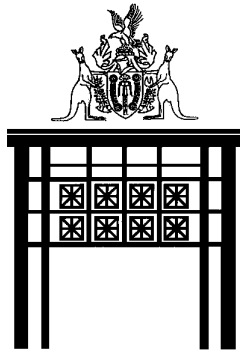


Chapter 7.

Discussion Paper No. 7

**An Australian Republic?
Implications for the Northern Territory**



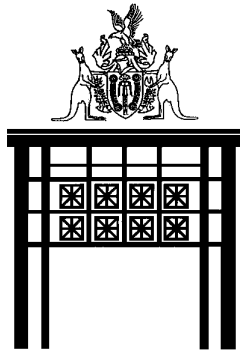
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**SESSIONAL COMMITTEE ON
CONSTITUTIONAL DEVELOPMENT**

Discussion Paper No. 7

**An Australian Republic?
Implications for the Northern Territory**

MARCH 1994



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Sessional Committee on Constitutional Development

DISCUSSION PAPER No. 7

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Implications for the Northern Territory**

March 1994

A paper presented for public comment by the
Sessional Committee on Constitutional Development

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A. EXECUTIVE SUMMARY

- (a) This Paper considers the implications for the Northern Territory and its future constitutional development should Australia become a Republic.
- (b) The Committee stresses that it is not concerned with the question whether Australia should become a Republic or not. It does not advocate a preference for any of the options raised within this Paper.
- (c) The purpose of this Paper is to stimulate debate and invite comments and suggestions by way of submissions to the Committee.
- (d) Particular issues raised in this Paper on which comment and suggestions are sought include:
 - (i) Is there a requirement for the Northern Territory to adopt a republican mode of government should Australia become a Republic?
 - (ii) Should Australia become a Republic is there a requirement for a new Northern Territory constitution to be consistent with other States constitutions.
 - (iii) Is there a requirement under a Northern Territory constitution to have a head of state and if so:
 - should that head of state be above party political issues;
 - how should that head of state be appointed or removed;
 - how long should the term of office be;
 - what should be the qualifications of office; and
 - what powers should the head of state have.
 - (iv) What are the other consequential implications for the Northern Territory in the event Australia becomes a Republic.

B. INTRODUCTION

1. Primary Terms of Reference

On 28 August 1985, the Legislative Assembly of the Northern Territory of Australia by resolution established the Select Committee on Constitutional Development.

Amendments to the Committee's original terms of reference were made when it was reconstituted on 28 April 1987. On 30 November 1989, the Legislative Assembly further resolved to amend the terms of reference by changing the Committee's status to a sessional committee. On 4 December 1990 it was again reconstituted with no further change to its terms of reference.

The original resolutions were passed in conjunction with proposals then being developed in the Northern Territory for a grant of Statehood to the Territory within the Australian federal system. The primary terms of reference include, as a major aspect of the work of the Committee, a consideration of matters connected with a new State constitution.

The primary terms of reference of the Committee include that it may inquire into, report and make recommendations to the Legislative Assembly on such constitutional and legal matters as are referred to it by relevant Ministers or by a resolution of the Legislative Assembly.

2. *Specific Terms of Reference*

- (a) On 9 May 1993, Mr M Perron MLA, the Chief Minister of the Northern Territory, made a further reference to the Committee on the implications for the Northern Territory, both as a Self-governing territory and as a new State, of any future establishment of an Australian Republic.

Without limiting the generality of these terms of reference, the Sessional Committee shall consider the following specific issues -

- (i) the relevance to the Northern Territory of the forms of government that may be brought into existence in any Australian Republic, both at a national and at a State level;
- (ii) the importance of having consistency between Northern Territory constitutional arrangements and possible future Commonwealth/State constitutional arrangements in the event of the establishment of an Australian Republic;
- (iii) the options and matters that should be considered in the preparation of a new State constitution for the Northern Territory in the event of the establishment of an Australian Republic; and
- (iv) such other matters relating to any future establishment of an Australian Republic, and any grant of Statehood to the Northern Territory within that Australian Republic, as the Sessional Committee considers to be relevant to the foregoing.

The Chief Minister further directed that this new reference be dealt with by the Committee in the same manner and in accordance with the same provisions as are contained in its primary terms of reference.

- (b) The preambles to this new reference are instructive. They provide:

"WHEREAS Australia is presently established under a monarchical system with the Queen of Australia as the Head of Government;

AND WHEREAS there is a significant debate on the question of whether Australia should be a Republic and it is possible that Australia may become a Republic sometime in the future;

AND WHEREAS the Northern Territory may at some time in the future become a new State within the Australian federation;

AND WHEREAS the Sessional Committee on Constitutional Development is presently considering matters pertaining to a new State constitution for the Northern Territory;

AND WHEREAS it is highly desirable that Territorians be informed of, and have the opportunity to comment on, the implications for the Northern Territory, both as a Self-governing Territory and as a new State, of any future establishment of an Australian Republic;

AND WHEREAS it is essential that the movement towards further constitutional development of the Northern Territory to Statehood should not be deferred as a consequence of the Republican debate."

- (c) This Discussion Paper considers, in response to this further reference to it, the implications of any future establishment of an Australian Republic on the future constitutional development of the Northern Territory.

3. *Discussion and Information Papers*

The Committee has prepared and issued a number of papers arising from its primary terms of reference, as follows:

- A Discussion Paper on *A Proposed New State Constitution for the Northern Territory*, plus an illustrated booklet of the same name.
- A Discussion Paper on *Representation in a Territory Constitutional Convention*.
- Discussion Paper No 3 on *Citizens' Initiated Referendums*.
- Discussion Paper No 4 on *Recognition of Aboriginal Customary Law*.
- Discussion Paper No 5 on *The Merits or Otherwise of Bringing an NT Constitution into Force Before Statehood*.
- Discussion Paper No 6 on *Aboriginal Rights and Issues - Options for Entrenchment*.
- Information Paper No 1 on *Options for a Grant of Statehood*.
- Information Paper No 2 on *Entrenchment of a New State Constitution*.

4. *Purpose of this Paper*

- (a) The Committee has resolved to issue this Discussion Paper in response to its new terms of reference and also to satisfy the desire that Territorians be informed of, and have the opportunity to comment on, the implications for the Northern Territory, both as a self-governing Territory and as a new State, of any future establishment of an Australian Republic. The Committee felt that the most effective way to afford the opportunity for the public to so comment was to issue this Discussion Paper and invite comments and submissions on it.

- (b) The Committee wishes to stress that it is not concerned with the question whether Australia should become a Republic or not. This is a national issue, already well canvassed elsewhere. This Paper is issued on the assumption, whether right or wrong, that Australia will become a Republic some time in the future. It concentrates on the implications of this assumption for the Northern Territory. The Committee does not wish to be taken as advocating one way or the other that Australia should or should not become a Republic. The Committee is not asking for public comments on whether Australia should be a Republic.
- (c) This Paper is not directly concerned with the exact nature of any possible future Republic for the whole of Australia except in so far as this might impinge on the Northern Territory and its constitutional development. The Committee does, however, note the recent Report of the Republic Advisory Committee *An Australian Republic - The Options*¹ and the detailed analysis contained in that Report, the options for such a Republic on the basis of minimal constitutional changes. That Report is referred to in this Paper as the "*RAC Report*". The Sessional Committee should not, as a result, be taken as endorsing the *RAC Report*.
- (d) The purpose of this Paper is therefore to consider the implications for the Northern Territory and its future constitutional development should Australia become a Republic. This necessarily involves at least those issues previously identified, and possibly some other issues. The Committee would welcome submissions and comments on these issues and any other issues arising out of its new terms of reference.

