

Chapter 5.

Discussion Paper No. 5

The Merits or Otherwise of Bringing an NT Constitution into Force before Statehood



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**SESSIONAL COMMITTEE ON
CONSTITUTIONAL DEVELOPMENT**

Discussion Paper No. 5

**The Merits or Otherwise of Bringing an NT
Constitution into Force before Statehood**

MARCH 1993



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Sessional Committee on Constitutional Development

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

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A. INTRODUCTION

1. *Terms of Reference*

- (a) 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 term of reference were made when the Committee 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, the Committee 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 terms of reference include, as a major aspect of the work of the Committee, a consideration of matters connected with a new State constitution. This discussion paper forms part of that consideration and is issued for public comment.

The primary terms of reference of the Sessional Committee are as follows-

- "(1) ... a committee to be known as the Sessional Committee on Constitutional Development, 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 powers;
 - (ii) executive powers;
 - (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; and
 - (c) such other constitutional and legal matters as may be referred to it by -
 - (i) relevant Ministers, or
 - (ii) resolution of the Assembly.
- (2) the Committee undertake a role in promoting the awareness of constitutional issues to the Northern Territory of Australian populations."

- (b) The Committee interprets these terms of reference as being capable of extending to a consideration of whether a new Northern Territory constitution should or could be adopted and given legal effect prior to any such grant of Statehood. The exact manner in which such a constitution could be given legal effect before Statehood would be a matter for negotiation with the Commonwealth Government, having regard to the current operation in the Territory of the **Northern Territory (Self- Government) Act 1978** of the Commonwealth and other Commonwealth legislation. This is discussed further in Item B below.

2. Discussion Papers

- (a) The Committee has already issued a number of papers, including four discussion papers for public comment, as follows -

- * A Discussion Paper on a **"Proposed New State Constitution for the Northern Territory"**
- * 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."**

The purpose of these papers was to invite public comment with a view to assisting the Committee to make recommendations on a new State constitution and the procedure for adopting it.

- (b) This Discussion Paper constitutes the fifth in the series, and deals with the options for and merits or otherwise of bringing the new State constitution into effect before any grant of Statehood. It does not represent the final views of the Committee. It is issued for public debate and comments. Submissions to the Committee are invited.

3. Committee Procedure

- (a) The Committee has adopted, as a fundamental aspect of its procedure in actioning its terms of reference, the conduct of a comprehensive program of community consultations within the Northern Territory on matters that could be dealt with in a new State constitution.
- (b) To this end, the Committee has already held a number of community visits and public hearings at various locations throughout the Territory. The Committee has also invited public submissions on its terms of reference and received a large number of both written and oral submissions. The procedures are set out in more detail in the Committee's latest Annual Report for 1991/92. These consultations will continue into the future as circumstances permit.
- (c) The question now being considered in this Paper arose during community consultations by the Committee. The question was raised as to why the Northern Territory had to

wait until Statehood for a new constitution. If work was already proceeding on the preparation of a new Territory constitution, the question was asked as to why it could not be given legal effect upon its completion, even if that did not coincide with any grant of Statehood. The matter of Statehood could then follow in due course on the basis of an existing and operating home-grown Territory constitution.

- (d) The Committee subsequently decided that this question warranted a separate discussion paper. The Committee now invites submissions on this question and the matters raised in this Paper.

B. CONSTITUTIONAL CONSIDERATIONS

- (a) The Northern Territory was formerly part of the Province of South Australia up to Federation in 1901. It then became part of the State of South Australia until the end of 1910. With effect from the beginning of 1911, it was surrendered by South Australia and accepted by the Commonwealth as a Commonwealth territory.
- (b) On 1 July 1978, as a result of the enactment by the Commonwealth Parliament of the **Northern Territory (Self-Government) Act 1978**, the Territory became self-governing, with its own Ministers drawn from the Legislative Assembly. It is well known that this Act was prepared in Canberra with limited input from local Northern Territory politicians and virtually no consultation with the Territory community. The extent of the grant depends largely upon Commonwealth regulations made by the Governor-General under that Act on the advice of the Commonwealth Government. These regulations define the executive authority of Territory Ministers and hence the scope of the grant of Self-government. The Act and regulations therefore represent a form of a constitution imposed by the Commonwealth upon the Northern Territory rather than one prepared and adopted by Territorians themselves.
- (c) The Northern Territory continues to have the status of a Commonwealth territory notwithstanding the grant of Self-government effected by the **Northern Territory (Self-Government) Act 1978**. As such, the constitutional division of legislative powers applicable as between the Commonwealth and the States does not apply to the Northern Territory. The Commonwealth Parliament may therefore legislate, and does legislate, for the Territory under section 122 of the **Constitution**, virtually without any constitutional limitations.
- (d) The Committee has already adopted the view that, as part of the progress towards Statehood, a new State constitution should be prepared and adopted to replace the **Northern Territory (Self-Government) Act**, and that this new constitution must be prepared by Territorians and not be imposed on the Northern Territory by outside agencies - see Appendix 1.
- (e) In its Information Paper No.1, "Options for a Grant of Statehood", the Committee has set out a detailed procedure which it envisaged for the adoption of a new Territory constitution. This involves a report by the Committee to the Legislative Assembly with a draft constitution, the adoption by the Legislative Assembly of a draft constitution,

the draft as adopted then being put to a Territory Constitutional Convention for discussion and ratification of a final draft, and then a Territory referendum for its approval. The Paper noted that the ability to legally adopt a new State constitution was dependant upon a specific grant of powers by the Commonwealth (p6).

