorities are also minorities within states and provinces suggests the potential utility of federalism as a model of government for and not simply among subnational communities.

Developing an appropriate sub-national federal model has been an ongoing process in the Northern Territory of Australia (NT), with its large Aboriginal population, and Canada’s northern territories, with their Aboriginal populations. In both cases, providing Aboriginal communities with greater control over their lives and futures through the representation of their distinctive cultural, social and economic interests within governmental structures and policy discourse has been of paramount concern. At the same time, there is a recognised need to meet the other side of the federalism coin, the promotion of unity in the face of diversity. Federal systems are judged by the balance they maintain between the protection of diversity and the promotion of unity.

In the Australian context, the drive for statehood in the NT raises the question as to how Aboriginal communities, interests and individuals might best be represented within a constitutionally entrenched state government. In the Canadian context, where the three northern territories have very different Aboriginal populations, several models of representation are being developed, each designed in different ways to provide representation for the cultural diversity falling within their respective jurisdictions. All

¹ Although Francophobes constitute only 24% of the Canadian population, they constitute 82% of Quebec’s population and thus effectively control provincial politics.
four cases, including the NT, potentially entail a different form of sub-national federalism.

Comparing the four Australian and Canadian models, therefore, should yield insights for the particular cases, and for those interested in minority representation in broader terms. When federalism is used as a frame of reference, insight can be gained as to how various institutional structures yield varying degrees of effective minority representation. This paper suggests that political institutions do indeed matter. Institutions such as federalism determine the types of political issues addressed, the decision-making style, and the values and interests brought into the decision-making discourse. By comparing the northern territories of Canada and Australia, we seek to determine how and to what degree effective minority representation can be provided through federal institutions.

Not surprisingly, the suggestion that federalism is an appropriate form of government for the Australian and Canadian norths springs initially from the fact that Australia and Canada are themselves federal states. Thus federal concepts and institutions are familiar, only their application to sub-national governments is unfamiliar. Nonetheless, considerable confusion can result from using the terminology of federalism to describe both national and sub-national political systems. Confusion can be minimised if the reader keeps in mind that the primary focus of our analysis is on government within the northern territories. However, it must also be remembered that federal governments for the territories will, like Russian dolls, be located within national federal systems. While this form of embedded federalism can be complex to describe, it opens new ways in which the balance between the protection of diversity and the promotion of unity can be struck. What is important is not only the balance within a particular jurisdiction, such as the Northern Territory, but also the larger balance that is created when, for instance, the NT’s position within the Commonwealth is taken into account. The protection of minority interests in this case is a function of the territorial institutions, Commonwealth institutions, and the relationship between the two. The territories, therefore, cannot be examined in isolation; it is possible that federalism within the NT could lean toward the preservation of diversity precisely because Australian federalism leans toward the promotion of unity.

**Apples and Oranges? Comparing the Australian and Canadian Northern Territories**

At first blush it may seem odd to compare the northern Canadian territories, with their harsh Arctic winters, with the tropical NT. Do the two jurisdictions² have anything in common apart from the coincidence of lying on the northern periphery of their respective national communities? Though at face value they appear to constitute different types

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² Whereas the NT consists of a single political-administrative jurisdiction, the Canadian north is more complex. The latter consists of three political-administrative jurisdictions: the Yukon, Northwest Territories and Nunavut. Though the Yukon and the Northwest Territories have a relatively long political history, Nunavut will not be formally established until April 1999. However, the political and administrative structure and functions of the new government are already in place. Therefore, for this paper, we will refer to Nunavut as constituting a separate political entity, thereby dividing the Canadian north into three units.
(apples and oranges), they are nonetheless of a similar species (fruit) and can be considered useful units for comparison. In ascending order of importance, the two "norths" share similar economic structures, paths of constitutional and political development, demographic characteristics, and indigenous Aboriginal concerns and preferences. Both norths, moreover, lie at the geographic and social margins of their national communities: the great bulk of the Canadian population is to be found more than a thousand kilometres to the south, huddled along the American border, whereas the great bulk of the Australian population is found along the eastern, southern and western coasts, far removed from the "Great Centre" and Darwin's northern coast. Though an article could be based simply on these similarities, it is our purpose here to provide only a brief overview.

The territorial economies in the two countries are resource-based (Cameron and White, 1995; Jull, 1991: Altman, 1988). In the NT, public sector employment, mining, and tourism are the most significant economic sectors. Across the Canadian north, government is by far the largest employer. Complementing the high level of government involvement in the economy are mining, oil and gas, tourism, and activities associated with the traditional economy of hunting, trapping and fishing. In both the Canadian and Australian norths, large federal government transfer payments account for a significant proportion of the GDP. Thus the economic dependency on large-scale resource extraction is compounded by dependency on financial transfers from the national government.

This compounded state of dependency has frustrated constitutional and political development. Dacks (1990) has suggested that the two are themselves linked, with constitutional development referring to increasing the jurisdictional span and autonomy of public government, and political development to the ability of the members of a society to make binding, legitimate decisions concerning their affairs. Loveday (1991) observes that the story of constitutional and political development in the NT and Canadian north can be told as the evolution from colonial or semi-colonial status to self-government. The evolutionary tale, however, does not document the emergence of a new sovereign community from under the controlling grasp of a hegemonic state. Instead, the tale outlines the transition of governmental capacity within a federation, a process marked by the gradual devolution of legislative powers from the national government (Ottawa or Canberra) to the territorial government (Dacks, 1990). Though the desirability of "statehood" or "provincehood" for each case varies, the end goal is the same: to achieve self-governing capabilities through representative and responsible government.

Until approximately the 1950s, territorial governments were administered through a paternalistic relationship, with national governments in both countries pursuing assimilationist political and economic policies (Cameron and White, 1995; INAC 1993a;

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3 It is worth noting, however, that both the Canadian north and the Australian alien outback (which is admittedly not cotermous with the NT) have made a disproportionate contribution to national mythology and symbolism. Canadians who have never strayed more than a hundred kilometres from the Canadian-American border still define themselves as northerners, and are quick to adopt the imagery of more northern climes.
Loveday, 1991; Whittington, 1985; Coombs, 1978). A federally appointed official whose mandate was dictated by the federal government was responsible for territorial administration. Legislative authority for a multitude of policy areas (e.g. education, health, economic development) remained with the federal government, and the territorial government, as it existed, was simply an administrative body. It is also worth noting in this respect that the territorial administration's concern with economic development was combined with national responsibility for Aboriginal affairs - hence, for example, the Canadian bureaucratic hybrid, the Department of Indian Affairs and Northern Development. Territorial institution were staffed by a mixture of appointed and elected officials whose limited policy influence was expressed through a non-binding, advisory role. In essence, the early years of territorial development were characterised by the national government exercising near autocratic territorial rule.

By the 1960s, however, the colonial relationship between the federal and territorial government began to give way to greater territory-based governance in both the NT and Canadian norths. The evolution of a fully elected legislature in the NT placed great pressure on the system of autocratic rule, eroding the control that Canberra enjoyed (Loveday, 1991). By the mid-1970s, the elected representatives had wrung substantive reforms from the national government, culminating in the Northern Territory (Self-Government) Act 1978. While the Act left Canberra with an ultimate veto over NT legislation, it also provided separate representative and administrative institutions with legislative powers similar to those of state governments. The Canadian north experienced a parallel developmental path. A shift in federal policy, emphasising a form of "welfare colonialism," paved the way for relatively autonomous northern governments providing universal government services similar to those enjoyed by southern residents (Dickerson, 1992; Coates and Morrison, 1992). A combination of territorial pressure to reduce Ottawa's role and the acquiescence of the federal government continues to pave the way for autonomous governments exercising legislative powers similar to those of the provinces (Cameron and White, 1995).

Nevertheless, territorial governments in both countries remain constitutional creatures of the federal government, exercising authority delegated by the national parliaments. Despite their acquisition of powers similar to state and provincial governments, territorial governments do not have exclusive control over the natural resources that rest within their jurisdiction, resources important to their economies and social development. Furthermore, until recently, constitutional and political development took place in the absence of Aboriginal issues and interests. Following from this absence, the underlying models that guided constitutional and political development in the past were the orthodox models in the other provinces and states (INAC, 1993a; Loveday, 1991). However, the contemporary paths of development are driven by demographic characteristics and, more specifically, by the presence of significant Aboriginal populations and the attendant pressures for accommodation of cultural diversity. Development is now preoccupied with providing balanced representation for both Aboriginal and non-Aboriginal interests.

Before moving toward a description of the population characteristics within the territories, it is useful to place the territorial populations within their national context. Relative to the other provinces and states, the populations of the northern regions are very small. Based on the 1991 census data for Australia and Canada, total territorial
populations were as follows: NT (175,856), Yukon (27,665), and Northwest Territories (57,430). Though in absolute terms the NT population is considerably larger than that of the Canadian territories, when population is expressed as a percentage of the national population, the picture is quite similar. Within Australia, the NT population accounts for 1% of the total population; within Canada, the Yukon population accounts for .1% and the Northwest Territories (including Nunavut) accounts for .2% of the national population.

![Figure 1](image)

Although the northern territories are small on the national scale, they are nonetheless complex with respect to their internal composition. Figure 1, which displays the Aboriginal/non-Aboriginal population split for the northern territories, reveals that they are indeed federal societies marked by significant cultural, linguistic and ethnic cleavages. Across the Canadian north, the Aboriginal population as a percentage of total population varies. In the Yukon, it constitutes a minority within a larger non-Aboriginal (primarily white) majority. The Yukon population is concentrated in Whitehorse (64%), the territorial capital, and the widely dispersed Aboriginal population is relatively homogenous, dominated by First Nations Indians. In Nunavut, the population and its distribution is a mirror image of the Yukon case. Here, the Aboriginal population comprises a vast majority (85%) and, compared to the Yukon, the population distribution is highly decentralised, scattered among two dozen small communities. Like the Yukon, however, the Aboriginal population is homogenous, dominated by the Inuit. The NWT falls between the two cases: the Aboriginal/non-Aboriginal population (after the Nunavut division) is relatively equal, with the non-Aboriginal population forming a slight majority (53%). Although a large percentage of the population lives in Yellowknife, the territorial capital, the rural/urban distribution is relatively equal. Unlike the Yukon and Nunavut, the Aboriginal population is ethnically diverse, composed of the Dene, Metis (Dene-white), and Inuit peoples. Most rural communities in the NWT are dominated by a single ethnic group (non-Aboriginal, Dene, Metis, or Inuit), thus creating regionally-based cleavages.

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4 The total population for the Northwest Territories includes the population which would fall within the jurisdiction of Nunavut. At the time of the 1991 census, it was calculated that Nunavut would contain about 21,000 (37%) of the 57,430 total population.
When compared to the Canadian cases, the NT possesses demographic characteristics similar to both the Yukon and the NWT. The overall picture is remarkably similar to that of the Yukon, the Aboriginal population in both is approximately 23% of the territorial population. Furthermore, while the Aboriginal population in the NT is culturally and linguistically diverse, it is ethnically homogenous, much like that of the Aboriginal population in the Yukon. However, the NT's population distribution is similar to that of the NWT. The major centers of Darwin and Alice Springs account for well over half of the territorial population, with the Aboriginal population being dispersed in small, culturally-homogenous communities.

With Aboriginal peoples constituting a significant proportion of their population, the NT and Canadian norths share similar internal pressures for institutional change to address previously marginalised Aboriginal interests. Today, the relationship between Aboriginal and non-Aboriginal populations, along with the development of an appropriate form of governance, is the single most important feature of the social and political landscape (Coates, 1991). The growth in the political sophistication and resources of Aboriginal interests has also lead to increased demands for institutional reform within the territories. This "coming of age" has inevitably lead to some tension between Aboriginal and non-Aboriginal populations regarding, among other things, the appropriate form of government for the territory and for communities therein.

It is not surprising, of course, that the Aboriginal and non-Aboriginal populations in the NT might have different interests, although this need not negate a broad set of common interests as territorial residents and Australians. Conflicting agendas are part and parcel of any ongoing political system. What makes conflict particularly problematic in this case is that the institutions and constitutional parameters of the developing government are at stake. In this context, conflicting agendas reflect conflicting world views and, perhaps, significantly different institutional preferences. For example, the non-Aboriginal population might be quite happy with a constitution for the NT modelled after existing state constitutions, whereas the Aboriginal population may prefer a constitution that incorporates relatively powerful and autonomous community governments. The former may be primarily concerned with the NT's relationship with the broader political community in Australia, the latter with the relationship between local communities and the new NT state. Similar lines of division can be drawn for the Canadian north. What remains to be seen is whether, and how, federal models of governance might provide an effective bridge between different world views.

**Balancing Diversity: Federalism in the North**

To this point we have argued that a comparison of the Australian and Canadian norths makes sense given their similarities with respect to demography, position within their respective national communities, and stage of constitutional development. Any fruitful comparison, however, requires a common frame of reference which, in this case, is

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5 This is not to suggest however that Aboriginal people are the prime drivers behind the NT movement for statehood. The central dynamics of this movement are found in the non-Aboriginal population; Aboriginal interests lie less with statehood per se and more with the form that statehood might take.
provided by federalism. This frame is not appropriate simply because Australia and Canada are themselves federal states, although this context has some bearing on the analysis to come. Nor is it the case that scholars within the two countries routinely apply federal concepts and principles to state or provincial analysis. In fact, there has been virtually no utilisation of federalism as an analytical unit for sub-national analysis. The primary reason federalism works as a comparative framework is that, as a philosophy and system of government, it is designed to address the inherent tension between the recognition of diversity, on the one hand, and the promotion of unity, on the other. This tension is most prevalent within federal societies such as those found in both the NT and Canadian territories.