5. *Relevant Issues Raised in Previous Committee Papers*

- (a) The Committee has not, in its previous published papers, considered any aspect of the implications of republicanism on the Northern Territory's future constitutional development. Thus, in the *Discussion Paper on A Proposed New State Constitution for the Northern Territory*,² for ease of reference called the "*Discussion Paper*", the Committee noted that at present Australia is a federal Commonwealth constituted under the Crown and in which the Monarchy, with the Queen as head of state, has a central role although to a large extent it is purely formal. This applies not only to the Commonwealth, but also to all the existing States.³ In relation to the Northern Territory as a new State, it was noted in the *Discussion Paper* that both the Commonwealth Constitution and the Australia Act 1986 contemplate that there will be a new State Governor, although not necessarily by the name of "Governor", as the

¹ 1993 AGPS, Canberra.

² Northern Territory Legislative Assembly Select Committee on Constitutional Development, 1987, Legislative Assembly of the Northern Territory, Darwin.

³ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987)* Item B 1(g) @ page 9:

At present Australia is a federal Commonwealth constituted under the Crown and in which the Monarchy, with the Queen as Head of State, has a central role although to a large extent it is purely formal. This applies not only to the Commonwealth but also to the States. Under Section 7 of the Australia Act 1986, each State (including a new State, see section 16) is to have a representative of Her Majesty, namely the Governor of the State. The Committee considers below the appropriate role of the Monarch's representative in relation to the new State Parliament.

representative of the Monarch, exercising the powers and functions of the Monarch — with limited exceptions.⁴

- (b) The Committee was of the view that under s7 of the Australia Act, it is implicit that any such Governor of the new State must be appointed and such appointment may be terminated by the Monarch following receipt of advice from the new State Premier. It was also of the view, that under present national constitutional arrangements, direct links must be established between the new State Governor and the Monarch, at least in relation to the appointment and termination of appointment by the Monarch of the new State Governor. It felt that those links should not be established and maintained through the Commonwealth.⁵
- (c) It has been argued by others that the present national constitutional arrangements, leaving aside any specific entrenched provisions on State constitutions, do not entrench the role of Monarch in the Australian States with the Queen as head of state. Thus, the *RAC Report* considered that it was a strong argument that s7 of the Australia Act assumes, but does not bring about or require, the existence of a Monarch with certain powers and functions in a State.⁶
- (d) Further, it has also been argued by Professor Winterton that the present national constitutional arrangements do not entrench the position of a State Governor⁷ — again, leaving aside any entrenched provisions in State constitutions. It is said that s7 of the Australia Act does not provide that there must be a State governor, and that by definition in s16(1), the term "Governor" includes a person for the time being administering the government of a State — see also s110 of the Commonwealth

⁴ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987)* -

Item F 14 @ pages 45-6:

The nature of the executive of the new State and the appropriate relationship between the executive and the legislature are matters that have to be considered in the context of a grant of Statehood to the Northern Territory. To a limited extent, any decisions taken in this regard will be controlled by requirements flowing from the Commonwealth Constitution and the Australia Act 1986. For example, both of those documents contemplate that there will be a new State Governor as the representative of the Monarch in the new State and exercising the powers and functions of the Monarch (with limited exceptions) in respect of the new State. The Constitution also contemplates that there will be an "Executive Government" of a State (Section 119) with an "Executive Council" to advise the Governor (Section 15 and see Section 70 and 84). Discussion of possible options for inclusion in the new State constitution is included below; and also

Item G 2 @ page 48:

Having regard to the relevant provisions of the Commonwealth Constitution and the Australia Act 1986, it follows that the Head of the new State and its government must be the Monarch, and that the Monarch's representative in the new State must be the Governor. Whatever the nature of the provisions that may be desired in the new State constitution as to the office of the new State Governor, it is clear that the relevant provisions of the Constitution and the Australia Act must be complied with. This limits the options available in this matter.

⁵ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987)* Item G3 @ pages 48-49:

Under Section 7 of the Australia Act, it is implied that the Governor of the new State must be appointed by, and the Governor's appointment may be terminated by, the Monarch following receipt of advice from the new State Premier in relation to that appointment or that termination. It follows in the Select Committee's view that direct links must be established between the new State government and the Monarch, at least in relation to the appointment and termination of appointment by the Monarch of the new State Governor. It would be inconsistent with the principle of constitutional equality with the existing States, as expressed in the terms of reference, for those links to be established and maintained through the Commonwealth. The Select Committee believes that this is really part of a wider principle that the composition of a new State Government from time to time is entirely a matter for the new State and its citizens and is not a matter in which the Commonwealth has any legitimate role to play.

⁶ *Republic Advisory Committee Report - The Options*, p127, 1993, AGPS, Canberra.

⁷ HP Lee and G Winterton, 1992, *Australian Constitutional Perspectives*, p277, Law Book Company, Sydney.

Constitution. The fact is, however, that all existing States are formally monarchical in nature with a Governor appointed by the Queen.

- (e) The present constitutional arrangements applying in the Northern Territory are also expressed to be monarchical in nature. Under the Northern Territory (Self-Government) Act 1978, the Northern Territory of Australia is established as a separate body politic under the Crown (s5⁸ and note s51), with an Administrator appointed — and his appointment is terminated — by the Governor-General and with power to exercise the prerogatives of the Crown in the Northern Territory (ss 31⁹ and 32¹⁰).
- (f) Since the Committee's *Discussion Paper* was issued, the question of whether Australia should become a Republic has become more of a live issue. There has also been some discussion as to whether the States must follow any lead by the Commonwealth in this regard, that is, whether the States must also become republican in nature if the Commonwealth of Australia does.
- (g) Working on the assumption that there is now a real possibility of Australia becoming a Republic, it is entirely appropriate that the Committee reconsider the options over a range of issues for future Northern Territory constitutional development. These issues range from:
- Should there be any requirement for the Northern Territory to adopt a republican mode of government if Australia became a Republic?
 - Would the basic nature of a Northern Territory constitution change in a Republic?
 - Whether the Northern Territory under a new constitution would still need a separate head of state?

and if so

- How should that Northern Territory head of state be appointed and removed, for what term, and what should be the qualifications of office?
- What powers should any such head of state have?
- What other changes would be necessary?

⁸ s5 The Northern Territory of Australia is hereby established as a body politic under the Crown by the name of the Northern Territory of Australia.

⁹ s31 The duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities.

¹⁰ s32 (1) There shall be an Administrator of the Territory, who shall be appointed by the Governor-General by Commission under the Seal of Australia and shall hold office during the pleasure of the Governor-General.

(2) The Administrator is charged with the duty of administering the government of the Territory.

(3) Subject to this Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of powers and functions other than powers and functions relating to matters specified under section 35 and powers and functions under sections 34 and 36) in accordance with such instructions as are given to him by the Minister.