- (f) In the context of any proposal to give that new Territory constitution legal effect before any grant of Statehood, this would likewise be dependant upon the concurrence of the Commonwealth. This would have to be in association with the repeal of the Commonwealth Parliament of the **Northern Territory (Self-Government) Act** and any consequential changes to other Commonwealth legislation (see Item C.1(e) below).
- (g) The Committee is of the view that, given the virtually unlimited plenary nature of the powers of the Commonwealth Parliament over territories in section 122 of the Commonwealth **Constitution**, there are virtually no constitutional impediments to the repeal by the Commonwealth Parliament of the **Northern Territory (Self-Government) Act** and the giving of legal effect to a new home-grown Territory constitution. The only limits that could not be infringed by the Commonwealth Parliament would be those arising from the few provisions of the Commonwealth **Constitution** (express or implied) which extend to territories.
- (h) Such a new, home-grown Territory constitution, once given legal effect by the Commonwealth Parliament, would not have an entrenched constitutional status such as applies to State constitutions, including any new State constitution (see the Committee's Information Paper No.2, "Entrenchment of a New State Constitution"). The Northern Territory Government could at best only rely on a political understanding with the Commonwealth Government that that Government would not subsequently seek through the Commonwealth Parliament to amend or repeal that new Territory constitution, at least not without the prior concurrence of the Territory Government and/or its people.
- (i) Whether the Commonwealth would be prepared to allow any subsequent changes to that new Territory constitution already adopted, in accordance with the procedures for change set out in that constitution, and without further Commonwealth concurrence, would be a matter for consideration and negotiation with the Commonwealth.
- (j) The Committee does not comment on the likelihood or otherwise of obtaining Commonwealth concurrence to the adoption of a new, home-grown Territory constitution prior to any grant of Statehood. This is a political issue that would need to be negotiated between the Territory and Commonwealth Governments. This Paper only concerns itself with the option for and merits or otherwise of such a proposal.

C. OPTIONS AND MERITS

1. *Options*

- (a) This Committee is committed by its terms of reference (see Item A.1 above) to proceed with the preparation of a draft constitution for the Territory as a new State for inclusion in its report to the Legislative Assembly.
- (b) On current proposals, the draft constitution, once it has passed through all the envisaged stages, including approval at a Territory referendum, will only come into legal effect contemporaneously with any grant by the Commonwealth of Statehood. It would be the **Constitution** of the new State.
- (c) The Territory Government would have the option, once the new constitution had been approved at a Territory referendum, of seeking the agreement of the Commonwealth Government to bring this new constitution into legal effect before any such grant of Statehood. Commonwealth agreement could even be sought in principle at any stage before any approval at a referendum, to be actioned if the referendum was successful.
- (e) The content of the new Territory constitution would in any event be dependent on the result of negotiations with the Commonwealth as to which items of Commonwealth legislation were to be amended or repealed and to be replaced by provisions in either the new Territory constitution or in Territory legislation. Obviously, this would need to include the **Northern Territory (Self-Government) Act 1978**, but would it extend, for example, to the **Aboriginal Land Rights (Northern Territory) Act 1976**? In this regard, the Committee has already in broad terms endorsed the view that in the absence of Commonwealth land rights legislation applying Australia-wide, the **Aboriginal Land Rights (Northern Territory) Act** should be patriated to and become part of the law of the new State upon the grant of Statehood by some agreed method (see Discussion Paper on a "Proposed New State Constitution for the Northern Territory", October 1987, p93). If this was to happen prior to the grant of Statehood in conjunction with the adoption of a new Territory constitution, this would necessitate discussions with the Commonwealth as to the terms and conditions upon which such patriation would be permitted, including the extent to which land rights should be protected by the new Territory constitution. Other Commonwealth Acts with special application in the Territory, such as the **National Parks and Wildlife Conservation Act** and the **Atomic Energy Act**, would also need to be considered.
- (f) The Northern Territory Government, in its submission to the Commonwealth entitled "Full Self-Government, the Further Transfer of Power to the Northern Territory" (June 1989), has already indicated its views on such matters, although not specifically in the context of also bringing a new Territory constitution into effect. The views in that submission, being a Government document, do not necessarily reflect the views of this Committee (which is bipartisan), but that submission does indicate many of the matters that would need to be considered in conjunction with the adoption of a new Territory constitution before any grant of Statehood.

- (g) There may be some such matters that the Commonwealth would not wish to deal with in advance of Statehood, but which might be dealt with in a new State constitution upon any later grant of Statehood. This could be accommodated by an appropriate mechanism for constitutional change contained in the new Territory constitution adopted before any grant of Statehood.
- (h) Subject to these complications, the option remains open, with Commonwealth concurrence, to bring a new home-grown Territory constitution once approved into operation before any grant of Statehood.
- (i) If it is decided that the new Territory constitution should be brought into operation before any grant of Statehood, the Committee does not support any change in the procedures within the Territory to adopt that new constitution (see Information Paper No. 1, referred to in Item B(e) above).