The manner in which federal countries address the tension between unity and diversity can be assessed according to four criteria: (1) the division of powers, (2) jurisdictional autonomy, (3) representation within national institutions, and (4) symbolic representation. For example, if one were assessing federalism at the national level in Australia, the following questions might be asked. What is the constitutional division of powers between the Commonwealth and state governments? What are the procedures through which the division of powers can be amended? How are the people and the governments of the states represented in Canberra? And to what extent does the Commonwealth constitution explicitly recognise territorial, racial or other forms of diversity within the country?

A similar set of questions can be asked of the proposed state government in the NT, and the emerging territorial governments in the Canadian north:

First, what is the jurisdictional domain of community-level governments? What powers do they exercise, and what financial resources do they control? In conventional federal usage, this is termed the division of powers, and can be summarised as either centralised or decentralised.

What is the autonomy of that jurisdictional domain? To what extent can the division of powers be altered unilaterally by the state government? Is the consent of community governments required? Do community governments possess low autonomy, moderate autonomy, or high autonomy?

How are community governments and their residents represented within the legislative and executive institutions of the state/territorial government? Are communities represented as communities, or are their members represented only as individuals indistinguishable from other individuals?

To what extent does the constitution of the state government provide for the symbolic recognition of diversity, thereby providing an interpretive framework for the document? Is there anything akin to a Bill of Rights, or the Canadian Charter of Rights and Freedoms?

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6 In Canada, the Charter of Rights and Freedoms provides a complex instrument for the recognition of diversities based on such characteristics as Aboriginal status, language, gender and multiculturalism.

7 By community-level governments, we mean those beneath the territorial governments in the Canadian and Australian norths.
In the abstract, the tension within federal societies such as the NT and the Canadian territories is between diversity as a centrifugal force and the desire for unity as a centripetal force. Constructing a governmental structure designed to achieve a durable balance in this push-pull dynamic has been fundamental to the constitutional development of the Australian and Canadian norths. At this point, it is important to note that a durable balance need not refer solely to parity regarding those provisions designed to preserve diversity and promote unity. Constitutional and political development does not follow the laws of physics, where balance is created by equal distribution along opposite sides of a fulcrum. For institutional development of this sort, balance may be created by an unequal emphasis. Indeed, it is a common feature of federal systems that the balance is weighted more heavily in favour of one side of the coin (diversity vs. unity). For example, at the national level, Australian federalism can be observed as providing greater emphasis on unity, while Canadian federalism emphasises protecting diversity. The nature of the balance depends in large part on the kinds and depths of societal cleavages; achieving a durable balance is an easier task in a relatively homogenous society than it is in a deeply segmented society. Regardless of the unique characteristics and emphasis of each model, it is the argument here that the developing governmental structure in both the NT and Canadian norths has been reflective of federal models.

Federalism in the Context of the Canadian North

The development of the governmental systems in the Canadian north is clearly a "work in progress." The Yukon government is currently involved in assembling a number of different relationships between First Nations and the territorial government, while the NWT and Nunavut are currently enmeshed in a process of mega-constitutional development. Whereas previous political and constitutional development was characterised by the devolution of powers from the core to the periphery, current development focuses on the appropriate devolution of powers within the territory, from the territorial to local governments. Across the three cases, and in its simplest form, the primary tension stems from debate over the appropriate legislative powers of public government, supported primarily by the non-Aboriginal population, and the appropriate legislative powers of self-governing local communities, primarily supported by the Aboriginal population. The overall goal of this developmental process, consistent with federalist principles, has been to achieve a balance between these two visions. To date, the products of this process across the three territorial jurisdictions in Canada's north reflect variants of a federal model. 

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8 It may be useful here to think of a beam balanced on a fulcrum. One could maintain the balance by adding equal number of elements to each side (unity and diversity) of the fulcrum. Alternatively, the balance could be maintained by adding a large number of elements to one side, but locates closer to the fulcrum, and a smaller number of elements to the other side, but located further from the fulcrum. The latter might be illustrated by land rights in the discussion to come.

9 Sub-national federal development in the Canadian north is still under construction, with most provisions of negotiated agreements yet to be implemented in full. As such, it is only possible for this paper to observe what has been accomplished thus far, and assume that the
In general, the structure of northern federalism varies according to the territory under consideration, each evidencing a different macro-institutional pattern. In the Yukon, the emerging federal system has evolved in conjunction with the land claims process. In 1973, spurred by the social damages that had been caused by economic and social development dictated by the federal and territorial governments, 14 First Nations, under an overlapping organisation, the Council for Yukon Indians (CYI), began negotiations with the territorial and federal government for a single land claim designed to provide greater control over their land and program development within (Smith, 1995). Negotiations were long and frustrating, with tentative agreements in 1976 and 1984 proving ultimately unsuccessful. By 1985, the diversity of interests within the CYI became irresistible, forcing negotiations to emphasise a single "framework" or umbrella agreement which would set only general parameters for individual (each of the 14 First Nations) self-government agreements (INAC, 1993c). The provisions of the umbrella agreement, passed in 1991, bear resemblance with the community government model of the NT, which allowed individual communities to "tailor" their government to meet their specific needs by specifying the legislative jurisdiction and level of responsibility (INAC, 1993d; 1993e). In terms of federal development, the umbrella agreement and the subsequent individual agreements have established provisions for a new, separate level of First Nations government within the Yukon (Coates and Morrison, 1992).  

In the NWT, the emerging federal structure is a result of Aboriginal negotiations and constitutional review with the territorial and federal government, and is designed to combine public government and community self-government. Extensive public consultation with territorial residents, along with negotiated land claims and the self-government frameworks within, have been the driving force behind the emerging governmental structure. However, unlike the Yukon, provisions within the land claim agreements and consultative documents have emphasised the accommodation of Aboriginal self-government within the existing, though significantly modified, institutions of public government (Cameron and White, 1995). Flowing from the Territorians' belief that "all authority to govern belongs to the people and flows from developmental rhetoric of today will become the established reality tomorrow. The latest documents guiding constitutional development for the three territories differ. For the Yukon, it is the umbrella agreement (INAC, 1993c) and the respective individual First Nations agreements (for example, INAC, 1993d; 1993e); for Nunavut, it is the Nunavut land claim agreement (INAC, 1993b) and the Nunavut Act; and for the NWT, it is a series of constitutional documents resulting in the latest draft constitution (CWG, 1996).

At the time of writing, there have been 4 self-government final agreements (out of 14) established in the Yukon. The Champagne-Aishihik, Nacho Nyak Dun, Teslin, and Vuntut Gwitchin First Nations have all settled agreements, setting the stage for the remaining ten.

We label these provisions regarding self-government as framework provisions because they are skeletal in nature, and do not possess the specificity that similar provisions possess for the Yukon. As well, at the time of writing, they have yet to be acted upon.

Community government empowerment is supported by most Aboriginal groups in the NWT, except a substantial portion of the Dene peoples. This group argues that they possess an unrelinquished sovereignty which legitimises their inherent right to self-government. For them, the "true" realisation of this right could only come with the further division of the territory.
them to their institutions of government," the means for accommodating a greater local 
involve ment in governance is to be achieved through the establishment of empowered 
community-level government, the size and structure of which will be flexible (Clancy, 
1992; CDC, 1992). Such internal flexibility will also translate into asymmetrical 
relationships between community and territorial government, depending upon the parties 
affected.

In Nunavut, the tension created by the conflicting visions of public government and self-
government in the Yukon and NWT have been solved by the creation of an Inuit 
dominated territory in which public government and self-government are synonymous 
(NCE, 1983). That this is the case is found in the following: "...the creation of the 
Nunavut territory and Government will represent an important first step in allowing, Inuit 
and other residents to take control of their lives and futures..." NIC, 1995: 5). Nunavut 
was born from the massive, and successful (from an Aboriginal point of view) land claim 
negotiated between the Tungavik Federation of Nunavut (TFN), the government of the 
NWT and the federal government (see Article 4; INAC, 1993b). Social homogeneity and 
years of consultation (the process originally started in 1976) ensured that a general 
consensus on the appropriate form of public services and governmental institutions 
would be achieved (Jull, 1988). Following this, the federal structure in Nunavut is quite 
simple, a territorial government supplemented by community governments, with no level 
of government existing between the two (NIC, 1995). Within this two-tiered structure, 
policy development implementation, and service delivery are to be highly decentralised, 
with administration headquarters located throughout the Territory.

As this brief overview illustrates, the emerging federal structures within the northern 
territories are complex. In the Yukon, the territorial and First Nations governments are 
the building blocks for a new federal structure. Though variation exists, territorial 
governments and relatively autonomous community governments in the NWT and 
Nunavut are the significant bodies around which the federal dynamic will emerge.

As well as being differentiated by their macro-institutional federal framework, the 
territorial structures vary along the lines of the federal criteria inherent in our 
comparative framework. Each territorial structure employs these criteria in a variety of 
ways to develop a durable balance within their federal societies.

**Jurisdictional Domain**

At the community-level, the legislative domain and financial resources that local 
governments might control are differentiated among the territories.\(^{13}\) Nevertheless, a 
division of the legislative domain is emerging. In the Yukon, First Nations governments 
have, at least, the potential\(^ {14}\) for an expansive jurisdictional domain following the

\(^{13}\) It should be noted that within the self-government agreements there are provisions regarding 
administration of Aboriginal justice policy. However, the First Nations have agreed to reserve 
this power until the year 2000, when the federal government releases its Aboriginal justice 
policy.

\(^{14}\) We stress the potential for expansive jurisdiction because the size of the legislative domain will 
be dependent upon the tailored agreement between the individual First Nation and the 
governments.
negotiated devolution of program authority from either the Yukon or federal government (INAC, 1993c). The legislative domain includes, among other things, taxation, education, health and social programs, and economic development. Once a First Nations government has laid claim to a policy sector, a subsequent increase in legislative autonomy occurs because the previous federal government veto is abolished (Smyth, 1993). While powers of taxation and resource revenues constitute significant resource generating powers, the bulk of financial resources for First Nations governments come from large block grants from the federal government, thus reducing the influence of the territorial government.15

In the NWT, the jurisdictional domain of community-level government has been more loosely defined than in the Yukon case, a characteristic demonstrating the embryonic form of the emerging federal structure. Empowered community government refers to local communities and institutions, through elected representatives, having control of and responsibility for programs, services, and infrastructure. Empowered communities are more than program administrators envisioned under previous policies; they receive program ownership within local institutions in order to manipulate local programs to ensure that they reflect local needs and interests (DMCA, 1996). Although the legislative boundaries are unclear, proposals concerning the division of powers are primarily functionalist, with the territorial government assuming responsibility territory-wide responsibilities (e.g. territorial highways) and the community government handling regional matters (e.g. social assistance programs). The division of powers is designed to create two levels of government sharing in an equal distribution of legislative power; community-level government is not subordinate to the territorial government. As it stands now, funding for community government will take the form of block funding, originating from the territorial government.

For Nunavut, finding a regionally-responsive balance in the division of powers is not as crucial as it is for the NWT. Given that Inuit majority will dominate the territorial government, designing an appropriate division of powers sensitive to local interests is of secondary import. The territorial government will focus on all aspects of legislation, including policy and program development, budget development, and policy evaluation. In the interim, the Nunavut government can contract the services of another government (NWT or federal) for program delivery. As such, the focus has been on the appropriate division of administrative powers within the territory, and has been guided by the principle that:

the Nunavut government should be a decentralised government as far as practicable, with conscious efforts made to distribute government functions and activities across the regions and communities of Nunavut and conscious efforts made to delegate as much authority as possible to Nunavut Government officials working at the regional and community levels (NIC, 1995: 23-24).

Constitutional development ongoing in Nunavut, however, has alluded to future community government responsibility along the lines of that being developed in the

15 Though performance criteria may apply, block funding is a way of transferring money which does not specify exactly how the receiver should spend that money.
NWT (NIC, 1996). Funding of the Nunavut government, along with the internal fiscal resources accrued from taxation and resource royalties, will rely upon a formula funding arrangement between Nunavut and the federal government similar to the equalisation payments to provinces (INAC, 1993a). Under this agreement, five-year unconditional funding is arranged between the territorial and federal government.

**Jurisdictional Autonomy**

Within Canadian federalism, local governments are creatures of the provincial government and, as such, have limited formal authority.\(^\text{xvi}\) Largely because they are linked to constitutionally protected land claims, community governments in the north are afforded a greater degree of autonomy and jurisdictional control. However, across the north, this autonomy is not equal to that of the provinces in relation to the federal government. Though consent is not required for amendment to either the self-government agreement or a First Nations constitution, First Nations governments in the Yukon must be consulted by the federal or territorial government, a feature not required within the provincial-local government relationship in the provinces. Community government in the NWT occupies a less secure existence. All institutions, including the division of powers affecting community government, can be amended by the territorial government or by the federal government; no provision for community consultation or consent is required (CWG, 1996). One emerging caveat of this has been a "companion" agreement to the constitution which would require Aboriginal consultation and consent for proposed amendment to the territorial constitution. For Nunavut, constitutional amendment of federal government legislation rests with the federal government. For amending legislation affecting community government an Inuit dominated territorial government ensures that hostile amendment is unlikely to occur.