6. *Specific Issues*

- (a) The specific terms of reference, as stated above, require a general examination of the implications for the Northern Territory of any future Australian Republic. However, the specific terms of reference also require the Committee to consider a number of specific issues — *see Item B 2(a) above*.
- (b) The first of these specific issues requires an examination of the possible forms of republican government that might be adopted at both national and State levels. The difficulty facing the Committee at this time is that it is at the moment purely speculative as to what forms of republican government may be adopted at these levels — if at all. Indeed, it is not even clear that all the States would change to a republican form of government if the Commonwealth did so at a national level. The *RAC Report* concluded that, however anomalous it might appear, particularly after a successful national referendum in favour of an Australian Republic, it would be legally possible for the Commonwealth Constitution to allow a State to remain with a monarchical form of government within that Australian Republic — assuming that the Queen agreed to such an arrangement.
- (c) The Commonwealth Government, while not having an announced policy, appears to be leaning in favour of a republican model at the national level that involves the least possible constitutional change. It is clearly too early to ascertain if this attitude will survive, particularly in the absence of bipartisan support. On this model, the changes would largely revolve around a replacement head of state. There would be a republican head of state for Australia, appointed or elected for a fixed term, to replace the Queen and the Governor-General. The constitutional amendments required on this model would provide for the exercise of powers by that new head of state. It is designed to try and preserve the essential elements of Australian democracy and the balance between the national Government and that head of state. Some provision would also be required to deal with position of the States. In addition, some consequential provisions would be required, but nothing else. The *RAC Report* has identified the options within this "minimalist" model.
- (d) The Committee is unaware of any indication from any of the States as to the possible republican models that could be considered for adoption in those States if Australia was to become a Republic. Until some firmer direction emerges at the federal level, it would seem the States will not have to seriously consider their position on this issue.
- (e) The second specific issue in the terms of reference relates to the importance of consistency between Northern Territory constitutional arrangements and those of the Commonwealth and States on the republican issue. In this regard, should the Northern Territory proceed to adopt a new constitution prior to any grant of Statehood. The Committee is of the view that it is most unlikely, but that the Northern Territory would be expected to follow the Commonwealth lead on the republican issue. If the Commonwealth Parliament was to repeal the Northern Territory (Self-Government) Act and replace it with a "home-grown" Northern Territory constitution, it seems highly likely that it would demand consistency in this regard. Should the Northern Territory also seek to become a new State, it seems most improbable that a Republican Australian Government would allow a new monarchical State to be established. The

ultimate decision in this respect lies with the Federal Government, as its concurrence is legally required to either allow the Northern Territory to adopt a new constitution or to become a new State.

- (f) The Committee, while being sensitive to the views of those of a monarchical persuasion, tentatively views that consistency on this issue is desirable. The Northern Territory has no history in its own right of direct links with the Crown — although it did have such links prior to 1911, but only as part of either NSW up to 1863 or of South Australia from 1863 to 1910. The current Northern Territory links with the Crown are indirect, in that the Administrator is appointed by the Governor-General, who in turn is appointed by the Queen. It finds no compelling reason for establishing such direct links between the Northern Territory and the Monarch in a new Northern Territory constitution if the equivalent links are severed at a national level. However, it invites comments on this view.
- (g) The Committee stresses that in adopting this tentative view, it does not seek to malign or disparage the attitudes of those who continue to support the Monarchy or the present monarchical structure in this country. This is a separate, national issue.
- (h) The Committee does not find it necessary at this time to consider the question of consistency at a State level. There is no requirement that a new Northern Territory constitution must be consistent with State constitutions on this issue. No doubt the Northern Territory will have regard to constitutional developments in the States.
- (i) The third specific issue, that of the options and matters for a new Northern Territory constitution within an Australian Republic, is considered in *Items C and D* of this Paper following.

C. NORTHERN TERRITORY CONSTITUTION - OPTIONS

1. Whether the Basic Constitutional Nature of the Northern Territory Should Change in a Republic

- (a) In its *Discussion Paper*, the Committee outlined in broad terms its tentative suggestions as to the constitutional nature of the Territory as a new State. As noted above, these suggestions were framed within the existing constitutional structure of Australia, including its formal monarchical aspect.
- (b) In broad outline, it was envisaged a continuation of responsible and representative government in the Northern Territory. This would include a fully elected Parliament comprised of single member electorates, from which Ministers of the Crown would be exclusively chosen to form a government to advise a separate head of state. This is within the broad tradition of the "Westminster" style of responsible government, whereby the Ministers are chosen from, and answerable to, the legislature. Subject thereto, the three traditional divisions of government, that is the legislative, executive and judiciary, would be maintained and their outlines delineated in the new constitution.

- (c) The Committee did consider in that *Discussion Paper* the possibilities of moving towards a "Presidential" system such as modelled in the USA, with a much more pronounced separation of powers between the legislature and the executive government.¹¹ However, it chose to support a continuation of a form of responsible government, partly for constitutional reasons,¹² and more particularly because this was the system best understood and accepted in Australia. The Committee saw no reason in departing from it.¹³
- (d) In the context of an Australian Republic, presumably all constitutional objections to a more radical change in the constitutional nature of the Northern Territory would disappear. It then becomes a matter of choosing the most appropriate form of government for the Territory, subject only to the endorsement of the Commonwealth as is required for any form of constitutional change in the Territory.
- (e) There may be an argument, should Australia become a Republic, and as a consequence also the Northern Territory, that it may be appropriate for it to experiment with a Presidential style of government, that is, with a more distinct form of separation between the legislature and the executive. There may also be arguments as to the proper role and powers of the Territory head of state in this situation, and whether it is even necessary to have a separate head of state. The issues concerning the head of state are dealt with separately in the following parts of this Paper.
- (f) One option for moving away from a responsible form of government includes the capacity to select some or all of the Ministers from outside the membership of the legislature, presumably using a method of selection that is not directly associated with, or is not controlled by, that legislature. For example, the Ministers could be selected directly by the head of state, irrespective of their status or membership of the legislature.
- (g) A further option might be to specify the qualifications of persons chosen to be Ministers, for example, that some of them be representative of Territory Aboriginal groups or community organisations. The head of state could in turn be given real executive powers, along the lines of the USA model. The Ministers could possibly be given fixed terms of office, subject to early termination and in limited circumstances only.
- (h) The Republic Advisory Committee, although referring to the British tradition of responsible government and to alternatives to this form of government, and whilst noting the Australian modifications to responsible government in the Commonwealth Constitution, did not proceed to consider whether a more radical change in the constitutional nature of Australia was necessary or available as an option. This was because the so-called "minimalist" position was embodied in that Committee's terms of reference.