2. *Merits*

- (a) The Committee is of the view that there are both advantages and disadvantages of bringing a new, home-grown Northern Territory constitution into force before any grant of Statehood. The Committee does not wish to express any preference for either view at this stage, but would welcome comments and views either way.
- (b) Some of the advantages of bringing a Northern Territory constitution into force before any grant of Statehood may include -
 - (i) It would focus solely on the issues surrounding a new, home-grown constitution and separate them from the political issues surrounding any grant of Statehood, such as the question of the extent of federal Parliamentary representation;
 - (ii) It would enable Territory citizens to have a real say as to how they should govern themselves without the added complications arising from Statehood as in (i) above;
 - (iii) It would facilitate a review of the current constitutional arrangements applying to the Northern Territory;
 - (iv) It may enhance the reconciliation process between Aboriginal and non-Aboriginal Territorians and the creation of a more harmonious community. It would do this by openly addressing the issue of what, if any, constitutional or other protections should be afforded to Aboriginal Territorians as part of one Territory, and thereby help to allay any fears arising from the proposals;
 - (v) It may assist the implementation of proposals for a further transfer of self-governing State-type powers to the Northern Territory by combining this with appropriate constitutional provisions, thereby providing a firm framework within which to meet the concerns of all Governments in discharging their respective responsibilities;

- (vi) It would better enable the Territory to demonstrate to the rest of Australia its capacity to govern itself in accordance with a constitution developed by Territorians themselves rather than one imposed by Canberra;
 - (vii) It would strengthen the constitutional position of the Northern Territory in advance of Statehood;
 - (viii) As a constitution has to be developed in any event if the Territory is to become a new State, there may be an advantage in finalising this development first before embarking on any Statehood campaign;
 - (ix) It would smooth the path to Statehood by enabling Territorians to evaluate how the new constitution operated in practice before they decided whether to move to Statehood, and by giving the Territory a functioning constitution upon which a grant of Statehood could be based;
 - (x) It is possible that Statehood may never occur, or if it does, it may not occur for a long time, particularly in view of the difficulties associated with federal Parliamentary representation. This should not be allowed to hold up the development of a new constitution for the Territory.
- (c) Some of the disadvantages of bringing a Northern Territory constitution into force before any grant of Statehood may include -
- (i) It would tend to divorce the question of whether the Territory should have a new constitution from the question of whether the Territory should be a new State, whereas it can be argued that the two questions are, or should be, connected and occur simultaneously;
 - (ii) It would involve difficult negotiations with the Commonwealth Government on two separate occasions, firstly on the issue of bringing into effect a new Territory constitution, and secondly at a later time on the issue of a grant of Statehood;
 - (iii) It is not necessary to repeal the **Northern Territory (Self- Government) Act** and regulations prior to Statehood as it may be perceived that they have worked reasonably well in the past;
 - (iv) The public development of a new Territory constitution could be used as an excuse for confrontation and lead to a deterioration of race relations rather than result in reconciliation and greater harmony;
 - (v) Any new Territory constitution would not have the protection of the Commonwealth **Constitution** until a grant of Statehood (see Item B(h) above);
 - (vi) Any failure in the development of a new Territory constitution could set back the cause of Statehood;

- (vii) The development of a new Territory constitution might be seen as adding an unnecessary complication to proposals for the further transfer of State-type powers as part of Self- government; and
 - (viii) The development of a new constitution arguably should only be undertaken in conjunction with a grant of Statehood as the priority goal (assuming Statehood to be the desired goal).
- (d) The Committee would welcome comments and suggestions from the public on this matter generally to enable it to form a view in its report to the Legislative Assembly.

APPENDIX I

EXTRACT FROM DISCUSSION PAPER :

"Proposed New State Constitution for the Northern Territory": October 1987

PART A, 2(c) and (d)

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PART A2(c) and (d) - Discussion Paper: : "Proposed New State Constitution for the Northern Territory" - October 1987

- "c) The Select Committee considers that Statehood for the Territory must provide for constitutional equality with the other States. This in part can be achieved by the preparation and adoption of a new State constitution to replace the Northern Territory (Self-Government) Act, the new constitution being guaranteed by the Commonwealth Constitution in the same way as are the constitutions of the existing States. This view is reflected in the terms of reference of this Select Committee (see Y below). It is envisaged that the primary task of this Committee is to make recommendations on matters relating to the framing of the new State constitution consistent with the principle of constitutional equality and other principles that the Committee considers applicable.
- d) The view of all members of the Select Committee is that the new State constitution must be prepared by Territorians; it should not be imposed upon the Northern Territory by outside agencies. Territorians must decide the form and content of their own constitution. Given the crucial role of the Commonwealth in any grant of Statehood, there is no doubt that the constitution will also have to be acceptable to the incumbent federal Government. The views of the States should also be sought."