To be sure, territorial constitutions and their governmental structure exist within an insecure environment. Nonetheless, the argument here is that community governments in the north possess or are likely to possess a greater degree of jurisdictional autonomy than do their counterparts in the provinces. Land claim agreements providing greater autonomy for sub-territorial governments in the north, an increased hesitancy by the federal government to become involved in territorial politics, and the public announcement by the governing federal Liberal party of a recognised inherent right of Aboriginal self-government all lend evidence of an emerging convention requiring Aboriginal consent for constitutional amendment. The manifestation of such a convention would be consistent with federal principles, paralleling the consent of provinces required for constitutional amendment. Although legal support for the necessity of Aboriginal consent to constitutional amendment has not yet firmly jelled, such support is emerging and is likely to manifest itself most emphatically in the north.

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\(^{\text{xvi}}\) The stress is on *formal* autonomy. Although in theory the local government for the City of Calgary could be abolished by the provincial government, there would be immense political problems in doing so. Note, for example, the rough ride that the Ontario government's recent plans for metropolitan amalgamation have had.
Institutional Representation

Consistent across cases of political development in the north has been the acceptance of central or territorial governance. As such, developing effective representation within the executive and legislative branches of the territorial governments has been a preoccupation of Aboriginal people. In the Canadian north, complex provisions have been developed to represent both community and individual interests within territorial institutions. As the dominant non-Aboriginal population favours the current representation system, territorial representation in the Yukon continues to be based on individual representation within a highly partisan legislature (Michael, 1989). Here the legislature’s structure and operating principles parallel the provincial model, emphasising the cabinet-parliamentary government inherent within the Westminster model. The championing of Aboriginal interests is wholly dependent upon a political party taking up the cause, a function adequately served by the New Democratic Party since 1985 (Coates and Morrison, 1992). More formal representation of the Aboriginal community’s interests within territorial institutions, therefore, falls outside of the legislature and rests within land and resources management boards which provide guaranteed community representation.17 Effective representation is provided through these boards, whose decisions cannot be overruled by the territorial government.

While in the Yukon the territorial legislature emphasises individual representation, leaving community representation for the more informal political process and autonomous boards, the representational picture in the NWT and Nunavut is significantly different. Here too, community representation exists outside the territorial legislature, and is provided through guaranteed membership in land and resource bodies established under land claim agreements. In contrast to the Yukon, however, the territorial legislatures are also designed to incorporate community representation.18 Stemming from the indigenous belief that political parties accentuate and perpetuate harmful social divisions, partisan politics within the territorial legislature does not exist (White, 1991). Instead, and consistent with Aboriginal culture, the legislative dynamic is animated by the consensus model, which, in its ideal form, is designed to ensure that community interest takes precedence over individual interests (O’Keefe, 1989).

Within the broad parameters of the consensus model, territorial legislatures in the NWT and Nunavut have taken different steps for community-oriented representation. The emerging constitution in the NWT reflects a belief in Aboriginal self-government, and therefore legislative institutions are designed "...in appropriate way to ensure representation of Aboriginal interests in any new territorial government" (CWG, 1996: 15). In this regard, the proposed territorial legislature will be composed of 22 elected members, eight of which will represent "...Aboriginal peoples who have land claim agreements, on-going land claim negotiations, on-going self-government negotiations, or treaty processes..." (CWG, 1996: 16). The legislature would thus include one member from each of the major Aboriginal governments (elected by Aboriginal Peoples) in the

17 Because these boards have been created within the context of land claims agreements, they have a unique form of constitutional entrenchment.

18 It should be noted that the NWT legislature is the model for the new Nunavut legislature, although significant modifications could be introduced in the years to come.
NWT after division, and would constitute the "Aboriginal Peoples Assembly;" the remaining fourteen members would be elected conventionally and would constitute the "General Assembly." In Nunavut, provisions for representation of Aboriginal communities does not exist, largely because the Inuit will dominate the initial territorial governments. Instead, the focus has been to develop guaranteed provisions for the equal representation of gender groups. However, electoral districting providing for this innovation has yet to emerge.

Symbolic Recognition

The constitutional and political structures of the emerging federal systems in the north have yet to be challenged within the courts or other judicial bodies. If we look ahead, however, we can anticipate the court challenges which have become so typical of federal states. In this context, knowledge of the intentions and understandings of the framers of the constitution can play a crucial role in shaping judicial decisions. Thus, the symbolic recognition of diversity within the constitution may provide the framework to guide constitutional interpretation.

In the case of Nunavut symbolic recognition is almost non-existent. Informing the need for community government, the symbolic recognition of diversity focuses less on the Inuit/non-Inuit divide than on regional diversity within the Inuit community. Widely dispersed communities retaining their own distinctive culture, language and way of life have been provided symbolic recognition, possibly paving the way for greater community governance NIC, 1995). Conversely, the umbrella agreement in the Yukon places great store in symbolic recognition: It recognises First Nations rights, titles and interests with respect to their traditional territories, their wishes to retain these rights; their way of life and intimate attachment to the land; their cultural distinctiveness; and the contributions they bring to territorial society. All of this can only provide support for an expansive treatment of First Nations self-government in the years to come.

The NWT's emerging constitution, consistent with development of the federal model through self-government within the system of public government, recognises diversity while also recognising the need for unity. It is likely that in no other Canadian constitutional document does the symbolic recognition of diversity and unity go as far as it does in the emerging NWT constitution. The preamble of the draft constitution states:

Aboriginal Peoples have traditionally used and occupied lands in [the NWT] since time immemorial and are self-governing. Canadians from many backgrounds came to [the NWT] and made it their home. Aboriginal Peoples agreed through their numbered and modern day treaties to share their lands, their knowledge and their resources. All of the people of [the NWT] share a commitment to build a strong, united and caring northern society by respecting the following principles: that men and women are treated equally and every individual is worthy of respect, respect and honour for our distinct cultures, traditions and languages is a vital aspect of northern society; building and sharing a future together through partnership is essential to all

19 Provisions in the emerging constitution regarding legislature enlargement ensure the proportionality of Aboriginal Peoples Assembly members (8) to General Assembly measures.
peoples in [the NWT]; the power to govern flows from the people; government should serve the people and be exercised as close to the community level as possible (CWG. 1996: 38).

The symbolism within the preamble clearly reflects the balancing of the two sides of the federal coin. At the same time that presence and rights of Aboriginal Peoples are recognised, the need for working together to "build a common future" is stressed.

This conclusion brings us to an important point. Thus far in our discussion, the focus has been on the development of the emerging sub-national federal structures of government within the northern territories, and on their internal features designed to preserve diversity. However, to what extent has the flip side of the federal coin, promoting unity, been addressed? Is there a unity-promoting strategy at work within these systems? Clearly, the NWT has established unity provisions within its constitutional frame by developing effective self-government within public government. However, while manifest attempts at unity promotion within the Yukon and Nunavut are less clear, at a more abstract level we can identify an implicit unity promotion strategy. Within the territories unity is pursued through the recognition of diversity. Emerging governmental structures have been designed with flexibility at the forefront, the flexibility to accommodate federal societies.

To some people, of course, it may seem odd to promote unity through the recognition of diversity, but this line of thought is intrinsic to federalism as a philosophy of governance. It worked, moreover, for the constitutional evolution of the United States, and it finds full reflection in the current recognition of multiculturalism in such documents as the Canadian Charter of Rights and Freedoms. At the same time, whether it will achieve a workable and durable federal balance in the northern territories remains to be seen. The outcome may well depend not only on the balance struck; between unity and diversity in the specific northern territories, but also on the balance struck within the encompassing Canadian federal state. This suggests in turn that future constitutional developments in the country at large are of considerable importance for the emergence and success of federal institutions in the north.

The Draft Constitution for the Northern Territory

To this point we have suggested that federalism provides a useful conceptual framework through which to explore constitutional development in the Canadian norths and, more specifically, the balance between the promotion of unity and the protection of diversity. What happens, then, when we apply the same four criteria - jurisdictional domain, jurisdictional autonomy, institutional representation and symbolic representation - to the draft constitution20 for the Northern Territory?

Jurisdictional Domain

At first glance, the draft NT constitution provides for only conventional forms of local government indistinguishable from those in the Australian states or Canadian provinces. The governments identified in section 9.1 would not be federal governments; they would be creatures of the NT Parliament exercising limited and delegated powers. However, section 7.3 "subject to this Constitution, an Act may provide for Aboriginal self-determination and for all matters incidental thereto" opens the door for a very different form of community government. Aboriginal self-determination is given a very expansive designation within the draft constitution: it means "the activity of Aboriginal people in the Northern Territory exercising control over their daily lives in order to safeguard, strengthen and develop their language, social and cultural customs and traditions, religion or beliefs, economies and identities." Although the legislative powers of Aboriginal governments have yet to be established, this definition potentially provides for a broad jurisdictional domain. Furthermore, the draft's recognition of Aboriginal peoples as self governing suggests that Aboriginal governments, if established, would be federal in character. Rather than resembling the local governments described above, they would exercise power that was constitutionally derived, not delegated.

The draft also recommends the patriation of the Aboriginal Land Rights (Northern Territory) Act 1976, thereby embedding it in the NT constitution. As a consequence, the powers of the land councils outlined in the 1976 Act would be constitutionally entrenched. At present, land councils are creatures of Commonwealth legislation; under the proposed NT constitution, they would become creatures of the NT Parliament. The point to stress is that the Land Rights Act provides the territorial foundation for Aboriginal self-government, just as land settlements have provided a similar foundation for Aboriginal self-government in the Canadian norths. While the land councils are not yet conventional governments, they are governments in waiting "with a land base over which they exercise a very considerable degree of control, statutory responsibilities which translate into real political power, and a funding base that is largely independent from the Commonwealth or NT governments" (Gibbins, 1988: 121).

In addition, the draft constitution calls for the recognition of Aboriginal customary law on a similar basis as common law, recognition which reinforces the powers of self-determination outlined above. However, there are two important caveats on this recognition, caveats which may reflect a more general cautionary stance with respect to self-government. First, it is proposed that customary law not be "implemented or enforced through the institutions and officers of government except in so far as the courts are prepared to do so or as Territory legislation so provides. Second, customary law is to be subordinate to any international agreements or covenants to which Australia is a signatory. As the Sessional Committee on Constitutional Development noted (1996: 5-13), somewhat disingenuously this should ensure that basic civilised standards are met...."

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21 Whether specific Aboriginal communities would have the capacity, financial or otherwise, to occupy that domain is another matter that cannot be discussed here.

22 Foundations for a Common Future, p. 5-7.
In summary, the draft constitution opens the door to a federal division of powers between the NT Parliament and Aboriginal governments, one based on the twin pillars of existing land rights and the proposed constitutional recognition of Aboriginal self-determination. However, given that enabling legislation is not yet in place, it remains to be seen to what extent this potential will be realised.

**Jurisdictional Autonomy**

It is difficult to discuss the jurisdictional autonomy of Aboriginal governments that have yet to be created. However, we can note that the autonomy of such governments will ultimately rest on the degree to which land rights are constitutionally entrenched. The draft constitution proposes that land rights would have the same character as organic laws, and would thus require the consent of two-thirds or three-quarters of the members of the NT Parliament before amendment could take place. If the threshold is three-quarters, then Aboriginal people will have a de facto although not a de jure veto on any amendment; if the threshold is two-thirds, the veto power would be weakened considerably. What is not clear (at least to the authors) is whether the patriation of the 1976 Aboriginal Land Rights (Northern Territory) Act will weaken the protection of land rights by courts external to the NT or by the Commonwealth government. In any event, the jurisdictional autonomy of Aboriginal governments, should they be created, will be somewhat less than the jurisdictional autonomy of the states in Australia or the provinces in Canada, both of whom must consent to any amendments to the constitutional division of powers. Whether the difference is of sufficient magnitude to be of any practical consequence is difficult to tell.

**Institutional Representation**

In terms of institutional representation, the draft constitution is not a federal document. For example, there is no provision for the legislative representation of communities, land courts or Aboriginal people as Aboriginals. The model of incorporation into the new body politic is as equal individuals, and individuals divorced from their ethnicity, gender or culture. The proposed methods of election for the NT Parliament do not call for special electoral districts for Aboriginal voters of the sort that have been proposed for the federal Parliament in Canada. However, the choice that is yet to be made between single member and multiple member electorates may have significant implications for the numerical representation of Aboriginal people within Parliament, and thus for the protection of Aboriginal interests in Territorial legislation.