¹¹ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987) pp39-47.*

¹² *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987) pp41-49.*

¹³ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987 pp57-59.*

- (i) This Committee is not similarly restrained by its terms of reference. Accordingly, it invites comment on whether it would be appropriate to alter any of its previous tentative suggestions for the Northern Territory in a new constitution as a consequence of Australia becoming a Republic.
- (j) Any advocacy of a move away from responsible government should take into account other relevant views expressed in this Paper and other Committee papers and also should have regard to the special circumstances of the Territory. These factors include:
- The proposal for a unicameral Territory legislature with partially fixed terms of office.
 - The proposals for a Territory head of state who would generally be required to act on the advice of his/her Ministers, except in limited and defined circumstances.
 - The desirability of having Ministers as members of the Territory legislature, as one means of ensuring a degree of accountability by government.
 - The possible need for other forms of checks and balances over government if there was greater separation between the legislature and the executive government.
 - The small population of the Territory over a vast area, and the limited skills and resources available as a result.
 - The complex ethnic mix of the peoples of the Territory.
 - The federal structure within which a Northern Territory constitution must operate.
- (k) There is no inherent reason why the Northern Territory should move away from a system of responsible government in a future Australian Republic, although it is not uncommon for republican systems to have a greater degree of separation between the legislature and the executive government. It is merely a question of the most appropriate form of government to suit the needs of the Territory.
- (l) One view is that some form of responsible government is best suited to the needs of the Territory, whether or not it is republican in nature. It can be argued that the legislature performs a most important function in overseeing government, a function facilitated by its ability to challenge Ministers on the floor of the House and ultimately, in extreme circumstances, to cause their dismissal if they lose the confidence of the House. This does not necessarily mean that the checks and balances provided by responsible government provide in themselves an adequate system of government accountability, but they are still a valuable part of the system of accountability in a democracy. It is the system to which Australians have become used to and are familiar with. Concerns may be raised that if a system of responsible government was to be replaced by a presidential system without equally effective methods of accountability, a future republican government in the Territory could potentially assume greater discretionary powers at the expense of the legislature. The issues of accountability will be addressed in subsequent Committee papers.

2. *Does the Northern Territory Need a Separate Head of State Under a Republican Constitution?*

- (a) In the Northern Territory at present, there is a formal head of government, the Administrator, whose position is separate from those who actually decide the day to day issues of government for the Self-governing Northern Territory, that is, the Northern Territory Ministers. These Ministers are chosen from the membership of the majority party in the Legislative Assembly. They also form the Territory Cabinet. Where a decision has to be formally taken by the Administrator, the Ministers, or some of them, meet in the Territory Executive Council to advise the Administrator. Consistent with the principles of responsible government applying elsewhere in Australia, the Administrator invariably follows the advice of his/her Territory Ministers — except in the rare case of a matter the responsibility for which has not yet been transferred from the Commonwealth to the Self-governing Northern Territory.
- (b) In the context of a new constitution for the Northern Territory, it would be a departure from normal "Westminster" practice not to have a head of state separate from the governmental decision-making body, the latter body being comprised of Ministers chosen from and responsible to the legislature.
- (c) This is not to say that such separation is essential. The recent precedent under the Australian Capital Territory (Self-Government) Act 1988 is of interest in this respect. In the Australian Capital Territory (ACT) there is no equivalent of the Administrator as head of government, perhaps partly due to historical reasons. It was felt that such an office was unnecessary in the ACT. The constitutional functions normally performed by a head of state are either performed by:
- the ACT Chief Minister
[e.g., the bringing into operation legislation passed by the ACT Legislative Assembly in place of normal assent-type provisions, and the appointment of Ministers]; or
 - the ACT Executive comprising the ACT Ministers as a whole
[e.g., responsibility generally for ACT government]; or
 - the ACT Legislative Assembly
[e.g., election of Chief Minister]; or
 - the Presiding Officer of the ACT Legislative Assembly
[e.g., the convening of meetings of the Legislative Assembly]; or
 - the Governor General
[e.g., the dissolution of the Legislative Assembly in specified cases and the disallowance of ACT laws]; or
 - either House of the Commonwealth Parliament
[e.g., the declaration of non-application of ACT laws in specified cases]; and in other cases

- ACT Ministers under particular ACT legislation.
- (d) Professor Lindell in his article "*The Arrangements for Self-Government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government*" expressed the constitutional view that the "territories" power in s122 of the Constitution is wide enough to authorise the Commonwealth Parliament to establish a Self-governing territory with its own government and legislature, but without a separate head of state.¹⁴ These comments were made in the context of the ACT, but they are capable of applying equally to any Commonwealth territory — such as the Northern Territory presently is. There may be views to the contrary. It is noteworthy that there has not yet been any constitutional challenge to ACT Self-government on this point.
 - (e) Thus, if the Northern Territory was to adopt its own home-grown constitution prior to any grant of Statehood, it would appear to be constitutionally possible to dispense with a separate head of government. The future creation of a Republican Australia would be unlikely to alter this situation.
 - (f) If the Northern Territory was to become a new State, there is a question whether it would be constitutionally possible for it to be established within the present monarchical framework without a separate head of state. That is, there is a question whether the new State governor, however called, could also be the political head of government or whether he/she must be a separate officer representing the Crown. This is discussed in *Item B.5 above*.
 - (g) It seems a stronger argument that on and from the creation of an Australian Republic, a new Australian State could validly be established with a constitution that dispensed with a separate head of state for that State. The concept of a separate head of state is commonly associated with the monarchical-Westminster model as the representative of the Crown, whereas republican models do not always have a separate head of state who is separate from political decision making process. Thus, for example, in the USA, the President as head of state is also responsible in a real sense for the government and is not a member of either House of Congress. The Vice President is also President of the Senate, but only has a casting vote.
 - (h) Ultimately, a decision to dispense with a separate head of state for a new State would require the support of the Commonwealth Government, given the Commonwealth's necessary constitutional role in the establishment of new States.
 - (i) The arguments for and against a separate head of state at the national level are set out in the *RAC Report*.¹⁵
 - (j) Arguments for dispensing with a separate head of state in the Northern Territory include:

¹⁴ Public Law Review, Vol 3, No.1, Vol, 1992, pp28-30, The Law Book Company Ltd, Melbourne.

¹⁵ *Republic Advisory Committee Report - The Options*, 1993, ch.4, AGPS, Canberra.

- The financial savings.
 - The fact that the ACT has been able to operate without any apparent difficulty in this regard.
 - That alternative arrangements can be made for the ceremonial and other representative roles of a separate head of state.
 - That the legal roles of the head of state, as exercised in accordance with Ministerial advice, can be given to other officials or to institutions, or can simply be dispensed with altogether in appropriate cases — e.g., the need for assent to legislation.
 - That it may be alleged to be undemocratic to have a separate head of state, particularly if he/she is appointed rather than elected, and if that person has some degree of real power.
- (k) The *RAC Report* suggests that one area presents greater difficulty, namely, the role of the separate head of state as a "constitutional umpire" in times of crisis. In the ACT this is dealt with by giving the Governor-General power to dissolve the ACT Legislative Assembly where it is incapable or ineffective or is acting in a grossly improper manner, and to appoint a Commissioner to run the ACT. Elsewhere in Australia, the representative of the Crown in each jurisdiction has broad constitutional powers, largely undefined, which can be exercised in times of political crisis.
- (l) This raises the controversial question of the reserve powers of the head of state, being powers which are exercisable other than in accordance with ministerial advice. In its *Discussion Paper*, the Committee favoured provisions in a new Territory constitution which removed, in most cases, the broad discretionary powers of a new State Governor, but which retained some limited powers in times of crisis.¹⁶ The latter being powers only applying in defined circumstances and which need not be exercised in accordance with ministerial advice. These issues are further elaborated in *Item D(h) below*.
- (m) If the views of the Committee in its previous *Discussion Paper* are to be adopted in whole or in part, it would necessitate the retention of a separate Northern Territory head of state as a constitutional umpire in times of crisis. In other words, there would be a Northern Territory head of state, who was not a Minister of the Government and who was independent of politics. That head of state would have certain specific reserve powers which could only be exercised in times of crises which need not necessarily be exercised in accordance with the advice of his/her Ministers.
- (n) The alternative is to dispense with all reserve powers in a constitutional head of state, leaving any crises to be dealt with by political and judicial methods of resolution. Such methods may be thought more in conformity with democratic principles, although some may not consider these methods to be satisfactory and sufficient in all cases.

¹⁶ *Discussion Paper on A Proposed New State Constitution for the Northern Territory* (NTLA 1987) pp50-56.

There may be good arguments for preserving at least some reserve powers in the particular circumstances of a small jurisdiction like the Northern Territory to avoid the risk of serious political confrontation, without having to rely on judicial methods of resolution having regard to the traditional independence of Parliament from judicial intervention and judicial reluctance to get involved in partisan political issues. This general issue is discussed further in *Item D below*.

- (o) The Committee is strongly opposed to any suggestion of a provision to deal with any crisis by way of some reserve power vested in the Governor-General or in any other such officer external to the Northern Territory under its new constitution.
- (p) The arguments in favour of not dispensing with a separate head of state in the Northern Territory include:
- The absence of such a head of state would deprive the Territory of a "constitutional umpire", discussed in the preceding paragraphs.
 - The symbolic and unifying influence of a separate head of state, if he/she is a person who is above politics.

[This is particularly important in the Northern Territory with its small but diverse population and ethnic mix, including a significant Aboriginal population.]
 - The value in ceremonial and representative terms of a separate head of state who is above politics.
 - That the absence of a separate head of state would result in the loss of the traditional right and function of such a separate head of state to be consulted by, to advise and to warn government ministers, and thus provide a limited, but potentially important aid to and independent check on government.

[This latter reason could be even more important in the Northern Territory, particularly if the separate head of state is a person who is knowledgeable and is seen as a person of some capacity and wisdom, capable of attracting support from both Aboriginal and non-Aboriginal interests.]
 - That a separate head of state may be part of the checks or balances inherent in the system, preventing too great an accumulation of power, or even prestige, in the leader of government — Premier, Chief Minister or however called.
 - That there is a lack of support, at least at a federal level, for dispensing with a separate head of state.
 - That having a separate head of state can be perceived as being democratic, particularly if elected.
- (q) One view is that it may be preferable to continue to have a separate head of state in the Northern Territory under a new constitution, even if Australia became a Republic. The

value of such an office in the special circumstances of the Northern Territory, particularly if it is occupied by a person who is above day to day political involvement, both from a symbolic, unifying point of view and also as an internal constitutional umpire. The change to a republic does not necessarily lessen the value of such an office. The Committee would like to assess the strength of support, or otherwise, in the Territory for dispensing with the present Northern Territory model of a separate head of state, applied to a new Territory constitution and would welcome comments either way on this matter.

3. *What Qualifications for a Head of State Should be Required?*

- (a) There seems to be little doubt that it is desirable for any separate head of state for the Northern Territory to be an eminent person who is widely respected and who can act in a politically impartial manner. However, these qualifications are not expressly prescribed in any Australian jurisdiction.
- (b) If it was decided to prescribe the qualifications of the head of state in the new Northern Territory constitution, matters that could be considered include that the head of state be:
- an Australian citizen;
 - a Territory or Australian resident — or should become a Territory or Australian resident;
 - a non-politician, or alternatively, not have been in a political office for a specified number of years, e.g., five years, prior to appointment;
 - of a certain age;
 - eligible to vote in the Territory or in Australia;
 - a person who has had no past convictions of a serious nature;
 - not bankrupt;
 - not holding some other office of profit from any government; and
 - a fit and proper person for the office.
- (c) The most controversial qualification would be as to the exclusion of politicians or former politicians. The arguments for and against depend on the relative weight to be given to the attribute of political neutrality as against the value of political skills and experience in a head of state. The *RAC Report* points out that the desire for political neutrality might be satisfied by other means, such as by having a method of appointment that ensures bipartisan support. This would not be the case if the head of state was simply appointed by the leader of government, and might not be guaranteed if the head of state was elected in certain ways.
- (d) The Republican Advisory Committee was inclined to the view, in a federal context, that subject to the particular mode of appointment of the head of state, there is no particular need for any specified qualifications for the office other than holding Australian citizenship and not hold another remunerated position while in office.¹⁷ The

¹⁷ *Republic Advisory Committee Report - The Options*, 1993, p57, AGPS, Canberra.

Sessional Committee does not wish to express a firm view on the matter at this stage, but invites comment.

- (e) The Sessional Committee considered in its *Discussion Paper* that there should be some constitutional guarantee of the governor's remuneration so that it cannot be reduced during the term of office.¹⁸ In relation to a possible future Republic, the Committee adheres to this position.
- (f) The Committee would welcome views on the qualifications that should be required of a separate head of state in a new Northern Territory constitution.

4. *Term of Office of Head of State*

- (a) The Northern Territory (Self-Government) Act presently provides for an Administrator to be appointed by the Governor-General under the Seal of Australia, but no fixed term of office is specified in the Act. The Administrator holds office during the pleasure of the Governor-General. The advice to the Governor-General on the appointment is provided by Commonwealth Ministers, but a practice is developing of consulting the Northern Territory Government first before any appointment.¹⁹
- (b) The Committee in its *Discussion Paper* took the view that in the situation of a new Territory constitution, the Commonwealth had no legitimate role to play in the composition of the Territory or new State Government. It envisaged that under the present monarchical framework and pursuant to s7 of the Australian Act the appointment of the Governor of the new State would be by the Queen acting on the advice of the Premier of that new State.²⁰
- (c) In a republican context, such an appointment by the Queen would of course cease to be applicable. This would necessitate a new method for the appointment, or election, and the removal of the Territory head of state. Such a method should also exclude any Commonwealth involvement.
- (d) Depending on the method of appointment or election, a fixed term of office of the Territory head of state may be thought desirable. Such a term could either be for a specified term of years, e.g., five years, or it could be for a term coinciding with the

¹⁸ *Discussion Paper on A Proposed New State Constitution for the Northern Territory* (NTLA 1987) Item G.5 Page 49:

The Select Committee considers that there should be some constitutional guarantee of the Governor's remuneration. This could take the form of an automatic appropriation plus a provision that the remuneration of the new State Governor shall not be reduced during his constitutions provide for the remuneration of the Governor and for its appropriation, and the Commonwealth Constitution, section 3, states that the Governor's salary shall not be altered during his continuance in office.

¹⁹ s32.(1) There shall be an Administrator of the Territory, who shall be appointed by the Governor-General by Commission under the Seal of Australia and shall hold office during the pleasure of the Governor-General.

(2) The Administrator is charged with the duty of administering the government of the Territory.

(3) Subject to this Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of powers and functions other than powers and functions relating to matters specified under section 35 and powers and functions under sections 34 and 36) in accordance with such instructions as are given to him by the Minister.

²⁰ *Discussion Paper on A Proposed New State Constitution for the Northern Territory* (NTLA 1987) pp48-49.

life or lives of the Territory Parliament, that is, from general election to general election.

- (e) An argument for separating the term of appointment of the head of state from the life of the Parliament is that it would avoid any association with the partisan atmosphere of elections.
- (f) There is also the question as to whether there should be constitutional restrictions on re-appointment or re-election to prevent the same incumbent from continuing in office for too long.
- (g) The Committee invites comment on the question generally of the term of office in the context of a new Territory constitution.