In general, the institutional structures that have been proposed for the Territorial Parliament are very conventional, and do not reflect the Aboriginal/non-Aboriginal divide in the electorate. There is no formal Aboriginal "veto," no matter how loosely

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23 Section 7.1.1 states that "the Parliament shall enact an Organic Law entitled the 'Aboriginal Land Rights (Northern Territory) Act' which shall contain provisions based on those contained in the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth..."  
24 There may eventually be formal provisions for the representation of Aboriginal groups or individuals on government boards and committees. However, this form of representation is quite different in character from legislative representation.
defined. This observation, of course, should not suggest that the institutional design is flawed, for there are strong arguments to be made for institutional incorporation of citizens as equal individuals. It is simply worth noting that representation within Parliament, the criteria necessary for passing or amending organic laws, and the process by which the NT constitution will be initially ratified and then amended in the future do not take into explicit account the Aboriginal presence in the NT. In this instance, the institutional emphasis is on the promotion of unity rather than upon the protection of diversity.

Some light on this trajectory of constitutional development may be shed by the remarks of the Hon. S.P. Hatton when he tabled the Sessional Committee's report on August 22, 1996. At that time he said: "Whether people like it or not, the Land Rights Act has become an established feature of the Northern Territory constitutional landscape, and this is not going to disappear upon a grant of Statehood." (Foundations for a Common Future, 8-156). It might be argued, then, that the decision has been made to use the Land Rights Act, or more specifically the patriated Land Rights Act, as the primary and in some respects almost the sole vehicle through which the political representation of Aboriginal peoples will be met. Perhaps, with the Act in hand (reluctantly or not), there is a sense that the rest of the new constitutional architecture for the NT can be built upon conventional lines.

**Symbolic Recognition**

The preamble to the draft constitution takes a dramatic step with the symbolic representation of Aboriginal peoples; it states that the NT 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. Such constitutional recognition is unprecedented in Australia (apart that is, from court interpretations), and will undoubtedly have the intended effect of strengthening the more detailed self-government provisions within the NT constitution. This recognition fits our understanding of federalism, which provides for the representation of constituent communities such as the Australian states.

The draft constitution's symbolic recognition of diversity does not stop with Aboriginal peoples. At several points it draws attention to the multicultural nature of the NT society, and provides for the protection of the linguistic and religious diversity underlying multiculturalism. For example, the proposed preamble notes that "the people of the Northern Territory are concerned to preserve a harmonious, tolerant and united multicultural society...." To this end, persons should not be denied the right to use their own language in communication with others speaking the same language, to preserve their own social and cultural customs in relations with other people of the same tradition, or to manifest his or her own religion. Note, however, that these provisions do not impose any public obligations with respect to multiculturalism; only English is to be the language of communication with the government, and one's cultural values do not constitute a claim on others not sharing the same cultural tradition.

To this point we have primarily discussed how the draft constitution recognises diversity within the NT. But what about the other side of the coin, the promotion of unity? Here
there are a number of important points to note. As the title of the Sessional Committee's report suggests (Foundations for a Common Future), the promotion of unity is not sacrificed on the alter of preserving diversity. Indeed, the draft constitution places considerable emphasis on the promotion of unity. The preamble describes Territorians as "free, diverse yet equal citizens" (emphasis added). The Sessional Committee's report stresses that "The new constitution should provide a legal framework for a form of Aboriginal and non-Aboriginal reconciliation and partnership within the one Northern Territory political entity" (Foundations for a Common Future, 5-11). Aboriginal self-determination is cast within the framework of "a unified Northern Territory society" (5-12), and multiculturalism "should be protected and encouraged in so far as it is compatible with overall social harmony and unity" (5-13). Some of the proposed (and minimal) restrictions or Aboriginal land rights were presented by Mr. Hatton "as being critical to finding a proper balance between Aboriginal interests and the wider Territory public interest as a whole" (8-157).

Thus in determining the appropriate balance between the promotion of unity and protection of diversity, the draft NT constitution does not go over-board in its protection of diversity. Indeed, one might argue that the emphasis is on the promotion of unity, subject of course to the constraints of Commonwealth legislation patriated into the NT constitution. This suggests in turn that the draft constitution looks to the Commonwealth for the protection of diversity, and for providing the appropriate federal balance. Whether the Commonwealth and its constitutional apparatus are up to this challenge is something that two Canadian observers are hesitant to judge.

To bring this discussion to a close, it is useful to point out some parallels and contrasts with the Canadian norths. Perhaps the first point to stress is that the constitutional proposal for the NT is more conventional than is the case for proposals in the Canadian norths. Simply put, the draft NT constitution looks more like existing state constitutions than do the Canadian constitutional proposals look like existing provincial constitutions. The unconventionality of the NT constitution comes in large part from the recognition of land rights, but this primarily a legacy from and concession to the 1976 Commonwealth legislation. Other than that, statehood for the NT looks more like statehood for New South Wales than provincehood for the Northwest Territories would look like provincehood for British Columbia. The second point is that within the three Canadian norths, the emerging constitutional model that is closest to the NT draft constitution is that of the Yukon. This in turn takes us back to Figure 1. Given the similar demographic composition of the NT and trajectories that are both similar to one another and different from the other two Canadian norths where demographic parameters are quite different.

Conclusions

In democratic political systems we generally expect majorities to prevail; a political system built upon the equality of individuals should yield no other result. However, citizens in liberal democratic states such as Australia and Canada have also come to expect some constraints on majority rule. For example, we do not expect majority rule to violate due process or to abridge the constitutionally-defined rights of individuals and groups. Moreover, and more important for this discussion, we recognise that federalism is designed to frustrate majority rule, to ensure that at least in some circumstances the
national majority will not prevail over majority preferences in individual states. Federalism, for instance, and in some cases shelters majority preferences in Queensland from majority preferences in the Commonwealth at large, should the two collide.

However, federalism only works as an effective line of defence for minority interests if national minorities can be recast as state or provincial majorities. This, for example, is the case with Francophobes in Canada – a minority within the country, but a commanding majority within the province of Quebec. But in the case of Aboriginal peoples, conventional federalism offers no assistance for they are a minority within the country and within the various states and provinces. To this point, then, federal principles have been extended to the states and provinces, but not beyond to the communities embedded within them. If we extend federal principles further, then they may well provide an institutional solution to the varying aspirations of Aboriginal and non-Aboriginal peoples.

Is it possible, then, to create successful federal institutions within the northern territories? To this point, the constitutional evolution of the four territories offers considerable grounds for optimism. At the same time, we must recognise that there are limits on institutional design. It is difficult, for instance, to design institutions that will offset deeply-rooted racism; success in this regard may depend more on evolutionary change in political culture. We also know that the partisan organisation of political life can both reinforce and subvert the intended effects of institutional design.\(^{25}\) For this reason, the future nature of partisan politics in the northern territories may have more to do with how institutions work than anything else. In this respect it is interesting to note the steps that have been taken in Nunavut and the Northwest Territories to expunge partisanship, steps that have not been taken in the Yukon and have not been contemplated in the NT.

Whether federalism within the northern territories will be successful also depends on how we measure success. Remember that federalism strives for balance between unity and the protection of diversity; a federal system that tips the balance too far in either direction will fail. But also remember that balance must be assessed within the context of embedded federalism. In assessing the northern territories, we must examine not only the federal balance within the territory but also the balance within the political system as a whole. Territorial systems may be able to lean more toward the protection of diversity if the national federal system leans toward the promotion of unity. It is only when both systems lean too far in the same direction that the ship of state may be unable to handle the stormy seas of conflicting interests.

In using a federal framework to assess the balance between diversity and unity in the Australian and Canadian norths, there is an important difference to note between the national and territorial experience. Federalism in such states as Australia, Canada and the United States was originally designed to accommodate relatively shallow forms of diversity. In the Australian case, for example, federalism had to accommodate six states whose population shared a great deal in common. Thus accommodating the relatively modest differences in culture, lifestyles and interests between the residents of Sydney

\(^{25}\) It can be argued, for example, that political parties have had a centralising impact in both Australia and the United States, and a decentralising impact in Canada.
and Melbourne was not a difficult institutional task. When federal states were faced with somewhat deeper diversity, such as that between linguistic communities in Canada, patterns of federal accommodation were somewhat less successful. Indeed, a strong separatist movement in the province of Quebec argues that federalism has failed, and should be replaced by two autonomous national communities. In the case of the Australian and Canadian norths, we are facing a level of diversity that is an order of magnitude greater than that faced by the national community in either country. (For instance, it could be argued that Nunavut was born from the failure of federal accommodation of Inuit interests within the NWT.) Therefore, the balance between the promotion of unity and the protection of diversity is that much harder to find on “the northern frontier.” Indeed, the task is of such complexity and difficulty that success is by no means assured.

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Sharing the Future

What is Multiculturalism?

Michele Castagna and Marguerite Rooke

Multiculturalism in a descriptive sense is no more than a term that describes the cultural and ethnic diversity of contemporary Australia and Australians. A definition most appropriate to the Territory and Territorians as it is a natural extension of what already is.

The territory was opened up, developed and built upon concepts of Multiculturalism and the blood and sweat and tears of people from diverse backgrounds.

The Chinese, in particular have left a significant legacy that continues today. The Italian people and other Mediterranean cultures, Slavic people and others from Eastern European blocks, have left their mark in developing the Territory as we know it today, especially

• miners
• retailers
• market gardeners
• land owners
• pioneers in the development of the Territory

all participated in creating community life and establishing roots that provided opportunity for a better quality of future.

The territory has never been for the faint hearted and has not attracted huge populations. People were needed to open up the Territory and all were welcomed and judged on their merit and contribution. Yes, there was racial vilification and segregation to varying degrees, many a tale or persons story will-verify this, much to our chagrin and shame especially in terms of todays modern philosophy. However keep in mind these same people are now part of our heritage past, present and certainly our future, as newly arrived migrants and refugee settlers continue to build a future in the NT.

Has Australia ever really been mono-cultural? Prior to European settlement Australia was inhabited by many Aboriginal clans with a diversity of languages and customs. European settlement brought the English, Irish, Scots and Welsh to Australian shores all of whom contributed to the Australian character.

From the Territory perspective it is perhaps time and constitutionally appropriate that a conceptual framework adequately representing the reality and flavour of Territorian
society be developed and that the framework must address facts of identity other than
ethnicity.

There is a need for a more inclusive, interactive model of society, one that acknowledges
the mistakes of the past but allows us to move into the future. Multiculturalism and
diversity is here to stay. It is becoming entrenched in the Australian psyche.

For the sake of the Territory constitution, the ideals and aspirations of the already
established framework of a multicultural society at a national level requires
consideration. Let there be a select committee of relevant Territorians to plan and adapt
etc pre existing policies, charters, mandates to reflect Territorian consciousness and
lifestyle. Let us build together in full participation the Territory of our choosing.

During this conference there will be many academic and esoteric papers presented. For
obvious reasons these papers of necessity are required for we speak and debate the laws
of the land as it were. Strong laws make for strong government which in turn protect the
weak and vulnerable and the rights of all Territorians.

However Marguerite and I are here believing in the humanitarian element of the
constitution and wish to see it reflected positively so that a harmonious and multicultural
society does exist in the constitution, judiciary and any other aspects of government
required to protect individual, group rights and access and equity issues.

Cultural diversity, recognition of languages, religion, customs etc need to be protected or
enshrined by constitution. I am aware that these important elements are addressed in
other state and Federal legislation. Perhaps a comprehensive Bill of rights should be
developed insuring the rights of all Territorians.

The constitutional framework is the top of the tree of knowledge while where Marguerite
and I operate and function is very much the people perspective. We are the human
element, people are our business.

As service providers we are expected to implement and execute Federal and Territory
policies in response to cultural diversity. These are the values handled on a regular basis
by the MRC.

The People Agenda. The wonderful motherhood statements that we make must have
truth.

No paper dragons thank you.

These are however, limits to Australian Multiculturalism. These have been summarised
as follows (and I quote form the National Agenda for a Multicultural Australia.)

I suggest replacing Australian with Territorian where appropriate

- multicultural policies are based upon the premise that all Australians should have
  an overriding and unifying commitment to Australia, to its’ interests and future
  first and foremost.

- multicultural policies require all Australians to accept the basic structures and
  principles of Australian society the constitution and the rule of law, tolerance and
  equality, Parliamentary democracy, freedom of speech and religion, English as the
  national language and equality of sexes.
Sharing the Future

- multicultural policies impose obligations as well as conferring rights: The right to express one's own culture and beliefs involves a reciprocal responsibility to accept the rights of others to express their views and values.

All of the above must be a 2 way street.

Rights must be protected and defended by law, all equal before God and the Courts. The Territory has an obligation to ensure a fair and equitable Territory for all Territorians regardless of ethnicity.

Thank you

- recognition of cultural diversity. Culture, languages, religion, regional self determination
- citizens participation in self-government
- recognition of Multiculturalism .......... no going back
- Australian Federation, constitution, 1901
- agenda for multi-cultural Territory showing the future sharing the future
- Participation through full partnership
- What is Multiculturalism
- Services issues/implementation
- Humanitarian, settlement, refugees
- Community relations
- Basic rights/social justice
- Access and equity issues
Marguerite's Experience Of Australia's Multiculturalism

Some thirty-five years ago while I was attending school in the Seychelles Islands where I was born, I studied the geography and history of Australia. We were taught about the Aboriginal and also the arrivals of new settlers since Captain Cook.