5. *Acting Head of State*

- (a) Under the Westminster tradition, it is normal to have a constitutional provision for appointing an acting head of state in the absence of the primary appointee for any reason. In the Northern Territory (Self-Government) Act at present, there is provision both for an acting Administrator — appointed by the Governor-General, and deputies of the Administrator — appointed by the Administrator.
- (b) Options for providing for an acting head of state in a new Northern Territory constitution include:
 - (i) the automatic appointment of a specified officer, such as the speaker of the Territory Parliament or the Chief Justice of the Supreme Court;
 - (ii) a provision for the standing appointment by some means of a separate acting head of state; or
 - (iii) election of a separate acting head of state by the Territory Parliament.
- (c) The choice of method may in part be dependent upon the method of appointing, or electing, the head of state.

6. *Appointment (or Election) and Removal of Head of State*

- (a) As stated above, the appointment and removal of the Administrator in the Northern Territory is presently done by the Governor-General, with no fixed term of office specified in the Act. The Committee is opposed to the retention of this system, which directly involves the Commonwealth Government in the decision, in the setting of a new Northern Territory constitution.
- (b) Assuming that a future republican system of government is adopted and assuming that a separate head of state is to be retained in the Territory, it becomes necessary to decide as to the method of appointment, or election and removal of that head of state. There are a number of options.

(c) The *RAC Report*²¹ considered a range of options in relation to the republican replacement for the Governor-General — President, or however described — including:

- . Appointment by the Prime Minister.
- . Appointment by the Commonwealth Parliament.
- . Popular Australia-wide election.
- . Appointment by an electoral college.

It concluded that the chief options appeared to be those involving selection either by a special majority of the Commonwealth Parliament or by popular election and the removal from office by a special majority of the Commonwealth Parliament. All of these options involved a diminution of the present power of the Prime Minister, in respect of appointing or removing the Governor-General and an increase in the power of electors or their elected representatives.²²

(d) This Committee, while noting the conclusions raised by the Republic Advisory Committee, views that the arguments advanced for and against the various options in an Australia-wide context may not necessarily be directly applied to the special position of the Northern Territory. The special circumstances of the Territory have to be taken into account, including:

- . its small population for such a vast area;
- . the comparatively small numbers of electors per electorate and the close contact between members of Territory Parliament and their electorates;
- . the likely nature of the new Territory Parliament — which the Committee has proposed that it should be unicameral in nature;²³
- . the fact that the Territory is only a unit of government within a wider federal system;
- . the complex ethnic mix of peoples in the Territory, the particular concerns of Territorians with their local political representation; and
- . the comparatively limited time in which the Territory has had fully elected representation and Self-governing responsibility.

Also of relevance are the questions whether there are to be any deviations from the existing system of responsible government and the extent of the powers to be given to the head of state, discussed in *Item D below*. All these factors may impinge upon the choice of methods for the appointment or election and removal of a separate Territory head of state.

²¹ *Republic Advisory Committee Report - The Options*, 1993, ch5, AGPS, Canberra

²² *Republic Advisory Committee Report - The Options*, 1993, p82, AGPS, Canberra.

²³ *Discussion Paper on A Proposed New State Constitution for the Northern Territory* (NTLA 1987) pp15-18.

- (e) The main options for the Northern Territory in a new constitution as to a separate head of state include:
- (i) Direct appointment by the political head of government — by the Chief Minister, Premier, or however described.
 - (ii) Appointment by vote of the new Territory Parliament. This could either be by a simple majority or by a special majority of members.
 - (iii) The establishment of a constitutional standing committee of eminent citizens to consider and report to Parliament on a nominee or nominees for appointment.
 - (iv) By popular Territory election, whether in conjunction with a general election of the new Territory Parliament, or separately.
 - (v) Appointment or election by some special body such as a Territory electoral college or constitutional convention.
- (f) The *RAC Report*, in commenting on the option of direct appointment by the Prime Minister, noted that most of the submissions advocated a different method of appointment, often citing the need for the head of state to be above politics.²⁴ If a similar system of direct appointment was to be adopted in the Northern Territory, there would no doubt be good reasons for the Territory political head of government to appoint a competent, knowledgeable person. There would, however, be a danger that the appointee would be perceived as being a political appointment and not above party-politics. The Territory electorate may well prefer an appointee who is not seen as being involved in day-to-day politically partisan issues and who has some degree of independence and at least be able to offer non-partisan guidance and advice. The Committee does not at this stage favour the option of direct appointment by the political head of government, but would welcome comments.
- (g) The option of appointment by resolution of the new Territory Parliament may be thought to be more democratic. However, this should be assessed in the context of a possible unicameral system in the Territory dominated by a system of political party representation. If a simple majority was required, the majority political party in the Parliament would be able to decide who the appointee should be. In practice, this is likely to mean that the nominee of the Territory Government would be chosen. If a special majority was required, this could potentially lead to a stalemate, depending on the state of the parties, and allow an acting head of state, however chosen, to perform the functions of the permanent office until a compromise was reached or until the support of a sufficient number of opposition members or independents could be obtained for the Government's nominee.
- (h) A variation may be to provide for a standing body of eminent citizens, perhaps including Chief Justice, Chief Minister or Premier, Leader of the Opposition and possibly eminent community representatives, to consider and report to the Parliament on a nominee or nominees. The nominee or nominees would have outstanding

²⁴ *Republic Advisory Committee Report - The Options*, 1993, p65, AGPS, Canberra.

qualities to be available for appointment, with the final choice being left to the Parliament from within the names forwarded by the standing body.

- (i) A popularly elected Territory head of state is perhaps the most democratic, giving Territory electors a direct say. It has the potential to ensure that there is an independent head of state. Conversely, the danger is that it could itself lead to the politicisation of the office, particularly if political parties or particular groups were to nominate candidates. This risk could be reduced by prohibiting such party nominations or support and by requiring appropriate qualifications which excluded members or former members of political parties, say, for 5 years, *see above*. It is also an expensive option, particularly if the election was to be held at a different time to general elections for the Parliament. It might also discourage suitably qualified candidates, both by reason of the expense and also because they may not wish to engage in election campaigns. If the Territory head of state was merely a figurehead, it may be unlikely to attract many high quality candidates at an election.
- (j) The final option raised above is appointment by some form of electoral college or constitutional convention. Such a body could be wholly or partly elected or nominated. Whether this is a viable option in the particular context of the Northern Territory is a matter for consideration. It might be considered too unwieldy and expensive, and could be challenged by certain sections of the community, depending on its composition.
- (k) The question of removal from office raises somewhat different considerations. Presumably the grounds for removal, short of any fixed term of office, would need to be specified. The traditional formula for removal is "proven misbehaviour or incapacity".
- (l) The method of removal would in part at least be dependant upon the method of appointment. Thus, if appointment was to be by the political head of government of the Territory, presumably there would be no objection to removal by the same method. If appointment was to be by Parliament, then presumably removal would be by the same method, perhaps requiring a special majority, and possibly after some form of inquiry and report. If the Territory head of state was to be elected by Territory electors, the options include removal by a Territory referendum or by a special majority of the Parliament.
- (m) The Committee does not wish to make any firm recommendations as to the method of appointment and removal at this stage, but invites comment on the most appropriate method for the Northern Territory in a new constitution.