About the Aboriginal, we were told that there were very few tribes mainly in the centre of Australia. Furthermore, some of our white neighbours in the Seychelles migrated to Australia in the late 40's and other white people from my country also continued migrating to Australia in the 50's, 60's, when Australia still had the White Migration Policy. Sometimes in the mid-sixties my white school colleague went to attend a wedding in Australia and stayed over for a holiday. On her return with one of her Australian cousins, I was very curious to know more about Australia and asked them lots of questions about the country and its people.

The answers were, "Australia is a white country and there are no black people at all living there", Then I further asked "What about the Aboriginal people?", the answer was "They used to exist long time ago but not anymore". I was very surprised by her reaction, but sort of believed it. I said to myself that I will not visit this country. I have lived in England, visited USA, USSR, North, South, East and West Africa, some Asian countries, but because of what I was told, Australia never appealed to me.

In 1984, my husband being a Geologist, accepted an offer for a job in Papua New Guinea. My family and I went to New Guinea in 1984, there, we met a lot of Australians from different backgrounds: European, Greek, Italian, Anglo Saxon etc.

They were very friendly and through them I began to learn a lot more about Australia. I was so interested to learn even more about Australia, I borrowed books from the Australian High Commission in Port Moresby, on the cultural diversity of the people.

This is when I realised that the information I was given in the 60's was incorrect. I visited Cairns in 1984 and travelled through to Brisbane along the East coast. It was to my surprise to see so many different cultures and also Aboriginal people for the first time. It was very different to what I was told in my geography lessons way back in the 60's. My first reaction was, "I can relate to this country," with its mixture of races and cultures similar to my country of birth. I visited Australia three times between 1984 - 1988 and travelled all over except the Territory. I was always interested to learn more about the Aboriginal people.

I did not realise the cultural diversity of the indigenous people of Australia until I arrived in the Territory (Alice Springs) in 1989. When I back tracked the comments made by my school colleagues some 30 years ago about the Mono-Cultural Australia which means only white people inhabited Australia and the Aboriginal were long gone, I then realised that the question of culture was based on skin color. Many people believe or were made to believe that Australia was Mono-Cultural until the mass arrivals of Greeks' Italians, Germans and other East Europeans which followed later by Chinese, Vietnamese and Cambodians in the late sixties and seventies, without realising or accepting that amongst the English, Irish, Scottish, Welsh, they had different cultures. That takes me to the topic of this presentation "Recognition of Multiculturalism versus Mono-Culturalism". Was Australia ever Mono-Cultural? With the cultural diversity amongst the indigenous people
who settled in different parts of Australia many thousands of years followed by the pearl
divers from Asia, the Pacific Islanders and Torres Strait Islanders, were joined later by
Chinese miners and so on. In reality, Australia has been a multicultural country for
hundreds or even thousands of years. But it was not recognised until the late fifties early
sixties with the opening of Chinese, Italian and Greek restaurants and later Vietnamese,
Cambodian and others. Also with the introduction of Mediterranean, Asian food in the
supermarkets and East European delicatessens.

Let's not make the mistake of recognising a culture by their food only! Such as the saying
goes, "I am Multicultural, I eat Chinese once a week, cook Italian all the time and I go to
Bali and Fiji for a holiday!" Let us recognise the value of People and what they have
brought to this Country. Let's recognise their religion and the way they dress etc. Born
in the Seychelles Islands with a population of 70,000 descendants from all over the
world. So multiculturalism is at its peak.

I am proud to be able to enjoy the same privilege of sharing Multiculturalism with the
Australian people as I would have enjoyed in my country of birth, no matter what colour,
religion, race, we are one and we are all Australians.

As I now live and raise my family in the Territory, I've got a vested interest in ensuring
the principles of Multiculturalism are contained in the proposed Territory's Constitution
and its laws.
Closing Remarks
Closing Remarks

JOHN BAILEY

You might be almost wondering why I sort of get 2 or 3 guernseys at this conference. I think I managed to ask a question earlier on, I chaired a session and now get to do the closing remarks. It really was not supposed to be that way. Initially, I think, the Chief Minister was going to open the conference and the Leader of the Opposition was going to close the conference, and for whatever reason neither of them have ended up being available. In relation to the Leader of the Opposition I have been asked to stand in and do a speech, so that is a little bit why you get me this many times, it is not because of any influence over Rick Gray or the Committee or any of the organisers to get me up here this often.

I have been here for probably about half of the conference with other things going on outside, and it is, I guess, frustrating to attend another conference on the constitutional development of the Northern Territory in a way, at the point we are now, and that is that I remember we had another major conference here about 4 or 5 years ago, I think 1992, and at stage my time on the committee, I had been there then about 3 years or so, working through the development of the constitution and the idea that as a bipartisan Committee we saw that we had a number of stages to still move through and that the information that was collected at that conference was very beneficial in helping set the direction of which Northern Territory constitutional development was going to take. And I guess it is sort of from listening to what people have said over the last 2 days and taking into account where we are that I frame the closing remarks that I am about to read to you.

Territorians have a unique opportunity, an opportunity denied to other Australians throughout this century, an opportunity to write the fundamental underpinnings of our community, its system of government, its rights and its future. It is an opportunity that Territorians must not ignore, and most importantly it is an opportunity that Territorians must not be denied.

The process for writing our constitution is almost as important as the ultimate outcome of the document itself. The establishment of a constitution can be a diversive process if people so choose that path; alternatively, it can be a tool for bringing people closer together. If the process is inclusive, Territorians together will be able to use the writing of the constitution as a means of healing division, and the comments made by His Excellency earlier on in relation to the South African experience I think demonstrated that.

Ladies and gentlemen, regardless of our political perspective, no-one could deny the Northern Territory has been divided on a number of issues over the last 20 years. The greatest mechanism of division is racial issues: land rights, sea rights, excisions, native title, the ownership of parks, all of these things have progressed in a haze of argument
and rancour, and regardless of the merits of the arguments forwarded by either group the result has been division. That division can translate into division in the writing of a constitution if that process is not handled properly.

Prior to the recent election, the Territory Labor Party laid out a timetable and a plan for statehood. Within that timetable the Leader formally committed the Labor Party to support for a elected people's convention as the author of the constitution with 75% if the people who would write our constitution be elected, the other 25% would be appointed from a wide range of community organisations, peak bodies and existing political members. The election, under that situation, being conducted under proportional representation for a system of 5 zones with 10 members elected from each zone. This is ultimately the most democratic means of putting an election together.

Decisions on the substance of the constitution based on consensus and where that does not occur, decisions would be made by two-thirds majority. All of these matters were laid out by Territory Labor prior to the election. As yet, the Country Liberal Party administration has not yet announced its intentions.

The recommendation for a people's convention was made by a bipartisan Select Committee in February 1995, more than 2½ years ago. In the time since then no indication has come from the government as to its intentions. Deadlines that should have been met if we are to achieve statehood by 2001 have passed. Indications of the mind of the Chief Minister have occurred with some off-the-cuff remarks in the Assembly and in the media; these seem to indicate an opposition to the election of a people's convention, preferring instead an appointed convention. I believe that that will be a very big mistake. An appointed convention will deny Territorians the right to be intimately involved in the writing of the constitution, it will shut them out of the process. In doing so the divisions developed over the past 20 years will remain or, perhaps, widen as we near statehood. The only excuse that has been offered for disapproving the path of the elected people's convention is cost. We have costed the cost of the convention process as being in the order of $6m.

We believe that considering some of the projects over the years an exercise of $6m to be spent on a constitution is a good investment. If it was spread over 2 budgets would not be a great deal at all; it is particularly insignificant when you consider the benefits to be gained by an embracing process as opposed to an exclusive process.

Ladies and gentlemen, the political debate that will surround statehood and the development of the constitution will be centred as much on process as content. That is unfortunate because it is the content that has the ultimate effect on all of our lives.

Over the last 11 years the bipartisan Committee has work assiduously to produce numerous papers on the issues that should be part of our constitution. The Committee has conducted numerous meetings, Territory-wide, on these issues, individual political parties have discussed and debated the issues internally within their own processes, and the parliament has before it a draft constitution.

But, seriously, the real community debate has not yet began. The people of the Northern Territory over the last 11 years have not felt included or part of the discussion process. For them it has been an argument amongst politicians, but now as we enter the final phase of that discussion, I have no doubt that the people will want to have a greater say.
That is the tradition process in any major political and social debate in this country. Usually the confines of those debates is narrowly limited at first and later, much later, spreads and becomes a national, public debate.

The debate on our constitution has followed that pattern, it has been rather confined to a debate among politicians and others close to the political process, and now it must spread and become a debate of the people. This is imperative if the outcome is to be successful. To snuff that debate out by confining it to a hand picked few will do a great disservice to our quest for statehood. That is why, I believe, it is so strident on the need for an elected people’s convention and a wide community debate.

Ladies and gentlemen, in addition to the establishment of an elected people’s convention much can be done to encourage this debate. The government and the parliament of the Northern Territory can start a building blocks of statehood process. To do this public accountability legislation needs to be set in place; freedom of information, whistleblowers, privacy, a decent register of members’ interests, all of this legislation needs to be introduced. It will demonstrate to the people of the Northern Territory a preparedness to modernise our government and political process.

Further than this, this government and the parliament must initiate a process of debate on the form of the Territory Assembly. In a small polity such as ours, is one member per seat an appropriate means of organising a parliament? Perhaps not. Some believe that the establishment of a proportionally represented parliament based on a zonal system will produce a more accurate and democratic result in the Territory parliament.

Over recent years in the 2 party preferred split between ourselves and our opponents has hovered between ourselves getting between 43% and 44%, and the government, the CLP, getting between 56% and 57%. Yet in the Territory parliament that has just resulted from the recent election the government has won 17 seats, sorry, 18 seats, and the opposition 7. So while our vote was 43% to 44%, our representation in parliament is only 28%.

These building blocks that should be implemented, whether we are a state or not, will lead to a greater public discussion on the way we are represented, the openness and accountability of government and the nature of our polity will broaden public involvement in the nature of our constitution and, therefore, the direction of our future.

So, ladies and gentlemen, whatever the outcome of the deliberations of this conference and future debates, all of us have a responsibility to ensure that the debate is widespread and involves the people of the Northern Territory. We all have a responsibility to resist efforts to restrict that debate and, finally, we have a responsibility to ensure that it is the people of the Northern Territory who make the decision about our constitution, and not just a hand picked few.

Thank you, and I hope you have all enjoyed your time in Darwin, those who are visitors; those who are locals, that you have gained something by the conference, and, I guess, I formally declare it closed.
Speech to
Constitutional Foundations
Conference Dinner
Speech to Constitutional Foundations Conference Dinner

NEIL CONN

Introduction

In contemplating the subject of my after-dinner address to you tonight I was very much aware that you have been conferencing for two days and are quite possibly in need of a break from the subject-matter.

Having thought about it some more, however, I concluded that I should take the risk and not waste the opportunity, with so many distinguished experts collected in the one spot and the doors locked, to bend your ears a little about the Constitution, since it is a matter very close to my heart.

The risk I take is that you might well conclude that it is also quite a distance from my brain since, unlike my last two, distinguished predecessors as Administrator I am not a lawyer, and am therefore poorly qualified in some respects to speak knowledgeably on the subject of the proposed Constitution for the State of the Northern Territory.

However, like my predecessors, I am an enthusiastic Territorian committed to the progress and prosperity of this great place - and will therefore take the risk tonight of offering you some suggestions and advice on where I hope your labours are taking you.

While some of the remarks I make may excite you for their ignorance of the law, of legal infrastructure and of legal processes, I am hopeful that others may cause you to reflect, and maybe even revisit, some aspects of your work to date.

Perspective

I come here tonight representing that mystical creature sometimes called the "average Territorian" (I avoid the term "ordinary Territorian", which I object to because I have yet to meet one in this extraordinary part of the world).

Our average Territorian has little if any legal knowledge, and a fairly unsophisticated view of the parliamentary and political processes (not altogether such a bad thing!), but a typically intense interest in where we are heading and how we are going to get there.

I therefore intend to approach the question of our Constitution from that perspective. I am taking it for granted, of course, that we need, and will have, a Constitution as we inevitably become the 7th State of Australia within the next few years.
The Sessional Committee Draft

I am fortunate in having available to me the thorough and generally admirable work of the NT Legislative Assembly's Sessional Committee on Constitutional Development, which has consulted widely and laboured mightily for over 10 years to produce for our consideration a Draft Constitution for the Northern Territory.

As has happened to me many times over the years I have lived and worked in the Northern Territory, I am struck again by the ability of Territorians to overcome the twin tyrannies of distance and scarce resources to produce quality work - and they have done it again here.

As well as the passion and humanity of distinguished Parliamentarians like Steve Hatton and Brian Ede, I detect the close involvement of my good friends the Crown Counsel (Graham Nicholson) and the former Parliamentary Counsel (Jim Dorling). Their reputations and high standing extend well beyond the Northern Territory. I know (Jim Dorling was working in Ireland when last I saw him), and it is with some trepidation that I intend to be a little critical, and perhaps a touch provocative, about the work in which they have played a significant part. Neither expert gentleman will be surprised at that, and will no doubt deal with me in due course.

Outline

To cut the risk of terminal entanglement in the subject matter, I will be dividing my remarks into 4 parts:

- the objectives of the Constitution, as I see them
- the constraints I see on the achievement of those objectives
- the mechanisms for their achievement; and
- the essential tests I will be applying to determine whether we have a good Constitution, or a dud.