D. POWERS OF A HEAD OF STATE - OPTIONS

1. Present Position

- (a) At present in the Northern Territory, the Administrator, performs, pursuant to section 32(2) of the Northern Territory (Self-Government) Act, dual functions, which come

together in his/her "duty of administering the government of the Territory".²⁵ This duality derives its source from section 35²⁶ of that Act and the Regulations relating to the transfer of functions from the Commonwealth to the executive authority of Territory Ministers. The latter Regulations contain a long list of state-type matters so transferred. They constitute the areas of responsibility of the Northern Territory Government.

- (b) Where a matter is transferred to the executive authority of Territory Ministers, the convention has arisen that the Administrator acts on the advice of his Territory Ministers, usually relayed through the Executive Council of the Territory — see the provision for advice in relation to section 35 matters in section 33.²⁷ This includes, but is not limited to, the assent to a law passed by the Legislative Assembly of the Northern Territory where that law only deals with section 35 matters — see section 7.²⁸
- (c) Where a matter is not so transferred, the Administrator must act in accordance with any instructions given to him or her by the relevant Commonwealth Minister — section 32(3).²⁹ In practice, most State-type matters have been transferred, so it is unusual for a non-transferred matter to come before the Administrator.

²⁵ s32 (2) The Administrator is charged with the duty of administering the government of the Territory.

²⁶ s35 The regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority.

²⁷ s33 (1) There shall be an Executive Council of the Northern Territory of Australia to advise the Administrator in the government of the Territory in relation to matters in respect of which the Ministers of the Territory have executive authority under section 35.

(2) The Council shall consist of the persons for the time being holding Ministerial office.

(3) The Administrator is entitled to attend all meetings of the Council, and shall preside at all meetings at which he is present.

(4) The Administrator may introduce into the Council any matter for discussion in the Council.

(5) Meetings of the Council shall be convened by the Administrator and not otherwise.

(6) Subject to the preceding provisions of this section and to any provision made by the regulations, the procedure of the Council shall be as the Council determines.

²⁸ s7 (1) Every proposed law passed by the Legislative Assembly shall be presented to the Administrator for assent.

(2) Upon the presentation of a proposed law to the Administrator for assent, the Administrator shall, subject to this section, declare -

(a) in the case of a proposed law making provision only for or in relation to a matter specified under section 35 -

(i) that he assents to the proposed law; or

(ii) that he withholds assent to the proposed law; or

(b) in any other case -

(i) that he assents to the proposed law;

(ii) that he withholds assent to the proposed law; or

(iii) that he reserves the proposed law for the Governor-General's pleasure.

(3) The Administrator may return the proposed law to the Legislative Assembly with amendments that he recommends.

(4) The Legislative Assembly shall consider the amendments recommended by the Administrator and the proposed law, with those or any other amendments or without amendments, may be again presented to the Administrator for assent, and sub-section (2) applies accordingly.

²⁹ s32 (3) Subject to this Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of

- (d) It seems clear, however, that in respect of transferred matters, nothing in the express words of the Northern Territory (Self-Government) Act requires the Administrator, as a matter of law, to act in accordance with the advice of his/her Ministers. The exercise of the discretion in this regard is, in the manner of the traditional Westminster system of responsible government, left to be determined by political conventions. By way of comparison, the *RAC Report* contains a discussion of the nature of these conventions and the reserve powers applicable to the Governor-General.³⁰ In strict constitutional and legal theory, although not in practice, the Administrator retains very wide reserve powers in the Northern Territory. These reserve powers extend to:
- the execution and maintenance of the Northern Territory (Self-Government) Act and other laws of the Territory; and to
 - the exercise of the prerogatives of the Crown in their operation in the Territory — section 31.³¹
- (e) The remedy available for dealing with an Administrator who offends against the conventions of his/her office is removal from office by the Governor-General. As the Administrator holds office at the Governor-General's pleasure, this could potentially occur at any time. Since Self-government, the power of removal has never been used for this purpose.
- (f) As noted above, the Committee in its *Discussion Paper* took the view that a new State Governor in the Territory should be appointed by, and should only be removed by, the Monarch on the advice of the new State Premier. Thus, if this view was adopted, the present position of a head of state holding office at Royal pleasure would remain. The formal decision would be made by the Monarch rather than by the Governor-General, and with the advice on that decision being tendered by the new State Premier rather than through Commonwealth Ministers. This position would obviously be inapplicable in a republican system. The options in that event for appointment and removal of a new Territory head of state are dealt with *in Item C above*.
- (g) It seems clear that if the Northern Territory was to become a new State, the duality of functions that presently exists in the Administrator, would not reside in a new head of state. The new head of state should seek his/her advice from his/her new State Ministers only.
- (h) The Committee in its *Discussion Paper*, on balance, favoured some form of constitutional restriction on the discretionary powers of the new State Governor. The general rule that was suggested was that the Governor should be required as a matter of law to act in accordance with the advice of his or her Ministers. The only

powers and functions other than powers and functions relating to matters specified under section 35 and powers and functions under sections 34 and 36) in accordance with such instructions as are given to him by the Minister.

³⁰ *Republic Advisory Committee Report - The Options* 1993, ch.6, AGPS, Canberra.

³¹ s31 The duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities.

exceptions envisaged by the Committee to this general rule would be in those specific cases where the new State constitution or legislation provided otherwise, or where it was clearly established that the new State government was acting or was proposing to act unconstitutionally.³² These exceptions would include power to deal with the situation where a vote of no-confidence in the government was carried by the new State Parliament or where the Premier resigned.³³ The Governor would then have power to call upon another member of Parliament to form a government. If the Governor was unable within a reasonable time to appoint another member who would, in the Governor's opinion, be able to form a government that had the confidence of the Parliament, the Governor would have power to dissolve the Parliament.³⁴ The Committee added that where the Governor acted within these exceptions other than in accordance with Ministerial advice, the Governor should be required to table written reasons in the Parliament within a reasonable time.³⁵

2. *Options*

- (a) If Australia should become a Republic, then on the assumption that the Northern Territory in any new constitution would also adopt a republican form of government, *see Item B 6(e)-(g) above* — the question arises whether any of the recommendations and endorsements in the *Discussion Paper* as to the powers of a Territory head of state should still be adopted or whether they need revision.
- (b) Any decision as to the powers of a separate head of state in the Northern Territory, in a republican system of government, must take into account whether any changes are to be made to the existing system of responsible government and also the manner in which that head of state is to be appointed or elected and removed from office. The issues are interrelated. There may be a concern that a separate head of state, with wide discretionary powers and a substantial degree of security of office for a fixed term,

³² *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987)* Item H.8:

On balance, the Select Committee considers that, as a general rule, the representative of the Crown should be required as a matter of law to act in accordance with the advice of his or her Ministers. By incorporating convention into the constitution, the law would thereby reflect contemporary practices in the Westminster system. The role of the representative of the Monarch would otherwise remain unaffected, although the manner in which that representative exercised his or her powers and functions would have been clarified. The only exceptions to this general rule that the Committee envisages are those specific cases where the new State constitution or legislation provides otherwise, or where it is clearly established that the government was acting or is proposing to act unconstitutionally. The special position relating to the appointment and dismissal of Ministers and dissolution of the new State Parliament is discussed below.