Objectives

For inspiration on the objectives that might be promoted by, or even contained within, the document, I turned first to the Preamble to the Constitution of the United States:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

That wording undoubtedly goes a bit far to be a model for the State of the Northern Territory, so I guess I draw it to your attention solely as an example of clear and inspiring English, written and adopted some 210 years ago!

More suitable, perhaps, would be the second paragraph of the American Declaration of Independence, which predated the Constitution by some 11 years: (4/7/1776)
We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these, are life, liberty and the pursuit of happiness.

While the words best remembered tend to be "life, liberty and the pursuit of happiness" (not even a whiff of "user pays, corporate governance or accountability", to pick at random three uninspiring examples of present-day objectives!!), the words that leap out at me are "all", "equal" and "rights".

Before I make too much of that felicitous combination of words, I should take a look at what the Sessional Committee has recommended in its draft Constitution for the NT.

To be honest, it's not all that easy to detect explicit objectives there (although a limited number, and one in particular, are clear from the form and content - I'll come back to that in a moment).

The nearest I can get to a "US-style constitutional objective list" (to be carefully distinguished from "US-style election campaign advertising" of recent memory!!) is in Part 8, where 8(1) reads as follows:

1. Notwithstanding anything in the laws of the Northern Territory other than as provided in subsections (2) and (3) [bit ominous, that], a person shall not be denied the right -
   
   a. to use his or her own language in his or her communications with other people speaking or understanding the same language;
   
   b. to observe and practice his or her own social and cultural customs and traditions in his or her relations with other people of the same tradition; and
   
   c. to manifest his or her religion or belief in worship, ceremony, observance, practice or teaching.

So far, so good - a commendable list of basic human rights that Territorians could relate to - although I do confess to a twinge of unease about providing a possible umbrella in the NT for some of the looney and life-threatening "religions" that gain publicity from time to time, and for the practices of some ethnic groups which other Australians would consider unacceptable or even barbaric.

Perhaps the same uneasiness was experienced by the drafters of Part 8, which continues:

2. The rights in subsection (1) a, (b) and (c) shall be subject to this Constitution, any Organic Law and any reasonable regulation imposed by an Act (not being an Organic Law) in the public interest.

I read that as effectively scrubbing-out the guarantee of individual rights so carefully laid out in the preceding paragraph. As a layman devoted to Plain English, someone will have to explain to me why part of the Constitution has to be made subject to itself or to another Law of virtually equal status, but let me complete the Part... .

3. The rights in subsection (1) b and (c) shall only operate to the extent that they are not repugnant to the general principles of humanity as contained in any international agreement to which Australia is a party.
So, there you have it: your language, customs and religions are OK provided they don't run counter to a Government regulation (scope unfettered), and provided there isn't a "Gareth Evans type Biggles clause" out there in our international treaties ... 

Don't get me wrong - I'm all in favour of a broad declaration of a Territorian's rights and responsibilities in our Constitution, but what is the point of leaving them firmly rooted in midair like this??

I guess that leaves me squarely with the proponents of the simple, direct and intelligible "life, liberty and pursuit of happiness" school of Constitution drafters, and the three words I plucked from the Declaration of Independence, and now choose to run together: "all equal rights"

**Constraints**

Let me now single out a few constraints within which NT Constitution-drafters must work, and which I think would be accepted by the majority of Territorians. First, the certainties:

- the Australia Act and the Australian Constitution (since we want to be a full partner in the Australian Federation)

- International treaties/legislation to which Australia is a party (likewise, although I don't think everyone would want to see too many examples of the "Gareth Evans/Biggles flyover" approach!); and

- the existing Northern Territory Self Government Act of 1978, which has proved remarkably workable in practice.

Let me add two which look fairly innocuous, but conflict sharply with the published results of the Sessional Committee's work):

- to cover 100 % of Territorians, present and future (here I confess to grave difficulties with the Draft's efforts to provide special recognition and rights to Aboriginal Territorians, not because I do not feel and care for their urgent and obvious needs, but because it starts our new State off with two permanent classes of citizen ); and

- to follow Westminster system conventions, rather than obligations set in law (and here I single out the requirement that the Governor act only in accordance with Executive Council advice).

A further constraint that is certain to cause enormous problems, but for which I earnestly hope there is a sensible outcome, is in

- the NT Land Rights Act (which is Mabo-plus, experienced by no entity other than the NT, and unlikely to ever be experienced anywhere else in Australia).

In many ways, the outcome in regard to the Land Rights Act, and its patiriation to the NT legislative system, will be the litmus test for progress towards true Statehood for the NT.
Mechanisms

Let me now move on to the third of the parts that I foreshadowed to you, namely the mechanisms needed to achieve the objectives of the Constitution, subject to the constraints identified and popularly supported.

Here the Sessional Committee has chosen to pick up, with a couple of interesting innovations, the system largely in place already in the Northern Territory:

(1) the electoral processes seem unexceptionable, ensuring satisfaction of that part of Para 2 of the Declaration of Independence which tells us

.... That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

(2) the role of Governor is closely aligned to that of the Administrator under current arrangements (indeed, to Governors generally), although I think it is a mistake to bind the Governor to perform only on Executive Council's advice. I much prefer the Westminster convention which leaves room for intelligent parties in difficult circumstances to hammer out a pragmatic result (given that only John Kerr and Philip Game have acted in a way to stimulate this defence of democracy, and that there is persuasive evidence that Gough Whitlam and Jack Lang, respectively, thoroughly earned the places that Kerr and Game gave them in Australian history....)

Nor am I personally happy about the Oaths in the proposed Schedule to the Constitution, mirroring exactly the Oaths in the present Self-Government Act. I have made it an open secret that, on the occasion of my own swearing-in, I would have preferred to have made that Oath to the Queen of Australia and to have incorporated a reference to the people of the Northern Territory. In the event, the law demanded an unadorned reference to the Queen.

I implore you not to read any further implications into that statement.

(3) the roles and responsibilities of the Legislative Assembly and the Executive Council defined in the draft Constitution are, likewise, in accordance with established Territory practice.

(4) finally, and most importantly, is the mechanism for change to the Constitution.

If I may add at this point one final quote from the American Declaration of Independence, at Para 2 it states:

.... That, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Here I believe that the processes should be made difficult, but not impossible - entrenched, but not set in reinforced cement - at arms length, but within the people's grasp - and I think that is the position reached by the Sessional Committee.
Essential Tests

Let me now turn to the fourth and final group of requirements that I have impudently set the drafters of our Constitution.

My first demand is for a Plain English document.

The Law Reform Commission of Victoria, in its 1986 document "Legislation, Legal Rights and Plain English" made the following pungent comments:

“As a community we have successfully excluded ignorance of the law as an excuse, but we have been far less successful in ensuring that all members of the community can understand their legal rights and obligations clearly. Indeed, the language in which laws and legal documents are often expressed places serious obstacles in the way of citizens and effectively forces an ignorance upon them.... Essentially, what a plain language project is concerned with is communications and efficiency.... The thrust for plain English is concerned with communication, not with the law or policy as such...Readers have to be active participants for communication to take place.”

Second, I would like a trim and taut document. Thoughts exceed, but say, 10 pages in all??

The draft NT Constitution at this stage fills no less than 41 pages. How accessible (or perhaps more importantly accessed) would that be to (or by) the “average Territorian” for whom I am attempting to speak?

Stripped of footnotes and annotations that usually accompany the printed document, the 7 Articles and 27 Amendments of the American Constitution occupy but 7 pages of my Encyclopaedia Britannia.

To quote again from the Report of the Law Reform Commission of Victoria (as you would recognise, this is research not plagiarism!):

“Every document must assume some knowledge, otherwise it would suffer from information overload and be indigestible”

I regret that my obvious target here must be the lengthy Preamble suggested by the Sessional Committee which, while rich in historical references and geographical facts, will simply serve to divert your average reader to other pursuits long before he or she gets to the principles and processes under which he or she is to be governed.

Here I dare to disagree with the first Paragraph of the Declaration of Independence on which I have drawn so heavily tonight:

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and nature's god entitled them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

My message here would be, without presence at originality Never Complain, Never Explain. Perhaps I should add the present-day rider that the explanation will probably be ignored or distorted by the media anyway.... !
I suspect the draft Preamble might simply have been a bin into which a number of Committee problems may have been tipped in order to promote the largely bipartisan Report which emerged, or at least to foster some of the warm glow in which such an outcome was conceivable.

Whatever the reason, I see no place for it in my version of our Constitution - or, maybe, one no longer than the Preamble to the American Constitution that I quoted earlier!

Thirdly, I would plead for the eventual Constitution to confine itself (outside the basic machinery clauses that I have already ticked) to broad principles.

The KISS principle should be framed and up on the drafter’s wall: Keep It Simple, Stupid

Is it really essential that we endeavour to anticipate all challenges to eventual legislation before they happen?

As the Law Reform Commission said in its report:

“The attempt to cover all possible contingencies is counterproductive ”

As a one-time merchant banker and long-time Treasury head, I am very aware of the opportunities created for skilful and determined loophole divers by black-letter law ..... 

**Conclusion**

So there you have my layman, Territorian requirements for the Constitution of the new State of the Northern Territory:

- a relatively short, Plain English statement of rights and responsibilities, intelligible to most if not all Territorians of voting age, with a clear definition of the public machinery for implementation and, as time goes on, review and modification.

To achieve this end will require acceptance that there is no such thing as

- a perfect public servant
- a perfect Minister, or Cabinet of Ministers
- a perfect Judge, or bench of Judges

or, for that matter,
- a perfect Administrator, or Governor,

but also require a touch of faith that none of the foregoing is totally imperfect, and some even have a strong sense of duty and a social conscience.

The end result will contain the checks and balances, the countervailing powers, the room for pragmatic answers needed to keep this potentially unruly and headstrong mob moving in generally the same direction for most of the time.

Above all, it must be understood and supported by the bulk of the population who are, after all, required to vote in referenda on the Constitution’s structure and content both initially and, with the passage of time and the occurrence of fundamental societal and economic change, on future occasions as change to the Constitution becomes necessary and unavoidable.
The Constitution that I envisage should be more in the nature of a mud-map than detailed navigation instructions for the journey that lies ahead of us.

The strength of a democratic institution like ours depends critically on the sympathy and understanding of the people within it.

The task of communicating is necessary, and well and truly worth doing in the long term interests of our Northern Territory. So let's get on with it.
Biographies
THE HON K J A ASCHE, AC QC

Former Administrator and Chief Justice of the Northern Territory

The Hon K J A Asche, AC, QC completed his primary education in the Northern Territory and his secondary education at Melbourne Grammar School. He served in the Royal Australian Air Force from 1944-46. After graduating from Melbourne University, he practised at the Queensland Bar from 1951-54 and at the Melbourne Bar from 1954-75. In 1972 the Hon. Asche was appointed Queens Counsel. He was also a part-time lecturer at the School of Social Studies, Melbourne University from 1964-75 and in Family Law at the Royal Melbourne Institute of Technology from 1968-75.

In 1976 Hon Asche was appointed the first Judge in Victoria to the Family Court of Australia. From 1973 to 1986 he held positions in various tertiary institutions in Victoria. The Hon. Asche was Chancellor, Deakin University from 1983-87. From 1985-86 he was Acting Chief Judge, Family Court of Australia.

In 1986 he was appointed a Judge of the Supreme Court of the Northern Territory and was its Chief Justice from 1987-1992 when he was appointed as the Administrator for the Northern Territory. The Hon. Asche was the Administrator for the Northern Territory until December 1996.

The Hon. Asche was also Chairman of the University College of the Northern Territory from 1986-88 and its Chancellor until 1992. He has also been Chairman of the NT Parole Board, Australian Red Cross Society (NT Division) and Scout Association of Australia (NT Branch).

PROFESSOR CHERYL SAUNDERS, AO

Director, Centre for Comparative Constitutional Studies, University of Melbourne

Professor Saunders is the Director, Centre for Comparative Studies, Law School at the University of Melbourne. She also holds the positions of Professor of Law at the University; President, Administrative Review Council of the Commonwealth; and Editor, Public Law Review. She is the Deputy Chair of the Constitutional Centenary Foundation and a member of the Executive Committee of the International Association of Constitutional Law.

Under Professor Saunders’ direction, the Centre for Comparative Constitutional Studies has developed four principal programs: the Australian Constitutional System; Commonwealth-State relations; Asia-Pacific Constitutional Systems; and Supra-National arrangements. Research and public seminars and conferences are carried out in relation to each new program. Regular Centre publications include the quarterly Intergovernmental News and the Lawasia Comparative Constitutional Law newsletter.
At the University of Melbourne, Professor Saunders is Deputy Dean of the Faculty of Law; Associate Dean, Graduate Studies; and Deputy Vice President of the Academic Board.

Professor Saunders has published widely on Constitutional Law, inter-governmental relations and constitutional development in Australia.

MR STEPHEN PAUL HATTON, MLA

Member for Nightcliff
Chairman of the Sessional Committee on Constitutional Development and former Minister for Constitutional Development

Mr Hatton has served on a number of parliamentary and backbench committees, the most significant being the role of Chairman of the Northern Territory Parliamentary Committee on Constitutional Development working on the Statehood program and particularly preparing the draft Northern Territory Constitution.