³³ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA)1987)* Item H 12, p55:

In the case where the Premier has resigned or has vacated office, the Select Committee suggests that the Governor should be free to invite another member to form a government. If the Governor has been unable within a reasonable time to appoint a member who would, in the Governor's opinion, be able to form a government which had the confidence of Parliament, the governor should be free to dissolve the Parliament.

³⁴ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA)1987)* Item H 11, p55:

Where a vote of no-confidence in the government has been carried by the Parliament, the Select Committee suggests that the Governor should be free without advice to invite another member to form a government and to dismiss his or her existing Ministers. If the Governor has been unable within a reasonable time to appoint a member who would, in the Governor's opinion be able to form a new government which had the confidence of the Parliament, the Governor should be free without advice to dissolve the Parliament. The Select Committee considers that the Governor should be able to seek the advice of Parliament (if then sitting as to whether the government has its confidence, or to summons the Parliament (if not then sitting) for the sole purpose of considering whether the government has its confidence.

³⁵ *Discussion Paper on A Proposed New State Constitution for the Northern Territory (NTLA 1987)* Item H 14, p56:

The Select Committee further suggests that the written reasons of the Governor for acting otherwise than in accordance with advice in exercising any of these powers should in each case be required to be tabled in the new State Parliament within a reasonable time.

could be tempted to interfere in the day-to-day business of government by Ministers chosen from and responsible to the Parliament. This concern may be increased if the separate head of state was to hold office as a result of a popular election, that is, unless it was decided to move more towards a presidential type of system. This would mean dispensing with the present Westminster style of responsible government and possibly also a separate head of state.

- (c) Any such concerns would be much reduced if the Committee's views were to be adopted to confine the Territory Governor's powers by express constitutional provisions in the manner discussed above. This would involve the adoption of the Committee's earlier position, extended to a republican context, that as a general rule the separate head of state for the Northern Territory should be required, as a matter of law, to act in accordance with the advice of his or her Ministers, with limited exceptions — the "reserve" powers. This general rule would presumably extend to include the function of assenting or otherwise to legislation passed by the Territory Parliament — if this power was to be retained in the head of state — except that assent would not be given on behalf of the Crown.
- (d) Assuming any such reserve powers are to be retained, the options for dealing with them in a federal republican context, as identified in the *RAC Report*, were said to be:
- to codify those powers wholly or partially;
 - to not codify them at all;
 - to incorporate the relevant existing conventions by reference;
 - to provide an authoritative statement of those conventions or to give the Parliament power to make laws on those conventions.
- (e) The Republic Advisory Committee that prepared that Report felt that if the new head of state were to be popularly elected, the case for a detailed codification of powers would be strengthened, since that would arguably lessen the danger of the head of state becoming a competitor for political power with the Prime Minister. That Committee did not consider in detail the possibility of leaving the present broad powers of the Governor-General, conventions included, in their present state. It did not feel that this was a viable option. Such an approach, it is said, might lead many people to fear, perhaps justifiably, that the conventions, which grew up around monarchical powers, would not apply in a republic and that as a result, the new head of state would have potentially autocratic powers. On the other hand, the Committee was not required to recommend a particular approach in dealing with any reserve powers and the manner of their exercise. It merely identified options.
- (f) The Sessional Committee considers that its previous tentative views as to the constitutional definition of the circumstances and manner in which a new Territory head of state may exercise specific reserve powers other than in accordance with the advice of his/her Ministers — *see DI(h) above* — are as applicable, if not more so, to a future republican context in the Northern Territory. There may be less concern as to the possibility of an autocratic exercise of power by a head of state in the Northern Territory than at a national level, but the concern cannot be totally dismissed. Such a position might exist if a new Territory head of state was to be subject to popular

election. A change to a republican system can only increase any such concern. This would seem to justify some form of Territory constitutional provision which clearly identified and limited — or which enabled the identification and limitation of — the circumstances in which any reserve powers existed and which controlled the manner of their exercise. The alternative is to dispense with all reserve powers.

- (g) It would appear that there are good arguments in favour of retaining at least some of the reserve powers relating to a separate Territory head of state, even if a republican system of government was to be adopted. The Committee is not at this stage convinced that, having regard to the particular nature of the Northern Territory, it is appropriate to dispense with all such powers, leaving the Territory without an impartial "constitutional umpire" in times of crisis — *see Item C 2 above*. However, the circumstances and manner in which any such powers can be exercised can, and perhaps should, be constitutionally defined and limited. The object could be said to be to seek a balance between democratic principles and the desirability of appropriate checks and balances in a small jurisdiction, designed to enhance the standard of government and to secure the orderly and fair resolution of political disputes.
- (h) The Committee notes the example in the *RAC Report* of a draft form of words for the codification of the most important conventions at a federal level. This would extend to the dismissal of a Prime Minister and the dissolution of the House of Representatives, upon a confirmed constitutional contravention by government as declared by the High Court.³⁶ An alternative is also examined in that Report, with a draft form of words, which would involve the virtual complete removal of any discretion at head of state level, so as to ensure that the head of state would always act in accordance with ministerial advice, and which would set out rules for resolving situations that would otherwise be covered by conventions.³⁷
- (i) The Committee would welcome comments on the extent to which the reserve powers presently applicable to the Administrator should be preserved, if at all, in a new Territory republican constitution with a separate head of state, and if preserved, whether in and what manner their exercise should be constitutionally specified and confined.

E. CONSEQUENTIAL IMPLICATIONS

1. In the situation where the Northern Territory needs to adopt a new constitution for its further constitutional advancement, either before or at the point of a grant of Statehood, it is timely that the debate as to a possible republic has now arisen. If there is a move to an Australian Republic, and the Committee is not advocating that there should be, it will be possible to draft new Territory constitutional provisions that conform to that new national republican setting. Unlike the Australian and State constitutions, it will not be necessary to embark on a revision of existing constitutional documents.

³⁶ *Republic Advisory Committee Report - The Options*, 1993, pp101-5, AGPS, Canberra.

³⁷ *Republic Advisory Committee Report - The Options*, 1993, pp107-12, AGPS, Canberra

2. This means that once the primary issues as to the Territory head of state were resolved, the change to a Republic would, in the Northern Territory, be a relatively simpler exercise than elsewhere in Australia.
3. Some change would be necessary to some Territory laws and practices to reflect the change to republican status, but these are likely to be minimal. Thus, for example, prosecutions for criminal offences would in future presumably be brought in the name of the Northern Territory rather than in the name of the Crown. The exercise of the prerogatives of the Crown in the Northern Territory would in future presumably become the exercise of equivalent rights of the Northern Territory in its own right.
4. It may be that other consequential action by the Territory would be required as a result of the any national arrangements for an Australian Republic. It is impossible to presently foresee what these might be.
5. Should Australia become a Republic, the Committee sees no reason why it would not be possible to facilitate the introduction of republican status in the Northern Territory, together with the adoption of a new Territory constitution and possible grant of Statehood. The Committee suggests that only a few issues of importance need to be resolved within the Territory, as outlined in this Paper, in order to allow this to occur. Assuming that a national decision was taken for a change to republican status, presumably by a national referendum, the Committee suggests that it would make good sense to proceed in implementating a new Northern Territory constitution on republican lines at the same time. The Committee invites comment on these issues and on other matters that have any relevance to its terms of reference.