He has held many Ministerial Portfolios, from 1984-1986 Minister for Lands, Minister for Primary Production, Minister for Conservation, Minister for Ports and Fisheries, Minister for Primary Production, during which period he also served as Minister for Police and Minister for Public Employment. From 1989 to 1997 Minister for Health and Community Services, Minister for Conservation, Minister for Industries and Development, Minister for Lands Housing and Local Government and Minister for Aboriginal Development, Minister assisting the Chief Minister on Constitutional Development matters, Attorney-General, Minister for Education and Training, Minister for Sport and Recreation, Minister for Correctional Services, Minister for Ethnic Affairs. In September 1997 he returned to the backbench.

Prior to entering politics Mr Hatton was the Executive Director, Northern Territory Confederation of Industry and Commerce.

DR CHRISTINE FLETCHER

Director
North Australia Research Unit, Darwin

Dr Christine Fletcher is Director of the North Australia Research Unit which is part of the Research School of Pacific and Asian Studies at The Australian National University.

She has a PhD in Political Science from the University of Western Australia. Previously, she was at the National Centre for Development Studies and the Federalism Research Centre at The Australian National University.

Dr Fletcher is the author of over 40 publications on development, intergovernmental relations, federalism, intergovernmental relations and indigenous peoples.

Among her recent publications are Budgeting for Statehood in the Northern Territory (with Prof. Cliff Walsh) and Grounds for Agreement.
MS JOSIE CRAWSHAW

Commissioner, North
Northern Territory Aboriginal & Torres Strait Islander Commission

[Delivered Mr Djekurra's paper]

Born in Darwin, Ms Crawshaw is a member of the Gurindji nation. She went to school in Darwin and Charters Towers (Qld) and holds a Degree in Education from the University of Canberra.

She currently heads the Aboriginal Health Policy and Education Unit at the Menzies School of Health.

Recently, as Manager of the Top End Aboriginal Coalition, Ms Crawshaw was involved in attempts to establish a multi-purpose cultural and tourism centre in Darwin.

Ms Crawshaw previously worked for the Northern Land Council, the former Aboriginal Development Commission and the NT Government (as head of the Aboriginal Development Branch). From the late 1970s to 1988 she was a member of several committees dealing with employment and training.

For the past six years she has been a United Nations indigenous representative on the International Labor Organisation and worked on the Draft Declaration on the Rights of Indigenous People.

MR GATJIL DJERRKURA OAM

Chairman, ATSIC, Canberra

Mr Donald Gatjil Djekurra was born in Yirrkala, Northern Territory. He completed his tertiary studies at the South Australian Institute of Technology and obtained the Aboriginal Task Force Certificate and Community Development Certificate. In 1984, Mr Djerrkura was awarded the Medal in the General Division of the Order of Australia (OAM) for services to the Aboriginal community.

As a senior elder of the Wangurri Aboriginal clan, Mr Djerrkura is responsible for a number of traditional and ceremonial activities on behalf of his clan and the East Arnhemland/Yirrkala Aboriginal Community.

Currently, Mr Djerrkura is the full-time Chairman of the Aboriginal and Torres Strait Island Commission (ATSIC).

Previous to being appointed Chairman, ATSIC, Mr Djerrkura was General Manager of Yirrkala Business Enterprises (YBE), Nhulunbuy, NT (1986-1996); Chairman of the Aboriginal and Torres Strait Islander Commercial Development Corporation (1990-1996); Chairperson of the North Aboriginal Investment Corporation; Chairman of Miwatj Aboriginal Health Corporation for East Arnhem region and Director of the Henry Walker Group Ltd.
Rev. Dr Djiniyini Gondarra, OAM

Executive Officer
Aboriginal Resource & Development Services Inc.

Rev. Dr Djiniyini Gondarra was born at Milingimbi, Eastern Arnhem Land. He was educated at the Methodist Mission School and trained as a Sunday School teacher and youth leader in the Methodist Church.


From 1973-75 Rev. Gondarra was a candidate for the Ministry. He studied at Raronga Theological College, Papua New Guinea and received a Certificate of Christian Ministry. He was ordained in 1976.

Since Rev Gondarra's ordination, he has combined religious work with community work and has held positions in various Missionary and Progress groups

Rev. Gondarra has many publications and awards to his credit.

In 1988 Rev. Gondarra has been the Executive Officer of the Northern Regional Council of The Uniting Aboriginal and Islander Christian Congress.

Ms Annie Keely

Lawyer, Alice Springs

Annie studied law part-time in Melbourne while working as an Articled Clerk and was admitted to practice in 1983. She continued in private practice for a short time, then worked as the Legal Officer of the Victorian Equal Opportunity Board for 2 years.

After an extended period of travelling Annie returned to Australia and moved to Alice Springs to work as a Legal Officer at the Central Land Council where she worked for most of the next seven years. For more than two years now she has worked as a sole practitioner continuing to work in the fields of Aboriginal land rights, heritage protection and native title.

Mr Alistair Wyvill

Barrister at Law
William Forster Chambers

Alistair Wyvill graduated from the University of Queensland with a Bachelor of Economics in 1979 and a Bachelor of Laws with honours in 1984. In 1992 he was awarded a Masters Degree in law with distinction from the University of London.
He was first admitted as a legal practitioner in 1981 and has practised in the Northern Territory in Public International Law. He has published in areas as diverse as the Law of Restitution and Vietnamese Bankruptcy Law.

Alistair has closely followed the development of the constitution for the new State of the Northern Territory since 1987 and has addressed a number of conferences and meetings on the issues arising therefrom.

**MR MICK DODSON**

**Aboriginal and Torres Strait Islander Social Justice Commissioner**

**Human Rights and Equal Opportunity Commission**

Michael Dodson is Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner appointed under the provisions of the *Human Rights and Equal Opportunity Legislation Amendment Act (No. 1) 1992*. Commissioner Dodson has been a prominent advocate on land rights and other issues. He took up his current appointment on 17 April 1993.

Born in the Northern Territory township of Katherine, Mick was educated in Katherine, Darwin and Victoria. He completed a Bachelor of Jurisprudence and a Bachelor of Laws at Monash University. He worked with the Victorian Aboriginal Legal Service from 1979 to 1981, when he became a barrister at the Victorian Bar. He joined the Northern Land Council as Senior Legal Adviser in 1984 and became Director of the Council in 1990.

From August 1988 to October 1990 Mick was Counsel assisting the Royal Commission into Aboriginal Deaths in Custody. He has been a member of the Victorian Equal Opportunity Advisory Council, Treasurer of the North Australian Legal Aid Service. He is a member and Deputy Chair of the Australian Institute of Aboriginal and Torres Strait Islander Studies. He is currently the Chair of the National Aboriginal Youth Law Centre Advisory Board.

Commissioner Dodson is a vigorous advocate of the interests of the Indigenous peoples of the world. He was the Co-Deputy Chair of the Technical Committee for the 1993 International Year of the World's Indigenous People. Mick is also Chair of the United Nations Advisory Group for the Voluntary Fund for the Decade of Indigenous Populations. He also serves as a member of the Board of Trustees of the United National Indigenous Voluntary Fund.

Mick's most direct contribution has been in the elaboration of International standards for Indigenous rights through crafting of the text, of the *Draft Declaration on the Rights of Indigenous Peoples*. Now that the Draft Discussion has left the Working Group on Indigenous Populations – on its way to the General Assembly – Mick will follow its passage through the United Nations system, endeavouring to preserve its integrity.
Mr Peter McNab

Senior Lecturer in Law
Northern Territory University

Mr McNab was born and educated in Perth, Western Australia. He graduated in Law from the University of Western Australia in 1979. After completing his tertiary education, he moved to the Northern Territory. On completing his Articles with a Darwin law firm in 1980, he joined the Commonwealth Attorney-General's Department where he worked from 1980-93.

He joined the Northern Territory University in 1989. In 1994 he took 12 months leave without pay from the Northern Territory University to take up a senior position in the Office of the Northern Territory Anti-Discrimination Commissioner. In 1995 he returned for further study at the University of Melbourne in the Doctor of Juridical Science (S.J.D) program.

Currently, Mr McNab is a Senior Lecturer teaching mainly public law in the Faculty of Law at the Northern Territory University. He has also appeared as junior counsel in the constitutional challenges to the euthanasia laws (in 1996) and mandatory sentencing laws (in 1997). He is also a part-time member of the Social Security Appeals Tribunal.

With Dr P Loveday, he edited Australia's Seventh State published in 1988 by the North Australian Research Unit of the ANU/Law Society of the Northern Territory.

Dr James Renwick

Barrister at Law, Sydney

Dr James Renwick was first admitted to practice in 1985. After 3 years of commercial practice in Sydney, he took a 2 year term contract with the Northern Territory Department of Law which involved him full time in Aboriginal land claims.

At the end of his 2 year term, Dr Renwick joined the Commonwealth Attorney-General's Department where he was initially Deputy Director of Research at the Administrative Review Council and, later, Principal Legal Officer in the Australian Government Solicitor's Sydney Office, specialising in Administrative Law.

Along the way, Dr Renwick graduated with the first Doctorate in Juridical Studies from an Australian University - Sydney University. His thesis topic was The Constitutional Position of the Northern Territory of Australia.

Dr Renwick has also written on the topic of Aboriginal Sacred Site protection in the Northern Territory.

He has practiced at the Sydney Bar since early 1996, specialising in administrative law and native title. He retains a keen interest in legal developments in the Northern Territory.
DR DEAN JAENSCCH

Politics Department  
Flinders University, Adelaide

Dean Jaensch is Professor of Politics at the Flinders University of South Australia. He has published widely on Australian politics, and is a regular media commentator of contemporary Australian politics and elections.

He has been an observer of Northern Territory politics since 1974, and has closely followed its political development, based at the North Australia Research Unit. He is the author/co-author of a number of books, monographs and articles on the politics and political history of the Northern Territory.

DR DAVID TROLLOPE

Senior Lecturer in Political Science  
Northern Territory University

Dr David Trollope is formerly a Senior Lecturer in Political Science in the Northern Territory University.

Until recently David was head of the graduate program in Public Policy.

He has published extensively on policy making both locally and in the United States of America.

DR ALISTAIR HEATLEY

Reader in Political Science  
Northern Territory University

Dr Heatley is has been associated with higher education institutions in the Territory since 1974.

Between 1980 and 1982, he was a Research Fellow in the North Australia Research Unit of the Australian National University. For two years (1986-87) he served as a Ministerial Officer in the Office of the Chief Minister with a responsibility for constitutional development matters. Dr Heatley has published extensively on politics and administration of the Northern Territory as well as on aspects of Aboriginal politics, northern development and Australian federalism.


He has also contributed prolifically to the local and interstate media.

Presently he writes a weekly opinion column for "The Northern Territory News". Dr Heatley is an acknowledged expert on local Territory politics.
PROFESSOR CAMPBELL SHARMAN

Political Science Department
University of Western Australia

Campbell Sharmann studied law and political science at the University of Adelaide and has graduate degrees for the University of London (LSE) and Queen's University, Kingston, Ontario. He has a long standing interest in the operation of state government and federalism in Australia, and in the way constitutional and electoral rules shape the political process.

Professor Sharmann was a commissioner on the Western Australian Commission on Government during its existence from 1994-96 and is currently Head of the Political Science Department at the University of Western Australia.

PROFESSOR BRIAN GALLIGAN

Department of Political Science
University of Melbourne

Professor Galligan is a graduate in Commerce and in Economics from the University of Queensland. He worked and qualified as an accountant in Brisbane before doing a Masters Degree and Doctorate in Political Science at the University of Toronto, Canada.

In 1992 Professor Galligan was the head of the Politics and Economics of the Research School of Social Sciences at the Australian National University, and Acting Director of it's Federalism Research Centre. He has done research work on aspects of Australian constitutional design and comparative political economy. He co-ordinated the Research School of Social Science's centenary decade project on "Reshaping Australian Institutions: Towards and Beyond 2000", and also co-ordinated a national survey on citizen and elite attitudes towards human rights in Australia.

Professor Galligan is Professor and Director of the Department of Political Science, University of Melbourne.

He has many publications to his credit. He is the author of the recently published 'The Federal Republic', Cambridge University Press.

HIS EXCELLENCY DR BHADRA RANCHOD

High Commissioner for South Africa, Canberra

Dr Bhadra Ranchod was born in Port Elizabeth, South Africa. He is a graduate of the University of Cape Town and was admitted as an Advocate of the Supreme Court (Cape Provincial Division) on 17 January 1973.

In 1969 he obtained a diploma in Scandinavian Studies at the University of Oslo, Norway and thereafter the degrees of Doctorandus iuris (the equivalent of a Master’s and Doctor of Laws (LL.D) at Holland's ancient University of Leiden.
Dr Ranchod was appointed senior lecturer in the Department of Private Law at the University of Durban-Westville in July 1972 and was promoted to Professor and Head of the Department of Private Law on 1 January 1974. At the age of 32 he was elected Dean of the Law Faculty. In 1980/81 he was Visiting Scholar at Columbia Law School in New York where he worked on a Bill of Rights for South Africa. He has lectured extensively both in South Africa and abroad and has published on a wide range of social issues.

From 1987 to mid 1992, Dr Ranchod served as Ambassador to the European Union in Brussels. He was appointed as Head of a State Department with the rank of Director-General on 1 July 1992. He was appointed Minister on 11 February 1993 and held the Tourism portfolio in the central cabinet. He was also a founder member of Lawyers for Human Rights.

With the first democratic elections held in April 1994, Dr Ranchod was elected as a member of the National Assembly for KwaZulu/Natal and on 10 May 1994 elected as Deputy Speaker of Parliament. He played an active role in drafting the new South African constitution.

Currently His Excellency is the High Commissioner/Ambassador for South Africa in Australia and non-resident High Commissioner to New Zealand and Fiji.

**MR JOHN AH KIT, MLA**

**Member for Arnhem**  
**Northern Territory Legislative Assembly**

John Ah Kit was born in Alice Springs in 1950. He moved to Darwin in 1954.

John's father, Jack was from Camooweal and from the Waanyi people whose country straddles the Queensland/Territory border. John's mother, Stella was a Warrumungu woman taken away from her people as a child under the then assimilation policy and sent to The Bungalow in Alice Springs.

John was educated in Darwin where he attended Darwin Infant and Primary; Parap Primary and Darwin High School. He left school at the age of 14. In his youth John was active in sports, including playing for Buffaloes in football and basketball as well as hockey, soccer and Rugby League.

After school, John worked as a ringer, labourer and truck driver for more than a decade. In 1977 he enrolled as a student of the Aboriginal Task Force at the then South Australian Institute of Technology, graduating with an Associate Diploma in Social Work in 1978.

During 1979-81 John was employed as a District Officer with the Department of Social Security based in Katherine. He served as President of the Katherine's Kalano Association during 1980-81 and from 1981-84 John worked as its Executive Director in 1981. In 1984, John was appointed Director of the Northern Land Council. In 1991 John was appointed the Executive Officer, later Executive Director of the Jawoyn Association based in Katherine.
Mr Ah Kit has been active internationally, nationally and in the Northern Territory in the preparation and delivery of research and discussion papers on Aboriginal matters.

In August 1995, John was elected to the Northern Territory Legislative Assembly as the member for the seat of Arnhem representing the Australian Labor Party.

MR RICK GRAY

Executive Officer
Sessional Committee on Constitutional Development
Northern Territory Legislative Assembly

Rick Gray has been the Executive Officer to the Committee on Constitutional Development since 1988. He holds a degree in Public Administration and has had extensive experience in management and public administration. He is currently undertaking a Master of Public Policy at the Northern Territory University.

Prior to coming to the Northern Territory, Rick was employed in various managerial positions within the private sector both in Australia and Papua New Guinea before joining the Papua New Guinea Government in 1975. His first posting was with the Village Court Secretariat, Department of Justice, and then as CEO of a provincial public service department that established and maintained a system of local government in the East New Britain Province. He was also an adviser to the East New Britain Provincial Government on inter-governmental matters relating to local and provincial governments.

In 1981, Rick moved to the Northern Territory and has worked in various positions within the Northern Territory Public Service, primarily in the area of Commonwealth/Northern Territory relations. Prior to taking up his present position, he held the position of Secretary/Manager to the Jabiru Town Development Authority.

In 1994 he co-edited with Prof David Lea and Sally Roberts, a book that published the papers that were presented to the Constitutional Change in the 1990s Conference held in Darwin in 1992.

Rick is also the Secretary/Treasurer of the Constitutional Centenary Foundation’s NT Chapter.

THE HON. BRIAN MARTIN, AO

Chief Justice of the Northern Territory

Brian has been a legal practitioner since 1959 and started practice in Alice Springs in 1963. He has been formerly the Solicitor-General from 1981 to 1987, a Judge of the Court since 1987, and Chief Justice since 1993.
THE HON. JANELLE SAFFIN, MLC

Member for Lismore, NSW

The Hon. Janelle Saffin is a member of the Legislative Council in New South Wales Parliament. She was elected in 1995.

Janelle is involved in many social justice and legal issues, including domestic violence, women’s health issues, with a special interest in International law.

Janelle is a lawyer, she has experience in private and public legal practice. She has a Bachelor Degree in Legal Studies from Macquarie University and a Diploma of Education from Northern Rivers College of Advanced Education. She is currently undertaking a Master of Business Administration at Southern Cross University in Lismore, undertaking a Thai language course.

Janelle is involved in several government and community boards. She is the NSW member of the Southern Cross University Council and a member of the NSW Legislative Standing Committee, Law and Justice.

MR ANTHONY REGAN

Fellow
Research School of Pacific and Asian Studies
Australian National University, Canberra

Anthony Regan is a Fellow in the Research School of Pacific and Asian Studies at the Australian National University, Canberra. He works in a project on State, Society and Governance in Melanesia, doing research on the interface of constitutional law and politics and also on the Bougainville peace process. He trained as a lawyer, working as a private practitioner in Australia in the late 1970s before working in Papua New Guinea and Africa for 16 years. He was a government lawyer in Papua New Guinea for four years, before working at the Government funded social science research institute in Port Moresby for four years. He later taught constitutional law in the Law Faculty at the University of Papua New Guinea for five years. From 1991 to 1994 he was a full-time constitutional adviser to the Government of Uganda which was then developing a new Constitution. He has written extensively on constitutional law and decentralisation policy in both Papua New Guinea and Uganda.

MR GRAHAM NICHOLSON

Senior Crown Counsel
Northern Territory Attorney General’s Department

Mr Nicholson was born in Western Australia and matriculated in 1960. He graduated from the University of Western Australia Law School in 1964 with Honours. He won several prizes in Constitutional Law and Jurisprudence. Mr Nicholson received the Master of Laws Degree in 1983 from the Queensland University.
He commenced his legal career in 1965 and was admitted as a Practitioner of the Supreme Court of Western Australia in 1967, of the Supreme Court of the Northern Territory in 1974 and of the High Court of Australia in 1983.

Mr Nicholson's career in the Northern Territory commenced in 1974 when he was appointed as Principal Project Officer, Legislation Branch and Member of the Constitutional Reform Study Group, Department of the Northern Territory. He was the first Crown Solicitor for the Northern Territory to be appointed consequent upon the grant of self-government. Mr Nicholson was attached to the University Planning Authority and has been a visiting lecturer in law, and visiting fellow to the Northern Territory University since its inception, lecturing in constitutional law, administrative law, mining law, public and private international law, evidence and other subjects. He has also been a visiting lecturer in Law, University of Malaya for four months in 1990-91 and at Udayana University in Bali in 1995-96, as well as a guest lecturer at a number of other Asian universities. He has also resided in Laos on a special project.

Mr Nicholson has a number of publications to his credit including "The Constitutional Status of the Self-Governing Northern Territory" (1985) and "Constitutionalism in the Northern Territory and other Territories" (1992) and "The Concept of 'One Australia' in Constitutional Law and the Place of Territories" (forthcoming).

Mr Nicholson is also the Legal Adviser to the Northern Territory Sessional Committee of the Legislative Assembly on Constitutional Development and a Member of the Council of the Constitutional Centenary Foundation. He is a member of the International Law Association and the World Jurists Association.

DR ROGER GIBBINS

Department of Political Science
University of Calgary

Roger Gibbins was born and received his undergraduate education in British Columbia, Canada, and then received his MA and PhD in Political Science from Stanford University, California, in 1970 and 1974 respectively. He has been with the Department of Political Science at the University of Calgary in Alberta, Canada, since 1973. After serving as Department Head from 1987 to 1996, he is now back in the ranks as a professor of political science.

Dr Gibbins' research interests include western Canadian politics, constitutional politics and comparative federalism, including comparisons between Canada and Australia. He has written on Aboriginal and statehood issues in the Northern Territory, and spent seven months in Australia in 1987. Recent publications include books on western Canadian politics, quantitative methods, and gender politics.
MR KEVIN MUXLOW

Department of Political Science
University of Calgary

Kevin Muxlow is an MA student in the Department of Political Science at the University of Calgary, with an undergraduate degree in Political Science from the University of Victoria. He is completing his thesis on agricultural trade liberalisation, and is currently employed as a research analyst for the Alberta Barley Commission.

MS MICHIELE CASTAGNA, OAM

President
Migrant Resource Centre of Central Australia

Ms Castagna's family including her grandfather came to Alice Springs in 1947. As an Italian family, along with many others, went Mica Mining at Harts Range. From mica to copper until the "Markets" fell out.

Ms Castagna worked with the Special Education field for many years until taking up a position with Territory Health Service in 1983 managing "Disability Services and Liaison". She was an Alderman on the Alice Springs Town Council for 2 terms (8 years) interested in community issues including multicultural matters.

Due to her Italian background, she had a heavy involvement with the Migrant Resource Centre from its inception beginning at the grass roots. Last year, she was elected President.

Ms Castagna received an OAM in the late eighties for her work in disability in Central Australia. She has represented the Territory on many occasions on disability business.

MS MARGUERITE ROOKE

Welfare Worker
Migrant Resource Centre of Central Australia

Ms Marguerite Rooke was born and educated in the Seychelles Islands. She speaks 3 languages, namely, French Creole, English and French. She was also educated in the United Kingdom, USSR and USA. From the mid 70's till late 80's she represented women from her country at several international conferences. She migrated to Australia in 1989.

Ms Rooke joined the Migrant Resource Centre of Central Australia in 1990 and was the President until December 1996. During her time at MRC as President, she initiated a research on Migrants and Refugee population in Central Australia.

In 1995/96, Ms Rooke was a member of the Minister for Immigration's Settlement Advisory Council.
Marguerite is currently a Welfare Worker with the MRC of Central Australia. Her work focuses on the settlement of newly-arrived migrants from non-English speaking background, especially women and children living in remote areas. She is currently involved with people who have survived torture and trauma in their homelands and is pursuing the development of a support group for these people.

Ms Rooke is the Chairperson of Sadadeen Primary School Council and is also a member of various committees including the National Network for Refugee Women, CSDA Migrant Advisory Committee, and the NT Settlement Strategy Planning Committee.

Marguerite is also a Multicultural Radio Broadcaster.

**MR JOHN BAILEY, MLA**

**Deputy Leader of the Opposition**

**Northern Territory Legislative Assembly**

Mr John Bailey, MLA obtained his Bachelor of Arts degree from Flinders University and a Diploma of Education from the University of Adelaide. Mr Bailey also has a Diploma in Applied Psychology from the Flinders University and a Certificate in Counselling from the Darwin Community College (now the Northern Territory University). He is a registered Psychologist within the Northern Territory.

Mr Bailey commenced his career in the Northern Territory in 1977 as a teacher of Biology and Science, and from 1980 was Guidance Officer and School Counsellor.

In 1988 he established his own private practice in psychology and counselling.

Mr Bailey’s political career started in 1989 with his success in the by-election of that year. He has held shadow portfolios in Planning; Conservation and Environment; Youth, Sport, Recreation, Health and Community Services, Liquor Commission, Work Health Authority, Menzies School of Health Research and Ethnic Affairs. He has also served as member on the Subordinate Legislation and Tabled Papers Committee, Sessional Committee on the Environment, the Public Accounts Committee and is the Deputy Chair of the Sessional Committee on Constitutional Development.

Mr Bailey is currently Deputy Leader of the Opposition; Shadow Minister for Asian Relations, Trade and Industry Youth and Young Families Territory Insurance Office and Shadow Treasurer.

**THE HON. DR NEIL CONN, AO**

**Administrator of the Northern Territory**

The Hon. Dr Neil Conn was born in Sydney, receiving his early education at a variety of schools in northern and western New South Wales. He attended the University of Sydney, receiving the Bachelor of Economics with First Class Honours in Economic Statistics and subsequently the degree of Master of Economics.
His Honour lectured in Economics at the University of Sydney from 1961 to 1975. This period included two years of secondments to the Commonwealth Treasury and the Department of Secondary Industry in Canberra. He also spent one year as the James B Duke Fellow at Duke University in North Carolina where he received his doctorate in Economics and membership of the American honour society Phi Beta Kappa.

From 1975 to 1977, His Honour worked in Paris as Principal Administrator in the Growth Studies Division of the Organisation for Economic Cooperation and Development (OECD), returning to Sydney to become Deputy Secretary of the New South Wales Treasury from 1977 to 1981. He first came to the Northern Territory as Under-Treasurer in 1981, occupying that position until 1983 when he returned to Sydney to work in the private sector as Executive Director Corporate Finance for CIBC Australia Ltd, a Canadian-owned merchant bank based in Sydney.

In 1986, Dr Conn was engaged by the Northern Territory Government to lead its Railway Executive Group in preparing a full feasibility and financing study of the Alice Springs to Darwin railway. At the conclusion of that study in late 1986 he accepted the invitation to again become Under-Treasurer of the Northern Territory, the position from which he retired on 30 November 1996 as the longest-serving chief executive in the Northern Territory public service and by far the longest-serving Head of Treasury in Australia.

Dr Conn was appointed an Officer of the Order of Australia in the General Division (AO) in the Australia Day Honours List of 1996 for ‘public service as Under Treasurer of the Northern Territory Treasury and to the community’.

On 17 February 1997 His Honour Dr Neil Conn was appointed Administrator of the Northern Territory. He is the 16th Administrator since 1911, and the fourth since Self-Government in 1978.
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